NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued November 15, 2023
Decided December 14, 2023

Before

DIANE S. SYKES, *Chief Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

No. 22-2820

HAROLD JOHNSON,
Plaintiff-Appellant,

v.

STATEWIDE INVESTIGATIVE SERVICES, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 20-cv-1514

Sharon Johnson Coleman,
Judge.

O R D E R

Harold Johnson, a security guard, sued Statewide Investigative Services, Inc., his former employer, for firing him in violation of the Age Discrimination in Employment Act. *See* 29 U.S.C. §§ 621–634. The district judge granted Statewide's motion for summary judgment. But Johnson supplied evidence sufficient to persuade a reasonable factfinder that Statewide lied about why it fired him and that it fired him because of his age. Thus, we vacate the judgment and remand.

When reviewing summary judgment, we construe the record in favor of Johnson, the nonmoving party. *Marnocha v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 986 F.3d 711, 718 (7th Cir. 2021). In 2011 Johnson began working full-time as a supervisor for Statewide, a staffing service, in Chicago. He was 69 years old. Eight years later, on February 4, 2019, Michael Barone—Statewide's Director of Operations—phoned Johnson, then age 77, to say that Statewide was firing him. Barone said that Johnson was being fired solely because Statewide was ending the supervisor position. Although Johnson was then earning $1 more hourly than the remaining part-time guards, Barone stressed that "money … wasn't the reason" for the discharge and that Johnson was an "exemplary employee." About two months prior to the call, Johnson told Barone that he was willing to work part-time.

The parties dispute whether Johnson was a supervisor when Statewide fired him. Statewide asserts that Johnson's attire, responsibilities, and status in the payroll system reflected that he was a supervisor through 2019. Johnson attests that in 2017 Barone said that he was "no longer a supervisor," that he had the same responsibilities as other security guards, and that Barone never called him the supervisor.

Further, Johnson asserts that Barone referred to Johnson's age disparagingly. He testified that twice in April and September 2017 Barone asked Johnson for his age and how long he planned to work for Statewide. Johnson also stated that "from time to time" Barone called him an "old man." Following the discharge, Statewide hired guards to fill the shifts that Johnson had staffed. Over the next two months, Statewide hired four part-time security guards ages 28 to 57; collectively, they filled Johnson's shifts.

Johnson sued Statewide for firing him because of his age, and after discovery Statewide moved for summary judgment. In response Johnson offered a declaration asserting facts that Statewide replied had never been disclosed: Johnson specified that Barone occasionally called him an old man "several times from 2017 through February 4, 2019." He also stated that he had asked Barone if he could remain employed part-time instead of being laid off.

The judge granted Statewide's motion. She disregarded "certain averments" in Johnson's declaration—she did not specify which—that contradicted Johnson's deposition testimony in violation of the sham-affidavit rule. Next, under the framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the judge ruled that Johnson lacked a prima facie case of discrimination because no evidence suggested that he was treated worse than similar employees. The judge reasoned that Johnson could not compare himself to the part-time guards that Statewide hired to replace him because he

had worked full-time. And even if Johnson had shown a prima facie case, the judge continued, and even though his status as a supervisor was in dispute, no reasonable jury could find that Statewide insincerely believed that he was a supervisor when it fired him to eliminate that position. The proffered evidence of insincerity was Barone's remarks about Johnson's age, but the judge thought that they were too disconnected from the firing to be probative.

On appeal Johnson challenges (1) the judge's refusal to consider his declaration under the sham-affidavit rule and (2) the entry of summary judgment. We review the former for an abuse of discretion, *James v. Hale*, 959 F.3d 307, 314 (7th Cir. 2020), and the latter de novo, *Marnocha*, 986 F.3d at 718.

Regarding the judge's refusal to consider the declaration under the sham-affidavit rule, Johnson argues that his declaration (reciting Barone's age-based comments and Johnson's offer to work part-time) and his earlier statements do not conflict. Statewide responds that in two respects they do: First, Johnson testified at his deposition that Barone twice made age-related remarks, but in his declaration he said that it happened "several times." Second, as Statewide argued in the district court, Johnson testified that when Barone phoned to fire him, he did not ask to work part-time to keep his job, yet in his declaration he said that he made that request.

We do not know which remarks the judge excluded because she did not say. Reading between the lines, we can infer that she might have disregarded the assertion in Johnson's affidavit that Barone made age-related comments "several times." A party has submitted a sham affidavit only when that party previously gave "clear answers" that "negate the existence of any genuine issue of material fact." *Castro v. DeVry Univ., Inc.*, 786 F.3d 559, 571–72 (7th Cir. 2015) (quoting *Bank of Ill. v. Allied Signal Safety Restraint Sys.*, 75 F.3d 1162, 1170 (7th Cir. 1996)). Courts should take "great care" before excluding statements under the sham-affidavit rule to avoid deciding questions of credibility. *Id.* at 571. Here this standard was not met because the judge did not say what she was excluding, and Johnson's "several times" declaration did not arguably negate any clear testimony. In an interrogatory answer, Johnson stated that "from time to time" Barone referred to him as an old man, and he gave two examples at his deposition. Consistent with these statements, his declaration permissibly reiterated that Barone used the epithet "several times."

