UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20877

KEITH L. CROWLEY,

Plaintiff-Counter Defendant-Appellant,

versus

AMERICAN GENERAL CORPORATION,

Defendant-Counter Plaintiff-Appellee.

Appeal from the United States District Court for the Southern District of Texas (CA-H-93-1557)

(October 24, 1995)

Before SMITH, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:[1]

Keith Crowley challenges a summary judgment in favor of his former employer, American General Corporation, in this age discrimination action. Because the record does not contain evidence from which a rational juror could find that the non-discriminatory reasons proffered by American General for Crowley's termination were unworthy of belief, summary judgment was proper. Accordingly, we **AFFIRM**.

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Crowley, employed by American General as a financial analyst and investment portfolio manager, was 57 years of age when his employment was terminated in 1992. He had been hired in 1969 by California Western States Life Insurance, and was retained in his position when Cal-West became a subsidiary of American General in 1975. When American General assumed Cal-West's investment functions in 1979, Crowley was transferred to American General offices in Houston, Texas.

By 1989, American General had restructured its holdings and sold some of its subsidiaries. This reduced its investment portfolio and substantially reduced the municipal bond portfolio that Crowley was employed to manage; that task was thereby reduced drastically. American General eliminated his position; and, as hereinafter discussed, Crowley's employment was terminated several years later.

As noted, Crowley's employment with American General continued post-divestiture. But, because American General lacked the *municipal* bond work that had previously comprised his responsibilities, Crowley was assigned different responsibilities, for which American General later found him unsuitable. Crowley's new assignment required him to perform credit analysis for the *corporate* bond portfolio. The credit analysis Crowley was assigned dealt with corporate bonds that differed from the municipal bonds he had worked with previously; and his supervisors found that, in this new area, Crowley could not offer critical insights valuable

in maximizing the investment in corporate bonds. Because the company was not satisfied with his performance, Crowley was terminated.

Crowley sued, contending that, subsequent to the sale of subsidiaries and its shrinking effect on the company's municipal bond portfolio, American General failed to utilize his skills to their potential and instead turned over investment management tasks to younger employees who lacked his qualifications. He claimed further that American General was motivated to drive him from its employ by the illegal intent to discriminate against him because of his age. In addition, Crowley asserted that American General maliciously deprived him of the full measure of retirement benefits to which he was entitled.

Finding that the record lacks evidence from which a rational trier of fact could find for Crowley, the magistrate judge recommended granting American General's motion for summary judgment; the district court so ordered.

II.

Crowley makes ADEA[2] and ERISA[3] claims. It goes without saying that we review a summary judgment *de novo*. ***Waltman v. Int'l Paper Co.***, 875 F.2d 468, 474 (5th Cir. 1989). Simply put, it is proper when no reasonable juror could find for the non-moving party. ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 248 (1986).

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[2] Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*

[3] Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq*.

A.

The ADEA prohibits discrimination against individuals who are at least 40 years of age. The employee has the initial burden of establishing a *prima facie* case of discrimination; to do so, the employee must show: (1) that he was discharged; (2) that he was qualified for the position; (3) that he was within the protected class when discharged; and (4) that he was discharged under circumstances that imply age discrimination. *E.g.*, ***Bodenheimer v. PPG Industries***, 5 F.3d 955, 957 (5th Cir. 1993).

The plaintiff creates a rebuttable presumption of age discrimination by establishing a *prima facie* case. The employer must then articulate a legitimate, nondiscriminatory reason for the challenged action. ***Texas Department of Community Affairs v. Burdine***, 450 U.S. 248, 254 (1981). If the employer offers evidence that the action was motivated by a legal purpose, such as a legitimate business rationale, the presumption of discrimination is rebutted; and, absent countervailing evidence that the explanation is unworthy of belief, the trier of fact must accept the proffered reason as the true reason for the employer's action. ***Guthrie v. Tifco Industries***, 941 F.2d 374, 377 (5th Cir. 1991) ("The trier of fact may not disregard the defendant's explanation without countervailing evidence that it was not the real reason for the discharge."), *cert. denied* 503 U.S. 908 (1992).[4]

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[4] The parties dispute the legal consequences that would flow from a circumstance in which a plaintiff offers evidence that the employer's explanation is false, but not that the reason is a pretext for discrimination; and, along that line, each offers differing conclusions about the effect of ***Saint Mary's Honor Center***

Crowley contends that evidence does exist from which a rational juror could conclude that his dismissal was motivated by age discrimination in violation of the ADEA (and that such evidence also supports his ERISA claim, discussed *infra*). He relies on evidence of: (1) a remark, made 11 years prior to termination, about his photograph in an annual report; (2) a claimed "pattern" of discrimination against four employees; (3) the employment or promotion of four younger employees; and (4) his own assertions of his relative merit as an employee, as well as his personal suspicions regarding American General's intolerance for older employees. Having reviewed the record, and as explained below, we reject Crowley's assertion that evidence exists that would have been sufficient to support the inference that American General's explanation for terminating Crowley was false, much less that it was a pretext for age discrimination.

1.

Crowley cites a remark, *uttered in 1981*, that, because he looked young, his photograph was selected then for use in American General's annual report. From this extremely dated statement, made 11 years before his termination, Crowley seeks to draw support for the inference that American General's explanation for his dismissal is unworthy of belief.

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v. Hicks, __ U.S. __, 113 S. Ct. 2742 (1993). However, we do not reach this question, because no countervailing evidence exists in the record from which a reasonable juror could infer that American General's explanation for Crowley's dismissal was unworthy of belief. In short, the effect of ***Saint Mary's*** is not implicated by this appeal.

