IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-50834
Summary Calendar

GLENN WILLIAM JOHNSON,

Plaintiff-Appellant,

versus

ARKANSAS FREIGHTWAYS, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the
Western District of Texas
(94-CV-23)

(October 13, 1995)

Before JOLLY, JONES, and STEWART, Circuit Judges.

PER CURIAM:*

On January 28, 1993, Glenn William Johnson sued his former employer, Arkansas Freightways, Inc., a/k/a American Freightways, Inc. ("American"), in Texas state court, alleging that he was terminated because of his age in violation of the Texas Commission on Human Rights Act ("TCHRA"), Tex. Rev. Civ. Stat. Ann. art. 5221K, § 1.01 et seq., and that he was retaliated against for filing a workers' compensation claim in violation of the Texas

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Workers' Compensation Act, Tex. Rev. Civ. Stat. Ann. art. 8307(c). Under the circumstances described below, the defendant removed the case to federal court on January 27, 1994. After the district court denied Johnson's motion to remand, American moved for summary judgment. The court granted summary judgment, finding that Johnson failed to show that the stated reason for termination was a pretext for age discrimination. Johnson now appeals the denial of his motion to remand and the grant of summary judgment in American's favor. For the reasons described below, we affirm.

I

Johnson was employed by American from September 2, 1991, until February 28, 1992, as a terminal manager at the company's Dallas, Texas site. Forty-three years old at the time of both his hiring and termination, Johnson alleges that Jerry Jones, American's vice president of operations, told him that he was being terminated because the company needed someone who could mingle better with the younger, hourly workers. As Johnson understood it, the company wanted a younger terminal manager that could relate better to the younger workers, thereby assisting it in its effort to avoid unionization. Johnson's replacement was thirty-six years old at the time he was hired.

Johnson filed a charge of age discrimination with the Texas Commission on Human Rights and the United States Equal Employment Opportunity Commission on May 8, 1992. He received his no cause determination and right-to-sue letter from the EEOC on December 14,

1992. On January 28, 1993, Johnson filed suit against American in Texas state court, alleging that he was terminated because of his age and in retaliation for filing a workers' compensation claim.

During the course of discovery, American propounded a first set of interrogatories to Johnson, which he answered on July 14, 1993. Relevant to this appeal are two interrogatories, which read as follows:

> INTERROGATORY NO. 9: State the facts that support your allegations that Plaintiff, Glenn William Johnson, is entitled to relief from discrimination in violation of the Texas Workmen's Compensation Act, Tex. Rev. Civ. Stat. Ann. art. 8307(c).
>
> ANSWER: Not applicable.
>
> INTERROGATORY NO. 10: Identify any persons having knowledge of discoverable matters concerning your allegations that the Plaintiff, Glenn William Johnson, is entitled to relief from discrimination in violation of the Texas Workmen's Compensation Act, Tex. Rev. Civ. Stat. Ann. art. 8307(c).
>
> ANSWER: Not applicable.

After several delays, American took Johnson's deposition on December 30, 1993. During the deposition, Johnson's counsel informed American that the alleged article 8307c retaliatory discharge claim had been erroneously included in Johnson's complaint. Johnson's attorney further stipulated, on the record, that the case did not involve workers' compensation.

Because the retaliatory discharge claim was no longer at issue, American was able to remove the case to federal district

court on the basis of diversity jurisdiction on January 27, 1994.[1] Johnson filed a motion to remand on February 25, which the court denied.

On August 12, 1994, American filed its motion for summary judgment that, following a hearing, the court granted. The district court found that Johnson had established a prima facie case of age discrimination, but that American had met its burden of production by articulating a legitimate nondiscriminatory reason for its decision, specifically, that Johnson was performing his job poorly. The district court further found that Johnson had not met his burden of showing that American's asserted reason was, in fact, a pretext for age discrimination.

Johnson now appeals.

II

Johnson raises three issues on appeal. First, he argues that the district court erred when it denied his motion to remand. Second, he asserts that the district court erred when it held that American had articulated a legitimate nondiscriminatory reason for his termination. Finally, he contends that the district court erred when it found that his summary judgment evidence failed to establish that American's reasons for terminating him were not pretext for age discrimination.

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[1]We have previously held that cases involving article 8307c are not removable. See Jones v. Roadway Exp., Inc., 931 F.2d 1086 (5th Cir. 1991).

A

We first consider whether the district court properly denied Johnson's motion to remand. We review de novo a district court's denial of a motion to remand. Baccus v. Parrish, 45 F.3d 958, 960 (5th Cir. 1995).

