IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
March 12, 2013

Lyle W. Cayce
Clerk

No. 12-50472
Summary Calendar

JUAN O. GONZALEZ,

Plaintiff-Appellant

v.

CITY OF SAN ANTONIO,

Defendant-Appellee

Appeal from the United States District Court
for the Western District of Texas
No. 5:11-CV-00375

Before KING, CLEMENT, and HIGGINSON, Circuit Judges.

PER CURIAM:[*]

Juan Gonzalez appeals the district court's grant of summary judgment to the City of San Antonio with respect to his claim of age discrimination. Because Gonzalez failed to show a genuine issue of material fact that the City of San Antonio's reasons for not hiring him for a parking attendant position were pretextual, we AFFIRM.

[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

I. FACTUAL AND PROCEDURAL BACKGROUND

Juan Gonzalez was first employed by the City of San Antonio ("the City") in 2004 as a part-time parking attendant. He was promoted to a full-time position in 2005, but returned to a part-time schedule in 2006 when his wife became ill. In 2009, Gonzalez applied for one of the City's three newly-opened, full-time parking attendant positions. The City interviewed multiple applicants, including Gonzalez, for the positions. The interview panel consisted of Ann Cruz and Elida Canales, both employees of the City's Parking Division. Ultimately, Adam Ortiz, Alison Recendez, and Sofia Coronado (collectively "the selected applicants") were chosen over Gonzalez. All three of the selected applicants were approved by the Division Manager of the Parking Division, Kenneth Appedole.

On February 20, 2010, Gonzalez filed a complaint with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq*. The EEOC determined that the evidence established an ADEA violation and provided a "notice of right to sue" letter. On May 12, 2011, Gonzalez filed his original complaint against the City, alleging discrimination on the basis of his age in violation of the ADEA.[1] The City filed a motion for summary judgment, which the district court granted, stating that Gonzalez "failed to present evidence from which a reasonable juror could conclude that the City's articulated reason for Gonzalez's nonselection . . . is unworthy of credence." The court also held that a reasonable jury "could not conclude Gonzalez was 'clearly' better qualified than the three persons selected." Gonzalez timely appeals.

[1] At the time this case was filed, Gonzalez was 68 years old, Ortiz was 33 years old, Recendez was 23 years old, and Coronado was 35 years old.

II. STANDARD OF REVIEW

We review a grant of summary judgment *de novo*, applying the same standard as the district court. *Moss v. BMC Software, Inc.*, 610 F.3d 917, 922 (5th Cir. 2010). Summary judgment is appropriate when, viewing the evidence in the light most favorable to the non-moving party, the record shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a).

III. ANALYSIS

The ADEA prohibits an employer from "fail[ing] or refus[ing] to hire . . . any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). "To establish an ADEA claim, '[a] plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial), that age was the "but-for" cause of the challenged employer decision.'" *Moss*, 610 F.3d at 922 (alteration in original) (quoting *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177–78 (2009)).

When, as here, a plaintiff's claim under the ADEA is based purely on circumstantial evidence, we review a district court's grant of summary judgment in favor of the employer using the framework set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–05 (1973). *See Patrick v. Ridge*, 394 F.3d 311, 315 (5th Cir. 2004). "Although intermediate evidentiary burdens shift back and forth under this framework, 'the ultimate burden of [showing] that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 143 (2000) (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). Under the *McDonnell Douglas* framework, a plaintiff must first establish a prima facie case of age discrimination. Both parties in this case concede that Gonzalez has established a prima facie case by showing that

(1) he belongs to the class of individuals protected under the ADEA, (2) he applied for and was qualified for the parking attendant position, (3) he was rejected, and (4) younger applicants were hired. *See, e.g., Medina v. Ramsey Steel Co.*, 238 F.3d 674, 680–81 (5th Cir. 2001).

Once Gonzalez established a prima facie case of age discrimination, the burden of production shifted to the City to show "a legitimate, nondiscriminatory reason for the employment decision." *Moss*, 610 F.3d at 922. The City contends that Gonzalez was not selected for a parking attendant position because he scored lower than the selected applicants during the interview process. As evidence of this justification, the City provided the deposition testimony of Ann Cruz and Elida Canales, the affidavit and interview forms completed by Cruz and Canales for each person interviewed, and the affidavit of Kenneth Appedole, the City's Parking Division Manager. The district court correctly found this evidence to be sufficient to establish a legitimate, nondiscriminatory reason for not hiring Gonzalez. *See Price v. Fed. Express Corp.*, 283 F.3d 715, 720 (5th Cir. 2002) (explaining that the defendant's burden at this stage "is satisfied by producing evidence, which, *taken as true*, would *permit* the conclusion that there was a nondiscriminatory reason for the adverse action" (internal quotation marks and citation omitted)).