Courts generally treat remarks of this type as mere "stray remarks", insufficient, as indirect evidence, to establish discrimination. ***Ray v. Tandem Computers, Inc.***, 63 F.3d 429, 434 (5th Cir. 1995). We have required for such remarks to rise to the level of direct evidence supporting the inference of discrimination that the remark be made by the decision maker, or one on whose recommendation the decision maker will rely; and that the remark both relate to, and be made near in time to, the challenged action. *See* ***Turner v. North American Rubber, Inc.***, 979 F.2d 55, 59 (5th Cir. 1992); ***Guthrie v. Tifco***, 941 F.2d 374, 378-79 (5th Cir. 1991), *cert. denied* 503 U.S. 908 (1992); ***Normand v. Research Institute of America, Inc.***, 927 F.2d 857, 865 (5th Cir. 1991). The fact that the remark was 11 years stale at the time Crowley was dismissed is sufficient alone to establish that it can be considered nothing more than a stray remark, incapable of supporting an inference of discrimination.

2.

Crowley asserts next that evidence concerning four other employees demonstrates a "pattern" of age discrimination. However, our review of the record reveals that, for several reasons, the referenced evidence cannot support such an inference. First, Crowley admitted that one of the employees was dismissed for excessive absenteeism. Second, the remaining three were all hired by American General in their mid-fifties, which flatly undermines any inference of age discrimination with regard to them. Third, one was never dismissed; rather, he was transferred to an American

General subsidiary. Thus, no evidence exists with regard to these employees from which a rational juror could infer "a pattern" of discrimination against older employees.

3.

Crowley claims also that the employment statuses of several employees comprise evidence of American General's preference for younger, to the exclusion of older, employees. However, he fails to support his contention with relevant facts.

After reviewing the record with regard to these contentions, we note that Crowley's comparison of himself to these fellow employees fails to recognize differences in their assigned tasks. Implicit in his comparisons is the flawed assumption that the tasks of all securities analysts are fungible.

While citing Roger Hahn's employment experience as illustrative of age discrimination, Crowley admitted that he found no fault with Hahn's performance and demonstrated no facts showing he was "clearly better qualified" than Hahn. Such a showing is required to demonstrate pretext in choosing one employee over another. ***Bodenheimer***, 5 F.3d at 959 & n.4; ***Walther v. Lone Star Gas Co.***, 952 F.2d 119, 123 (5th Cir. 1992).

Mark Fallon's employment is equally nonprobative of discrimination, because his job responsibilities were not substantially similar to Crowley's. Crowley conceded that he did not possess experience or expertise relevant to managing the mortgage-backed portfolio for which Fallon was responsible, and that he would need training to perform Fallon's duties.

Similarly, Joel Luton's position required analysis that differed from that for which Crowley was needed prior to American General's divestiture. Thus, Crowley could not demonstrate that he was "clearly more qualified" than Luton.

Finally, evidence that Craig Van Dyke was retained, while Crowley was not, fails to advance Crowley's theory of discrimination, because Van Dyke's position, a clerical position for which he earned approximately half Crowley's salary, did not involve work comparable to that for which Crowley was employed. Consequently, Van Dyke's employment is also too dissimilar to shed light on the reasons for which Crowley was dismissed.

4.

Lacking any specific, competent evidence to support his assertion that American General's explanation is unworthy of belief, Crowley's position depends ultimately on the hope that a rational juror could infer pretext from Crowley's assertions about the relative merits of other employees who remained employed by American General after he was dismissed, and Crowley's own, unsubstantiated theories regarding American General's reasons for dismissing him. We find it unnecessary to respond to each example of his conclusory assertions, other than to note that Crowley's subjective description of his own performance and subjective comparison to other employees do not constitute evidence sufficient to refute the employer's evaluation of the relative merits of its employees. ***Dale v. Chicago Tribune Co.***, 797 F.2d 458, 464 (7th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987).

To hold otherwise would be to deny the propriety of summary judgment in any employment discrimination case in which the plaintiff asserted that, in his own opinion, he was worthy of continued employment. Such a holding would be inconsistent with the wealth of case law in our circuit affirming summary judgment in age discrimination cases. *See, e.g.*, ***Moore v. Eli Lilly & Co.***, 990 F.2d 812, 817 n.24 (5th Cir.), *cert. denied*, 114 S. Ct.467 (1993).

B.

Crowley's ERISA claim cannot survive American General's motion, absent evidence in the summary judgment record from which a rational juror could infer that American General dismissed him with the specific intent to deprive him of benefits. ***Clark v. Resistoflex Co.***, 854 F.2d 762, 771 (5th Cir. 1988). Crowley simply cannot point to any evidence tending to show this intent.[5]

Crowley recounts that the company did not award him pay increases after its divestiture; but, his benefits were based on the highest salary he received over five of the last ten years of employment. Thus, evidence of no raise after 1989 does not support the inference that American General fired Crowley *in 1992* to deprive him of benefits. In sum, the record is simply barren of any evidence from which a rational juror could infer that American General fired Crowley to so deprive him.

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[5] Crowley asserts that the evidence upon which he relies to support his ADEA claim is also probative of his ERISA claim. Clearly that evidence is no more sufficient to support the ERISA claim than to support the ADEA claim, and we reject it for the reasons discussed *supra*.

III.

For the foregoing reasons, the judgment is

AFFIRMED.