

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 94-50379
Summary Calendar

PETE Q. SALAS,

Plaintiff-Appellant,

versus

TONY E. GALLEGOS, Chairman,
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Defendant-Appellee.

Appeal from the United States District Court for the
Western District of Texas
(SA-92-CV-522)

June 20, 1995

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

FORTUNATO P. BENAVIDES*:

Plaintiff-Appellant Pete Q. Salas ("Salas") appeals the district court's judgment granting the summary judgment motion of Defendant-Appellee Tony E. Gallegos, Chairman of the Equal Employment Opportunity Commission ("EEOC"). We affirm.

FACTS AND PROCEDURAL HISTORY

In May 1986, Salas, a 59 year-old Hispanic male, was one of twenty-one applicants for the position of Budget Analyst in the San

* Local Rule 47.5 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Pursuant to that Rule, the Court has determined that this opinion should not be published.

Antonio District office of the EEOC. Alfred Limon ("Limon"), the Administrative Officer and Personnel Management Specialist in that office, reviewed the applications and selected six applicants, including Salas, for an interview. Victoria Cavazos ("Cavazos"), a 41 year-old Hispanic female, was also selected for an interview.

Salas was certified for the Budget Analyst position at the GS-5, 7 and 9 levels. He had a bachelor's degree in sociology, and a professional certification in social work. Cavazos was certified at the GS-5 level only. She had prior work experience related to the functions of a Budget Analyst at the Department of Housing and Urban Development, and she had eleven years of bookkeeping experience in the private sector. Cavazos did not possess a bachelor's degree, but she had taken a number of college courses, including two accounting courses.

Both Salas and Cavazos were interviewed. Salas's interview did not go well. Salas wandered off the subject and volunteered extraneous information not relevant to the questions asked of him. On the other hand, Cavazos's interview went very well, after which Limon recommended to Pedro Esquivel ("Esquivel"), Director of the San Antonio District office, that Cavazos be hired for the position. Esquivel concurred, and gave the position to Cavazos.

Salas filed a formal EEOC complaint on August 27, 1986. The EEOC investigated and found no discrimination. Salas then pursued his complaint through the administrative hearing process. The administrative law judge ("ALJ") determined that Salas had not been the victim of unlawful discrimination, and the EEOC adopted the

ALJ's recommended decision.

On May 20, 1992, Salas filed suit in federal court pursuant to Title VII and the ADEA, alleging that he had been discriminated against on the basis of gender, national origin and age. On October 15, 1993, the EEOC filed a motion for summary judgment, supported by summary judgment evidence, which included *inter alia* an assertion of a legitimate basis for not hiring Salas and for hiring Cavazos. The district court granted the EEOC's motion, concluding that Salas: 1) failed to make out a *prima facie* case of discrimination based on national origin because Salas and Cavazos were both Hispanic; 2) failed to present evidence that the EEOC's reason for not hiring him was a pretext for age discrimination; and 3) failed to present facts to show that he was not selected because of his gender. Final judgment was entered in favor of the EEOC and against Salas.

DISCRIMINATION ON THE BASIS OF NATIONAL ORIGIN, GENDER AND AGE

The central question in this case is whether the district court properly granted summary judgment against Salas on his national origin, gender and age discrimination claims. We review the district court's summary judgment *de novo*. *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 956 (5th Cir. 1993). Summary judgment is appropriate when there exists no genuine issue of material fact so that the moving party is entitled to judgment as a matter of law. See FED. R. CIV. P. 56(c). In making this determination, the Court must draw all justifiable inferences in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*,

477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986).

With regard to his claim of national origin discrimination, Salas argues that the court erroneously ruled that he failed to make a *prima facie* case because both he and Cavazos were members of the same protected class of persons. We agree. A *prima facie* case of national origin discrimination requires the plaintiff to show that: 1) he belongs to a protected class; 2) he applied for a position for which he was qualified; 3) despite his qualifications, he did not receive the position; and 4) the position was filled by someone outside of the protected class. *Young v. City of Houston*, 906 F.2d 177, 180 (5th Cir. 1990). However, this Court has rejected the finding that hiring an individual of the same race as the plaintiff necessarily defeats his *prima facie* case. See *Hornsby v. Conoco, Inc.*, 777 F.2d 243, 246-47 (5th Cir. 1985); *E.E.O.C. v. Brown & Root, Inc.*, 688 F.2d 338, 340, & n.1 (5th Cir. 1982). It is sufficient to show that the employer filled the position with a person of the plaintiff's qualifications. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). Because Salas has shown that he was a member of the protected class, that he applied for a position for which he was qualified, that despite his qualifications he did not receive the position and that the position was filled by someone with comparable qualifications, we find he has sufficiently met the requirements of a *prima facie* case of national origin discrimination.

However, we may still affirm the district court's summary

judgment on alternative grounds. *See Vojvodich v. Lopez*, 48 F.3d 879, 886 (5th Cir. 1995). Thus, we next address the question of whether the EEOC has proffered a legitimate, non-discriminatory reason for not selecting Salas for the position of Budget Analyst and whether, assuming the EEOC's reason is legitimate, Salas has presented evidence that the reason is a pretext for national origin discrimination. *See Bodenheimer*, 5 F.3d at 957.

The EEOC has maintained that the reason that Salas was not selected for the Budget Analyst position is because he performed poorly in his interview. For example, Salas wandered off the subject of the questions asked of him by Limon. Cavazos, on the other hand, answered the questions on point and in a professional manner. We find that the EEOC's reason for not selecting Salas is legitimate and non-discriminatory. Therefore, the EEOC has met its burden of production.

We find that Salas has failed to provide factual evidence that could lead a reasonable jury to conclude that the EEOC's reason for not hiring Salas is a pretext for national origin discrimination. *Bodenheimer*, 5 F.3d at 958 (citing *St. Mary's Honor Ctr. v. Hicks*, ___U.S.___, 113 S.Ct. 2742, 2747, 125 L.Ed.2d 407 (1993)). The testimony of Oscar Garza suggesting another distinct and arguably legitimate reason for the EEOC's decision not to hire Salas, along with Salas's self-serving and purely speculative conclusions regarding the EEOC's reasons for not hiring him, are insufficient to raise a genuine issue of material fact as to pretext; a reasonable jury would not be led to conclude that the EEOC's reason

for not hiring Salas is a pretext for national origin discrimination. Accordingly, the district court did not err in granting the EEOC summary judgment as a matter of law on the claim of national origin discrimination. Likewise, we find that Salas has failed to meet his burden of persuasion with respect to raising a fact issue regarding the EEOC's asserted legitimate reason as a pretext for gender and age discrimination, and therefore, the district court did not err in granting the EEOC summary judgment on Salas's gender and age discrimination claims.¹

CONCLUSION

For the reasons articulated above, the judgment of the district court is AFFIRMED.

¹ Salas also raises on appeal the district court's denial of four other motions: 1) to deem admitted requests for admissions; 2) to compel discovery; 3) for enlargement of time in scheduling order deadlines; and 4) to strike the EEOC's exhibits. We have considered the arguments advanced by Salas and find them wholly without merit.