At this point, the burden shifted back to Gonzalez to show that the City's proffered reasons for its hiring decisions were merely pretext for the City's desire to recruit younger employees over older ones such as Gonzalez. *See Crawford v. Formosa Plastics Corp., La.*, 234 F.3d 899, 902 (5th Cir. 2000). "In determining whether [a plaintiff's] rebuttal rescues him from summary judgment, we look to whether he has 'raise[d] a genuine issue of material fact as to whether he has established pretext.'" *Haas v. ADVO Sys., Inc.*, 168 F.3d 732, 733 (5th Cir. 1999) (second alteration in original) (quoting *Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 41 (5th Cir. 1996).

In assessing a claim of pretext, "we look at rebuttal evidence in tandem with evidence presented as part of the prima facie case." *Id.* Rebuttal evidence showing the plaintiff to be "clearly better qualified" than the selected applicants is sufficient to establish pretext. *EEOC v. La. Office of Cmty. Servs.*, 47 F.3d 1438, 1444 (5th Cir. 1995). A plaintiff can also establish pretext by showing that the employer's proffered reason was not the real reason for its employment decision. *See Laxton v. Gap Inc.*, 333 F.3d 572, 579 (5th Cir. 2003) ("Our concern is whether the evidence supports an inference that [the employer] intentionally discriminated against [the applicant], an inference that can be drawn if its proffered reason was not the real reason for [the decision]."). Gonzalez argues that the City's reason for not hiring him was pretextual because he was clearly better qualified than the chosen applicants and because the evidence shows that the City's proffered reason for its decision was not genuine. He also argues that the EEOC's findings in his favor corroborate his claim that the City declined to hire him on account of his age.

A. Gonzalez did not Demonstrate that He is Clearly Better Qualified

Under the ADEA,"[a] showing that the unsuccessful employee was 'clearly better qualified (as opposed to merely better or as qualified) than the employees who are selected' will be sufficient to prove that the employer's proffered reasons are pretextual." *Moss*, 610 F.3d at 922 (internal quotation marks omitted) (quoting *EEOC*, 47 F.3d at 1444). However, as we have previously held, "the bar is set high for this kind of evidence." *Celestine v. Petroleos de Venezuella SA*, 266 F.3d 343, 357 (5th Cir. 2001). In order to show that he was clearly better qualified, Gonzalez must "present evidence from which a jury could conclude that 'no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over [him] for the job in question.'" *Moss*, 610 F.3d at 923 (quoting *Deines v. Tex. Dep't of Protective & Regulatory Servs.*, 164 F.3d 277, 280–81 (5th Cir. 1999)).

Gonzalez provides several arguments in support of his claim that he was clearly better qualified than the three individuals who were hired. First, Gonzalez accurately states that he had more experience working as a parking attendant than any of the selected applicants.[2] While Gonzalez's prior experience as a parking attendant is certainly relevant to the City's assessment of his qualifications, we previously have held that a candidate's "better education, work experience, and longer tenure with [a] company do not establish that he is clearly better qualified." *Price*, 283 F.3d at 723.

Here, Gonzalez has not convincingly demonstrated that having more experience as a parking attendant should be necessarily equated with possessing clearly superior qualifications. *See Moss*, 610 F.3d at 923. Indeed, the City submits that such experience was not the only factor it considered in making its decisions. For example, the City noted that although one applicant had no experience as a parking attendant, she had additional years of experience in another position requiring similar qualifications. Further, in contrast to Gonzalez, another candidate with experience as a parking attendant expressed willingness to receive additional job-related training. Therefore, even though Gonzalez had more experience as a parking attendant than the selected applicants, that experience alone does not indicate that he was clearly better qualified. *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 959 (5th Cir.1993).

