United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 3, 2023
Lyle W. Cayce
Clerk

No. 22-20004

TAM HOANG,

Plaintiff—Appellant,

versus

MICROSEMI CORPORATION; MICROCHIP TECHNOLOGY INCORPORATED,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:19-CV-1971

Before JONES, SMITH, and GRAVES, *Circuit Judges*.

PER CURIAM:*

Microsemi Corporation, a wholly owned subsidiary of Microchip Technology, Inc., reduced a department's number of managers from three to two as part of a reduction-in-force ("RIF"). Tam Hoang, a discharged manager, claimed Microsemi laid him off because of his age and national origin in violation of Title VII, 42 U.S.C. § 1981, the Age Discrimination in Employment Act of 1967 ("ADEA"), and the Texas Commission on Human

* This opinion is not designated for publication. See 5TH CIR. R. 47.5.

Rights Act ("TCHRA"). The district court granted summary judgment to Microsemi. Hoang appealed. Because a reasonable factfinder could conclude that Microsemi laid off Hoang because of his age, we REVERSE in part and AFFIRM in part.

Factual & Procedural Background

In 1990, Hoang began working for Compaq Computers as a Systems Engineer. Throughout the next two-and-a-half decades, Compaq Computers was purchased or reorganized four times. At the same time, Hoang was promoted from a Systems Engineer to an Engineering Manager and then a Systems Development Manager at the company which became Microsemi. In May of 2017, Microsemi hired David Sheffield, a forty-eight-year-old born in the United States, as the director of Microsemi's quality assurance group. Sheffield supervised three managers, including Hoang, who was fifty-eight years old and born in Vietnam. Hoang had worked for Microsemi and its predecessors for over twenty-seven years. The other two were Hinendra Somaiya, a forty-six-year-old born in India, and Arvind Chandrasekaran, a thirty-five-year-old born in India.

Sheffield's quality assurance group embraced two quality assurance methods: manual and automated. Sheffield was hired to emphasize automated quality assurance using a system called "Agile Manufacturing." This created tension between Sheffield and Hoang partly because Sheffield doubted Hoang's enthusiasm for automated quality assurance. In one instance, Hoang made a comment that came across as sarcastic or negative in a meeting with Sheffield and Tran, to which Sheffield exclaimed that his behavior "has got to f**king stop!" Sheffield also required Hoang's subordinates to bypass Hoang and report directly to him instead. At the annual performance review, Sheffield gave Hoang poor marks, a first for Hoang during his time at the company.

Hoang also contends that Sheffield assigned him difficult assignments with little instruction, and on at least one occasion asked Hoang to conduct a meeting with clients with less than fifteen minutes' notice. Hoang claims this was disfavored treatment that the other two managers did not receive. Sheffield concluded the quality assurance group needed one fewer manager. He spoke with the human resources director who advised Sheffield to follow the company's RIF guidelines. Sheffield worked with a human resources officer to develop criteria to evaluate the three managers, and they began with four general categories designated by the company's guidelines. Sheffield developed more specific factors to consider. Hoang received the lowest score under all the factors except for seniority. Microsemi discharged Hoang and did not hire a replacement. His job duties were mostly assumed by Somaiya.

Hoang filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") and, by referral, the Texas Workforce Commission. Both agencies issued a notice permitting Hoang to sue. Hoang then sued Microsemi for national origin discrimination under Title VII and 42 U.S.C. § 1981 and for age discrimination under the ADEA. He also alleged age and national origin discrimination under the TCHRA. The district court entered summary judgment for Microsemi. This appeal followed.

Standard of Review

This court reviews a district court's grant of summary judgment de novo. *Tiblier v. Dlabal,* 743 F.3d 1004, 1007 (5th Cir. 2014). Summary judgment is proper "if the movant 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).

"A non-movant will not avoid summary judgment by presenting speculation, improbable inferences, or unsubstantiated assertions." *Jones v. United States*, 936 F.3d 318, 321 (5th Cir. 2019) (internal quotation marks

omitted). "We are not limited to the district court's reasons for its grant of summary judgment and may affirm the district court's summary judgment on any ground raised below and supported by the record." *Boyett v. Redland Ins.,* 741 F.3d 604, 606–07 (5th Cir. 2014) (internal quotation marks omitted). The threshold inquiry, therefore, is whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986). Of course, "the substantive law will identify which facts are material." *Id.* at 248. The evidence must be viewed in the light most favorable to the motion's opponent. *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 956 (5th Cir. 1993).