Johnson initially filed this action in state court. Because it included a retaliatory discharge claim arising under the state's workers' compensation laws, the case could not be removed to federal court. See Jones v. Roadway Exp., Inc., 931 F.2d 1086 (5th Cir. 1991). On January 27, 1994, American, however, removed the case on the basis of diversity jurisdiction, 28 U.S.C. § 1332(a), within thirty days after Johnson stipulated in a deposition that the retaliatory discharge claim was no longer at issue. Johnson argues that the removal was untimely because on July 14, 1993, he had answered American's first set of interrogatories, see supra section I, which informed American that he was no longer pursuing the retaliatory discharge claim. He bases his argument on 28 U.S.C. § 1446(b) that provides, in relevant part, that "a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of . . . other paper from which it may be first ascertained that the case is one which is or has become removable."

The district court found that Johnson's answers to the interrogatories, stating that the workers' compensation claim was "not applicable," were too vague to notify American that he was no

longer pursuing this claim. We agree. As the district court stated, "The Plaintiff could have easily answered the Interrogatories in a more clear and precise manner. The Plaintiff chose not to do so; thus, the Court is of the opinion Plaintiff should not be allowed to benefit from his own vague answers to Defendant's Interrogatories." Order Denying Remand at 8. Thus, the district court properly denied Johnson's motion to remand.

B

We next consider Johnson's second and third points of error, his challenges to the manner in which the district court evaluated the shifting burdens of production in an employment discrimination motion for summary judgment. Johnson argues that the district court erred in determining that American had articulated a legitimate, nondiscriminatory reason for his termination. He further contends that the district court erred in its determination that his summary judgment evidence failed to make a showing that American's stated reasons for termination were a pretext for age discrimination.

As a threshold matter, we observe that although Johnson brought this action under the Texas state law against age discrimination (the "TCHRA"), the prima facie elements of an age discrimination claim under the TCHRA are the same as those required under the federal Age Discrimination in Employment Act ("ADEA"). See Adams v. Valley Federal Credit Union, 848 S.W.2d 182 (Tex. App.--Corpus Christi 1992, writ denied). The district court found

that Texas courts, furthermore, have held "that claims under the TCHRA are to be construed consistent with the federal courts' interpretation of analogous federal statutes," District court opinion at 6,[2] a point the parties concede. Accordingly, we will look to analogous federal law for guidance in this appeal.

The respective burdens of production of the plaintiff and the defendant in these actions are fairly clear. First, the plaintiff in an age discrimination case must make a prima facie case, wherein he must demonstrate that "(1) he was discharged; (2) he was qualified for the position; (3) he was within the protected class at the time of discharge; and (4) he was either i) replaced by someone outside the protected class, ii) replaced by someone younger, or iii) otherwise discharged because of his age." Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 (5th Cir. 1993). Should the plaintiff establish these requirements, "a presumption of discrimination arises which the defendant must then rebut by articulating a legitimate, nondiscriminatory reason for the discharge." Id. "Once the employer satisfies this burden, the presumption of age discrimination established by the employee's prima facie case dissolves." Id. Once this has been done, the "plaintiff's burden of persuasion then arises and he must prove

[2]See Farrington v. Sysco Food Serv., Inc., 865 S.W.2d 247 (Tex. App.--Houston [1st Dist.] 1993, writ denied)(race discrimination); Benavides v. Moore, 848 S.W.2d 190 (Tex. App.--Corpus Christi 1992, writ denied)(sexual harassment).

that the proffered reasons are not just pretexts but pretexts for age discrimination." Id. (emphasis in original).

Turning to the case before us, American does not dispute the district court's finding that Johnson established a prima facie case of age discrimination under the TCHRA. Johnson, therefore, focuses his arguments on the second and third steps in the order of proof, as outlined above. Johnson first contends that the district court erred in determining that American had articulated a legitimate, nondiscriminatory reason for his termination. He argues that these reasons were fabricated, and the fact that American did not discuss these reasons with him when he was fired creates a material issue of fact regarding the legitimacy of the reasons.

We disagree. Contrary to Johnson's argument, "[t]he employer need only articulate a lawful reason, regardless of what its persuasiveness may or may not be." Bodenheimer, 5 F.3d at 958. Furthermore, at this stage of the case, we are to avoid "making any credibility determinations . . . because 'the burden-of-production determination necessarily precedes the credibility-assessment stage.'" Id. (quoting St. Mary's Honor Ctr v. Hicks, ___ U.S. ___, ___, 113 S.Ct. 2742, 2748 (1993)(emphasis in original)). Reviewing American's reasons for Johnson's termination, it appears that the district court did not err when it found that American articulated lawful, nondiscriminatory reasons for Johnson's termination, essentially, poor performance by Johnson.