Gonzalez also contends that he was clearly better qualified than the chosen applicants due to his better attendance and cash-handling records and his reputation among his superiors as an excellent employee. Although a direct comparison of the applicants' statistics confirms that Gonzalez missed fewer

[2] At the time the City conducted interviews for the parking attendant positions, Gonzalez had worked as a part-time parking attendant for 48 months and full time for one year; Ortiz had worked as a part-time parking attendant for 4 months and had not worked full time; Recendez had not ever worked as a parking attendant; and Coronado had worked as a part-time parking attendant for 13 months and had not worked full time.

days and had fewer overages or shortages than the other applicants, this ignores the fact that the City used a rating system based on interview answers as the primary determinant in its hiring process.[3] A comparison of the ratings given by both Cruz and Canales to the applicants demonstrates that Gonzalez's overall score was lower than the scores of the selected applicants.[4] Based on these results, the City chose to hire Ortiz, Recendez, and Coronado over Gonzalez. Any resulting disagreement over whether Gonzalez should have been hired "merely constitutes a difference of opinion . . . [over] employment decisions that this court will not presume to second guess." *Cramer v. NEC Corp. of Am.*, No. 12-10236, 2012 WL 5489395, at *3 (5th Cir. 2012) (unpublished).

Furthermore, the comments of some City employees touting Gonzalez's work ethic do not raise a genuine issue of material fact as to whether Gonzalez was clearly better qualified than the selected applicants. For example, Brenda Hocott, a Parking Department Supervisor, testified that Gonzalez was "an excellent employee" and identified some problems that Hocott had experienced with at least one of the selected applicants. However, as the district court observed, neither Hocott's nor the other supervisors' testimony directly compares Gonzalez's qualifications with those of the selected applicants. Although Hocott might have believed Gonzalez to be a better applicant than those who were

[3] In any event, we also note that the statistical disparities between the candidates are not so great as to evidence that Gonzalez was *clearly* better qualified than the selected applicants.

[4] After each of their interviews, the applicants received a rating for certain enumerated job qualifications based on the applicant's answers to relevant questions. The ratings were given on the following scale, from best to worst: Great Response, Good Response, Average Response, and Poor Response. Both Cruz and Canales gave ratings to Ortiz, Recendez, Coronado, and Gonzalez. Ortiz received "Good Response" ratings from Cruz and Canales in every category but one, and Recendez and Coronado received "Good Response" ratings from Cruz and Canales in all of the categories. In contrast, Gonzalez received "Average Response" ratings from Cruz in all the categories, and received two "Poor Response," one "Average Response," and two "Good Response" ratings from Canales.

selected, her testimony does not support the conclusion that he was *clearly* better qualified for the position. Since Gonzalez's and the selected applicants' qualifications were not "so widely disparate that no reasonable employer would have made the same decision," *Moss*, 610 F.3d at 923 (quoting *Deines*, 164 F.3d at 280–81), any differences in qualifications among them is "not probative evidence of discrimination." *Moss*, 610 F.3d at 923 (quoting *Celestine*, 266 F.3d at 357).

As Gonzalez has failed to show that he was clearly more qualified than the selected candidates, we need not proceed to evaluate whether the City "made the best hiring decision or even a good decision." *Cramer*, 2012 WL 5489395, at *3. "Whether the employer's decision was the correct one, or the fair one, or the best one is not a question within [our] province to decide. The single issue [before us] is whether the employer's selection of a particular applicant over the plaintiff was motivated by discrimination." *Deines*, 164 F.3d at 281. Here, the City justified its hiring decisions with ample evidence to support its view that the selected applicants were more qualified than Gonzalez to be parking attendants. Gonzalez has failed to show that he is clearly better qualified than the selected applicants, and, by extension, that the City's proffered explanations for its hiring decisions are pretextual.

B. Proffered Explanation is not False or Unworthy of Credence

Gonzalez also argues that he has established pretext by providing evidence that the City's explanation of its hiring decisions was not truthful. *See Laxton*, 333 F.3d at 578 ("Evidence demonstrating that the employer's explanation is false or unworthy of credence, taken together with the plaintiff's prima facie case, is likely to support an inference of discrimination even without further evidence of defendant's true motive."). "An explanation is false or unworthy of credence if it is not the real reason for the adverse employment action." *Id.* Thus, Gonzalez must produce evidence, viewed in the light most favorable to

him, that would permit a reasonable jury to believe that the City's proffered reason for not hiring him was not its true reason, but rather was pretext for a discriminatory reason. *See Vaughn v. Woodforest Bank*, 665 F.3d 632, 637 (5th Cir. 2011).