Discussion

Discrimination claims brought under Section 1981, the ADEA, and the TCHRA are evaluated under Title VII's analytical framework. *Jackson v. Watkins*, 619 F.3d 463, 466 (5th Cir. 2010) (Section 1981); *Bauer v. Albemarle Corp.*, 169 F.3d 962, 966 (5th Cir. 1999) (ADEA); *Reed v. Neopost USA, Inc.*, 701 F.3d 434, 439 (5th Cir. 2012) (TCHRA). Hoang's Title VII and ADEA claims applies equally to his Section 1981 and Texas law claims.

Because Hoang has not offered any direct evidence of discrimination, we apply the modified *McDonnell Douglas* burden-shifting standard. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Under that standard, Hoang must first establish a prima facie case of discrimination. If he can do so, the employer then must "articulate a legitimate, non-discriminatory . . . reason for its employment action." *McCoy v. City of Shreveport*, 492 F.3d 551, 557 (5th Cir. 2007). This burden is one of production, not persuasion. *Id.* Once the employer states its reason, the burden shifts back to the plaintiff to either show that the employer's reason is false and merely pretext for discrimination or that a motivating factor is the

plaintiff's protected characteristic. *Burrell v. Dr. Pepper/Seven Up Bottling Grp.*, 482 F.3d 408, 411–12 (5th Cir. 2007).

1. Prima Facie Case

To establish a prima facie case of age or national origin discrimination, a plaintiff must show that:

> (1) he was discharged; (2) he was qualified for the position; (3) he was within the protected class at the time of the 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, 5 F.3d at 957. The last factor differs in reduction-in-force cases. *Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 812 (5th Cir. 1991). In such cases, the plaintiff must meet the first three requirements, and then must offer "some evidence that an employer has not treated age [or national origin] neutrally." *Id*; *see also Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 41 (5th Cir. 1996). This court modified the fourth prima facie element because "reduction-case plaintiffs are simply laid off and thus [are] incapable of proving . . . actual *replacement* by a younger employee." *Amburgey,* 936 F.2d at 812. Such is the case here because Microsemi did not hire a new employee to replace Hoang.[1]

[1] The fact that Hoang's duties were reassigned to one employee does not remove this case from the court's RIF framework. *See Armendariz v. Pinkerton Tobacco Co.,* 58 F.3d 144, 149–50 (5th Cir. 1995) ("The fact that a small percentage of . . . work was assumed by another . . . employee (at no increase in pay) does not change the fact that Armendariz' position itself was eliminated."); *see also Barnes v. GenCorp Inc.*, 896 F.2d 1457, 1465 (6th Cir. 1990) (eliminating a single person is a legitimate RIF and "a person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties"); *Smith v. F.W. Morse & Co.,* 76 F.3d 413, 423 (1st Cir. 1996) (finding that a position elimination defense is not defeated merely because another employee, already on the payroll, is designated to carry out some or all of the discharged employee's duties in

There is no dispute that Hoang satisfied the first three prima facie elements, but the parties disagree on the fourth. To support the fourth element for both his age and national origin discrimination claims, Hoang contends that his job duties were not reassigned among several employees, but were reassigned to one other employee, Somaiya. He also alleges that "Sheffield . . . could see he was a man in his late 50s or early 60s" and that he was Vietnamese, whereas Somaiya is not Vietnamese and he is substantially younger than Hoang. And while Somaiya was forty-six years old, "[t]he fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age*. Or to put the point more concretely, there can be no greater inference of *age* discrimination (as opposed to '40 or over' discrimination) when a 40–year–old is replaced by a 39–year–old than when a 56–year–old is replaced by a 40–year–old." *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312 (1996); *see also Hartley v. Wisconsin Bell, Inc.*, 124 F.3d 887, 893 (7th Cir. 1997) ("[W]e consider a ten-year difference in ages (between the plaintiff and her replacement) to be presumptively 'substantial' under *O'Connor*.").