In his third and final point of error, Johnson contends that the district court erred in its determination that his summary judgment evidence failed to establish that American's stated reasons for termination were a pretext for age discrimination. Johnson further asserts that the district court erred by focusing on the principles of Proud v. Stone, 945 F.2d 796 (4th Cir. 1991), and applying them to the facts of this case. Again, we disagree.

Johnson offered insufficient evidence in his attempt to establish pretext. It is our job to assess whether this evidence would lead a jury reasonably to conclude that American's reasons for terminating him were a pretext for age discrimination. Bodenheimer, 5 F.3d at 958. First, Johnson offered his affidavit that essentially rebutted, point by point, American's reasons for terminating him. Johnson's conclusory evidence of adequate job performance, standing alone, is insufficient to raise a jury issue of age discrimination. Bienkowski v. American Airlines, Inc., 851 F.2d 1503, 1507 (5th Cir. 1988). Even if we choose to believe Johnson's affidavit, "[m]ore is required, such as "direct" evidence of age discrimination, information about the ages of other employees in plaintiff's position, the treatment and evaluation of other employees, or the employer's variation from standard evaluation practices." Id. at 1508. Although the parties had been involved in discovery for almost one year, Johnson offered only one other piece of evidence to substantiate his argument that he was performing adequately: an e-mail message from Jones that

lauded Johnson's work a few months after he was hired. The e-mail message, although complimentary of Johnson's work, does not create a material issue of fact because it was sent three and one-half months before his termination, just two and one-half months after his hiring, and does not reflect his performance at the time of his dismissal.

Second, Johnson asserts that he was told at the time of his termination that the company needed someone who could mingle better with the hourly workers. He interprets this remark as an indication that American wanted a younger manager who could better relate to the hourly workers, because most of the hourly workers were young. He argues that the district court disregarded this evidence because it was not direct evidence of discrimination. To the contrary, the district court recognized this evidence for what it was: his opinion. He offered no remark by company officials related to his age, and this remark more likely was a reflection on Johnson's management style, not his age.

Third, Johnson argues that the district court erroneously "embraced" statistics offered by American to show that it did not discriminate against workers over forty. American's statistics showed that in the year Johnson was fired, six of the twelve employees fired were under forty, whereas two of the six new hires were over forty. Contrary to Johnson's argument, the district court merely referred to the figures as another piece of evidence

showing that American did not discriminate on the basis of age. These figures were not deceptive.

Fourth, Johnson contends that his firing was a form of age discrimination when compared to the discipline the company gave to younger workers for poor performance and misbehavior. Again, he relies solely on his affidavit to present this evidence, and fails to present direct evidence of the company's treatment of other workers. Moreover, the younger workers to which he refers were not terminal managers, and thus cannot be directly compared to him. He does refer to one other terminal manager that was counseled before an adverse employment action was taken, but this single incident does not prove age discrimination without further details. Furthermore, although Johnson charges that he was not warned about his deficient performance, he does admit that he was counseled about one area of his performance prior to his termination. This evidence simply does not show that American's reasons for firing him were pretext or false.

Fifth, Johnson attacks the credibility of Jones, stating that because he disputes Jones's affidavit, this establishes material fact issues regarding Jones's credibility. Once again, he is mistaken, because at a motion for summary judgment, we do not assess credibility. Bodenheimer, 5 F.3d at 958. "The employer need only articulate a lawful reason, regardless of what its persuasiveness may or may not be." Id.

Finally, Johnson attacks the district court's reliance on the rationale of Proud v. Stone, 945 F.2d 796 (4th Cir. 1991), in reaching its decision. In Proud, the Fourth Circuit stated that "in cases where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer." Proud, 945 F.2d at 797. He argues that the district court incorrectly applied this inference in evaluating his case because intervening circumstances occurred between his hiring and his firing that negate the inference. None of the instances that he cites--primarily a union campaign--indicates evidence of animus based on age against persons over forty. Furthermore, it is clear that the district court did not ground its decision on the Proud inference. Instead, the court explained the reasoning employed in Proud, traced its use in the courts, and incorporated it into its thorough analysis of the case. Consequently, the district court did not err in relying on this inference in reaching its conclusion.

Based on the preceding discussion, we hold that American articulated legal, nondiscriminatory reasons for Johnson's termination, and that Johnson presented insufficient evidence to establish that American's reasons for firing him were pretext for age discrimination. We affirm, therefore, the district court's grant of summary judgment.

III

To sum up, we hold that the district court properly denied Johnson's motion to remand. We also hold that the district court properly granted summary judgment in favor of American. Consequently, we AFFIRM the district court's judgment.

A F F I R M E D.