Likewise, to the extent that the judge disregarded Johnson's statement that he had offered to work part-time, that too failed to meet the sham-affidavit standard because his statement was not new. Johnson's deposition testimony that he did not ask

Barone to work part-time when Barone fired him over the phone does not foreclose the possibility that he asked for that change at another time. And in an interrogatory answer, Johnson stated that "[t]wo months prior to termination, [p]laintiff informed Barone that he was willing to reduce his hours." Johnson's declaration is thus "amplification rather than contradiction." *Cook v. O'Neill*, 803 F.3d 296, 298 (7th Cir. 2015).

Johnson next contends that summary judgment was improper. He invokes the burden-shifting approach of *McDonnell Douglas.* It is undisputed that he meets the first three elements of the prima facie case: his age (77) protects him, he met his employer's "legitimate expectations" (he was "exemplary"), and his firing was an "adverse action." *See McDaniel v. Progress Rail Locomotive, Inc.*, 940 F.3d 360, 368 (7th Cir. 2019). The parties debate only whether the younger workers Statewide hired are "similarly situated" to Johnson. Statewide argues that they are not because they are part-time, lower-wage, nonsupervisory guards. Johnson responds that they have the same title and responsibilities he did and at nearly the same pay (just a $1 per hour difference).

A reasonable jury could find that Johnson was similarly situated to the security guards Statewide hired to replace him. We use a "flexible, common-sense, and factual" approach to determine whether employees are similarly situated. *Coleman v. Donahoe*, 667 F.3d 835, 841 (7th Cir. 2012). In a head-to-head comparison, full-time and part-time employees generally are not similar. *Ilhardt v. Sara Lee Corp.*, 118 F.3d 1151, 1155 (7th Cir. 1997). But for three reasons (only one of which relies on the declaration), a jury could find Johnson similar to the part-time employees hired to replace him.

First, Johnson attests (both in an interrogatory answer and his declaration) that he offered to work part-time; thus, a jury could find him similar to those workers. Second, in *Ilhardt* we reasoned that part-time workers are distinct from full-time workers because the former receive fewer benefits and lower pay. *Id.* But that distinction does not apply here: Statewide does not contend that it gave part-time and full-time workers different benefits. And the pay difference, too, is arguably irrelevant. Although Johnson earned $1 per hour more than his replacements, a jury could find this difference immaterial because Statewide admits that "money" was not a reason for firing Johnson. Third, Statewide did not rely on Johnson's full-time status when firing him; it relied only on his status as a supervisor, a position Statewide said was no longer necessary. But as the judge correctly recognized, the parties genuinely contest whether Johnson was a supervisor when Statewide fired him, rendering this an issue for a jury. *See, e.g.*, *Peirick v. Ind. Univ.-Purdue Univ. Indianapolis Athletics Dep't*, 510 F.3d 681, 688–

89 (7th Cir. 2007) (ruling that because the employer had "disregarded" distinctions that it raised during litigation about different employees, the relevance of those distinctions was for a jury).

Johnson next challenges the judge's alternative ruling that Statewide's stated reason for firing him—its belief that he was a supervisor—was honest. *Brooks v. Avancez*, 39 F.4th 424, 433–35 (7th Cir. 2022). He gives two reasons why the record supports his view that this asserted belief is a pretext for discrimination. He first points to the comments on Johnson's age that Barone made from 2017 onward. But the judge correctly noted that those comments were too attenuated—in both context (over meals) and timing (well before discharge)—to suffice as evidence of pretext. *Bagwe v. Sedgwick Claims Mgmt. Servs., Inc.*, 811 F.3d 866, 885–86 (7th Cir. 2016).

Johnson's second argument, however, is sound. He contends that Barone's own statement in 2017 that he was "no longer a supervisor" would permit a reasonable jury to find that Barone (and thus Statewide) did not believe that in 2019 he was a supervisor; from this a jury could infer that Statewide fired him discriminatorily. We agree. "[I]t is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000). Likewise, Barone's knowledge that Johnson was willing to work part-time (and thus not as a supervisor), which Johnson expressed to Barone two months before the discharge, further suggests that Statewide's asserted reliance on his status as a supervisor could be pretextual. Thus, Johnson has adduced triable evidence of pretext.

VACATED and REMANDED