According to Gonzalez, the City's proffered reason for hiring the younger applicants—that they received higher ratings in their interviews—is false or unworthy of credence because the City's employees allegedly did not follow established hiring procedures and were dishonest about the decisionmaking process. Ultimately, however, Gonzalez's arguments do not suffice to raise a genuine issue of material fact concerning whether the City's explanations for its decision were pretextual.

Gonzalez contends that the City deviated from its normal hiring and selection policies in choosing the three younger applicants over him. We previously have held that an employer's intentional and deliberate departure from its stated hiring policies can "create a material issue of disputed fact as to whether the employer's explanation was false." *Blow v. City of San Antonio*, 236 F.3d 293, 298 (5th Cir. 2001). In *Blow*, for instance, the plaintiff introduced extensive evidence as to the defendant-employer's documented hiring procedures to demonstrate that the employer's deviation from those procedures was motivated by intent to discriminate. *Id.* at 295, 297. We concluded that this rebuttal evidence was sufficient to save the plaintiff from summary judgment because it raised a genuine issue of material fact as to whether the employer's proffered explanation for its hiring decision was false or unworthy of credence. *Id.* at 298.

Here, however, Gonzalez has failed even to show that the City deviated from its usual hiring practice or established policy in any meaningful way. Gonzalez contends that, in conducting his interview, the City employed a two-person panel instead of a three-person panel. He also alleges that the ultimate

decision not to hire him was made by a single person instead of the usual three-person panel. Gonzalez's basis for his contention that these practices violated the City's hiring policies is limited to the testimony of a City employee, Brenda Hocott, who claimed that she had sat on a panel with the parking division where three people performed the interview, and the testimony of Cruz, who suggests that a three-person panel is generally used for interviews. Neither Hocott nor Cruz states, however, whether the use of a three-person panel is an established City policy or merely a preferred practice. In other words, unlike the plaintiff in *Blow*, Gonzalez failed to introduce any evidence as to the City's documented hiring procedures. Without evidence of this nature, no reasonable jury could infer that the City's proffered explanation for its hiring decisions was false, much less that the City was "dissembling to cover up a discriminatory purpose." *Reeves*, 530 U.S. at 147.

Gonzalez's second argument focuses on discrepancies in Cruz's deposition testimony as compared to other employees' testimony and the City's records. Gonzalez attempts to compare his claim to that in *Gee v. Principi*, where we held that discrepancies in employees' testimony, in combination with evidence that the employees collaborated to discriminate against the applicant, were sufficient to establish pretext. 289 F.3d 342, 346–48 (5th Cir. 2002). During her deposition, Cruz testified that she believed that there were three interviewers on the panel that interviewed Gonzalez, while Canales testified and City records confirmed that there were only two interviewers. Cruz also testified that she discussed Gonzalez's qualifications with Canales, but Canales testified that no such discussion took place. Finally, Cruz alleged that she scored the applicants based in part on her personal observations of their work. Gonzalez responds that such observations would have been impossible because one of the three selected applicants had not worked for the City prior to being hired by the parking department.

Even taken as true, none of these alleged aberrations in Cruz's testimony undermine the City's proffered explanation for its hiring decisions. Contrary to Gonzalez's assertions, our holding in *Gee v. Principi* is inapposite. *See id.* In *Gee*, the plaintiff identified discrepancies in the defendants' testimony from which a factfinder could reasonably infer that the defendants formed a consensus to discriminate against the plaintiff during the interview process. *Id.* at 347–48. Unlike the plaintiff in *Gee*, Gonzalez did not tie the disputed facts in Cruz's testimony to any collective or individual antagonism against him. *See id.* In other words, in contrast to the plaintiff in *Gee*, Gonzalez's identification of inconsistencies between the testimony of Cruz and other City employees does nothing to undermine the City's explanation for hiring the selected candidates, nor does it give rise to an inference that the City engaged in a calculated attempt to conceal a discriminatory decsion.

The alleged discrepancies in Cruz's testimony do not undermine the City's description of the hiring process it used to fill the parking attendant positions. Additionally, absent evidence that the City deviated from its established hiring policies, Gonzalez's general objections to the City's rating system do not permit an inference of pretext, regardless of how many City employees ultimately participated in the interviews or the final decisionmaking process. Simply put, Gonzalez has not cast doubt on the City's assertion that it did not hire him because he received the lowest scores of any candidate when the City used a neutral rating system to rank the applicants. *See Warren v. City of Tupelo*, 332 F. App'x 176,182 (5th Cir. 2009) (While there may have been "some ambiguity regarding how the interview ratings form worked and whether [the employer] even followed such objective criteria in making [its] decision . . [that does not constitute] evidence that [the employer] did so in a discriminatory manner with regard to age.") (citing *Risher v. Aldridge*, 889 F.2d 592, 597 (5th Cir. 1989) ("As we have stated before, an agency's disregard of its own hiring system does not

of itself conclusively establish that improper discrimination occurred or that a nondiscriminatory explanation for an action is pretextual.")).