As this court has stated, "it is relatively easy both for a plaintiff to establish a prima facie case and for a defendant to articulate legitimate, nondiscriminatory reasons for his decision, most disparate treatment cases are resolved at the third stage of the inquiry, on the issue of whether the defendant's reasons are pretextual." *Amburgey*, 936 F.2d at 811 (5th Cir. 1991) (internal quotations and citation omitted).

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addition to his own, or because those duties are otherwise reallocated within the existing work force).

Here, Somaiya was retained and assumed all Hoang's job duties. A previous supervisor, Kumar Gajjar, determined that between Somaiya and Hoang, Hoang was better suited to manage both the manual and automation teams in the QA Group and placed Hoang over Somaiya's team of engineers. Furthermore, in the same month Sheffield was hired, Hoang claims Gajjar had recommended him for a promotion. Given this evidence, Hoang can make out a prima facie case and a factfinder could conclude that Microsemi intended to discriminate against Hoang because of his age.

2. Nondiscriminatory Reason and Pretext

Microsemi asserts that it "lawfully implemented a RIF and selected Hoang for termination based on objective factors and because it only needed two managers, not three." It also asserts that the RIF reflected a shift to "Agile Manufacturing methodologies," which includes a greater reliance on automated, instead of manual, testing. To determine which manager would be subject to the RIF, Sheffield, in partnership with the company's human resources representatives, evaluated and compared Hoang, Somaiya, and Chandrasekaran. He used four factors required by Microsemi's RIF practice: job criticality, flexibility, performance, and seniority. In addition to the four general evaluation categories, Sheffield also added specific subcategories—depth of agile system understanding and agile system engagement and implementation—that he admitted he made up and were purely subjective. For both subcategories created by Sheffield, he gave Hoang the lowest rating. Additionally, Sheffield gave Hoang the lowest rating in other subjective criteria (depth of agile system understanding, agile system engagement and implementation, assessment and validation capability using automated tools, and displaying Microsemi values) without ever writing him up in those categories.

Hoang argues that the subjective factors upon which Sheffield relied supports an inference of pretext. To establish pretext, "a plaintiff cannot merely rely on his subjective belief that discrimination has occurred." *Pilcher v. Cont'l Elecs. Corp.*, 121 F.3d 703 (5th Cir. 1997). Hoang's ultimate burden of persuasion under the ADEA and Section 1981 is to show that the protected characteristic is the but-for cause of discharge. *See Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177, (2009) (ADEA); *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020) (Section 1981). "The employer need only articulate a lawful reason, regardless of what its persuasiveness may or may not be." *Bodenheimer*, 5 F.3d at 958. "[T]he plaintiff in an ADEA disparate treatment case must offer evidence to rebut each of the employer's articulated legitimate, nondiscriminatory reasons." *E.E.O.C. v. Texas Instruments Inc.*, 100 F.3d 1173, 1180 (5th Cir. 1996).

Assuming Sheffield's criteria were subjective, "[t]he mere fact that an employer uses subjective criteria is not, however, sufficient evidence of pretext." *Manning v. Chevron Chem. Co.*, 332 F.3d 874, 882 (5th Cir. 2003). Hoang notes that another older Vietnamese employee was terminated based on low scores. Hoang further argues that Sheffield's unilateral initiation of a RIF was highly unusual and suspicious because Microsemi has not had a similar RIF. Similarly, Hoang argues it is suspicious that Microsemi never disciplined Hoang before Sheffield was hired, and that the company still uses manual methods of quality assurance. A reasonable factfinder could find that these subjective criteria were designed to give older employees low scores based on stereotypes that they are "inflexible." None of these categories show the same potential to discriminate based on national origin.

More concerning, however, is the statistical evidence. The average age of those terminated in the RIF was 55.9 years old and the average age of those retained in the QA group under Sheffield was 39.1 years old. This represents an age disparity of 16.8 years. From this sample of employees,

Hoang's expert concluded such an age disparity (16.8 years) in the RIF would occur by chance only 5.05% of the time. A reasonable factfinder could look at this evidence and conclude that Microsemi laid off Hoang because of his age.

CONCLUSION

The judgment of the district court is REVERSED as to Hoang's age discrimination claim under the ADEA and TCHRA. The district court is AFFIRMED as to the issue of national origin discrimination. We REMAND for further proceedings not inconsistent with this opinion.