

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 94-60140  
Summary Calendar

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MARIA M. GONZALEZ,

Plaintiff-Appellant,

VERSUS

KOCH REFINING COMPANY,

Defendant-Appellee.

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Appeal from the United States District Court  
For the Southern District of Texas

(92-CV-340)

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(December 21, 1994)

Before THORNBERRY, DAVIS and SMITH, Circuit Judges.

THORNBERRY, Circuit Judge:\*

**Facts and Prior Proceedings**

Maria M. Gonzalez filed a civil action in state court under the Age Discrimination in Employment Act (ADEA)<sup>1</sup> and Title VII of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

<sup>1</sup> 29 U.S.C. §§ 621 **et seq.**

the Civil Rights Act of 1964<sup>2</sup>, alleging age, sex and national origin discrimination based upon Koch Refining Company's (Koch) refusal to hire her. Koch removed the suit to federal district court. Following a bench trial by consent before a magistrate judge, the magistrate judge found no discrimination by Koch and issued a take-nothing judgment against Gonzalez. Gonzalez timely appeals to this Court. We affirm.

### **Discussion**

Gonzalez makes two arguments on appeal. First, she contends that the magistrate judge improperly shifted the burden of proof to her after she made a prima facie case of discrimination. Second, Gonzalez argues that the evidence is insufficient to support a verdict in favor of the defendant. On appeal from a bench trial, this Court reviews the magistrate judge's factual findings for clear error and the issues of law *de novo*. **Odom v. Frank**, 3 F.3d 839, 843 (5th Cir. 1993). However, "where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." **Anderson v. Bessemer City**, 470 U.S. 564, 573-76 (1985). Thus, this Court's review of the factual findings underpinning the magistrate judge's decision is limited in scope. **Id.**

In order to establish employment discrimination based on her allegations, Gonzalez had to establish a prima facie case of either

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<sup>2</sup> 42 U.S.C. § 2000(e) **et seq.**

age discrimination or Title VII discrimination<sup>3</sup>. **Thornbrough v. Columbus & Greenville R. Co.**, 760 F.2d 633, 638-39 n.4 (5th Cir. 1985). Once Gonzales established a prima facie case of employment discrimination, the burden shifted to Koch to proffer a legitimate, nondiscriminatory reason for its employment decision. **Id.** If Koch successfully tendered a nondiscriminatory reason, then Gonzalez had the burden of demonstrating that the alleged nondiscriminatory reason for not hiring her was merely a pretext for unlawful discrimination. **Id.** The ultimate burden of persuasion, however, remained with Gonzalez. **Bienkowski v. American Airlines, Inc.**, 851 F.2d 1503 (5th Cir. 1988).

The magistrate judge determined, based on the evidence at trial, that Gonzalez had made a prima facie case of discrimination under the ADEA and Title VII. However, the magistrate judge also determined that Koch had proffered a legitimate, nondiscriminatory reason for not hiring Gonzalez. Specifically, Koch proffered testimony from Gonzalez's interview during which she said that she liked to work in the tower so that she could hide from the bosses. Gonzalez also stated during the interview that if she were hired by

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<sup>3</sup> To establish a prima facie case of age discrimination, Gonzalez must have shown that she (1) was within the protected class and was adversely affected; (2) was qualified for the position; and (3) the job remained open or was filled by someone younger. **Lindsey v. Prive Corp.**, 987 F.2d 324, 326-27 (5th Cir. 1993). Similarly, to make a prima facie case of discrimination under Title VII, Gonzalez must have shown that: (1) she was a member of a protected group; (2) she was qualified for the position for which she applied; (3) she was not selected for the position; and (4) after Koch declined to hire her, the position remained open or was filled by someone outside of Gonzalez's protected group. **Davis v. Chevron U.S.A., Inc.**, 14 F.3d 1082, 1087 (5th Cir. 1994).

Koch, her desire would be to be transferred out of the maintenance department and into a warehouse job. Gonzalez, however, was not interviewing for a warehouse job at the time. She was interviewing for a job in the general maintenance division.

Manuel Villa, general maintenance foreman at the time Gonzalez applied for the position, testified about Gonzalez's comments and said that he found them troublesome because the comments brought her work ethics into question. Villa also testified that after the interview, he was convinced that she would not be a good addition to his general maintenance team and that neither Gonzalez's age, sex or national origin had anything to do with his decision not to hire her.

Gonzalez testified on her own behalf and never denied making the proffered comments to the hiring committee. In fact, Gonzalez admitted that she told the hiring committee that she liked to work in the towers because "she liked to get away from bosses". However, she also testified that she worked well in the towers.

The only other relevant testimony proffered by Gonzalez was that of Ricardo Salazar. Salazar testified that Koch had discriminated against him in the past. Specifically, Salazar claimed that he was unjustly fired after stabbing an Anglo employee with an ice pick. The other employee allegedly made ethnic remarks to Salazar which angered him. Salazar contended that the fact that he was fired and the Anglo employee was not fired, demonstrated Koch's discrimination against him. Salazar admitted, however, that

the supervisors at Koch were not aware of his difficulties with the Anglo employee because neither he nor anyone else reported it.

The magistrate judge determined that Gonzalez had failed to show by any competent, relevant evidence that Koch's stated reason for rejection was a cover-up for an age, sex, or race-related discriminatory decision. The magistrate judge also found that Koch's concern about Gonzalez' work ethics was a valid, nondiscriminatory reason not to hire Gonzalez.

The magistrate judge set out the correct legal burdens in his opinion, therefore Gonzalez is simply incorrect in her contention that the magistrate judge improperly shifted the burdens of proof and persuasion to her. Gonzalez is also incorrect in her assertion that the magistrate judge erred in making his findings and in rendering a take-nothing judgment against her. The magistrate judge did not clearly err in finding no evidence of discrimination as alleged by Gonzalez and in entering a take-nothing judgment against her.

#### **Conclusion**

Based on the foregoing, we affirm the judgment of the district court.

AFFIRMED.