Finally, Gonzalez's accusations of discriminatory animus on the part of Cruz are insufficient to support an inference that the City's proffered reasons for hiring the selected applicants were mere pretext. Gonzalez claims to have evidence that Cruz discriminates against certain employees on the basis of their age since she previously assigned Epi Garcia, an older employee, to work in only one parking garage instead of the usual rotating schedule of parking garages. The evidence, however, indicates that Garcia had not performed well at some parking garages and was better suited to work at a single garage. Furthermore, in spite of this unusual assignment, Garcia did not suffer any loss in pay or hours.

The only other evidence proffered by Gonzalez in support of his claim that Cruz discriminated against older employees was the deposition testimony of Hocott, who initially accused the City of discriminating against Gonzalez because of his age but later undermined her own testimony by conceding that she had no knowledge of how the panel made its final decisions. Hocott's isolated remark that some of the older employees may have been "put out" by the City is little more than a conclusory allegation of discrimination unsubstantiated by any supporting facts (aside from her mere speculations regarding Epi Garcia) that, on its own, does not demonstrate that Cruz or the City harbored a desire to deny older applicants a place in the workforce.

In sum, the material issue is not whether the City "made the right hiring choice but whether its proffered reason for that choice is unworthy of credence." *Cramer*, 2012 WL 5489395, at *4. As explained, Gonzalez has failed to produce evidence that would permit a reasonable jury to believe that the City's proffered reason for not hiring him was pretext for a discriminatory reason.

C. The EEOC's Findings do not Elicit an Inference of Age Discrimination

Similarly, Gonzalez's case is not significantly bolstered by the EEOC's findings. The EEOC determined that the City violated the ADEA in choosing to hire the selected applicants over Gonzalez based on the same facts that we have found insufficient to sustain Gonzalez's allegations—Gonzalez's prima facie case, his qualifications for the position, and the conclusory testimony of a City employee suggesting that Cruz prefers to hire younger applicants over older ones. Since the EEOC findings arose out of the same information provided to us and are not entitled to any more weight than other witnesses' testimony, those findings do not alter our analysis. *See Smith v. Universal Servs., Inc.*, 454 F.2d 154, 157 (5th Cir. 1972) ("[T]he [EEOC] report is in no sense binding on the district court and is to be given no more weight than any other testimony given at trial.").

In the absence of additional evidence suggesting that Gonzalez was passed over for the parking attendant position because of his age, the City's decision must stand. The ADEA does not "prohibit an employer from making a bad hiring decision, only a discriminatory one, and this court 'should not substitute [its] judgment . . . for the employer's in the absence of proof that the employer's nondiscriminatory reasons are not genuine.'" *Cramer,* 2012 WL 5489395, at *5 (quoting *EEOC*, 47 F.3d at 1448); *see also Jenkins v. Ball Corp.*, 140 F. App'x 519, 525 (5th Cir. 2005) ("[I]t is simply beyond the ken of the judiciary to determine which . . . applicants [are] the most qualified for a particular position—versus the opinion of the employer whose responsibility it is [to] hire such applicants—especially when [none] of the applicants' credentials are overwhelmingly and uncontrovertibly superior to the other[s]."). Because Gonzalez has not provided us with more than a "shadow of doubt" that the City employed a non-discriminatory hiring process to make its decisions, *see Bauer v. Albemarle Corp.*, 169 F.3d 962, 967 (5th Cir. 1999), and because the selected

applicants were qualified for the parking attendant positions, we agree with the district court that Gonzalez is not entitled to relief under the ADEA.

IV. CONCLUSION

Gonzalez has failed to demonstrate that he was clearly better qualified than the selected applicants or that the City's proffered reason for hiring the selected applicants over Gonzalez—that Gonzalez received lower ratings than the selected applicants during their interviews—was false or unworthy of credence. Gonzalez therefore has not demonstrated that the City's proffered rationale was mere pretext for discriminating against him on account of his age. Consequently, we hold that the district court did not err in granting summary judgment in favor of the City. AFFIRMED.