UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

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Tenth Circuit

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ROBERT L. HOECKER
Clerk

PAUL D. WINTERBURG, Plaintiff-Appellee, v. KANSAS GAS & ELECTRIC CO., Defendant-Appellant.	)	Nos. 86-1974 & 87-1213 (D.C. No. 83-1800) (D. Kansas)

ORDER AND JUDGMENT*

Before HOLLOWAY, Chief Judge, LOGAN and TACHA, Circuit Judges.

This is an appeal from the district court's denial of the motions of defendant Kansas Gas & Electric Co. (KGE) for a directed verdict, for judgment notwithstanding the verdict, or for a new trial. Defendant also raises the issue whether the court's jury instruction on "willfulness" violated the Supreme Court's holding in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985). Because we hold that the trial court erred in denying defendant's motions for directed verdict or for judgment n.o.v., we do not reach the other issues. Because we find insufficient evidence to support the verdict, we also reverse its award of

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

damages and attorney's fees. Thus, the appeal of the attorney's fees award is moot.

I

Plaintiff Paul Winterburg sued KGE alleging that KGE had discriminated against him in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. Winterburg alleged that KGE discharged him from his job as a statistical analyst because of his age.[1] At the time of his discharge, Winterburg was fifty years old.

Winterburg had been working for KGE approximately twenty-six years before his discharge in May 1983.[2] He spent his first thirteen years as a draftsman, then senior draftsman, for KGE. In 1971, Winterburg requested and received a transfer to the Right of Way department. He spent approximately ten years as a Right of Way agent. As an agent, his duties included negotiating and purchasing easements and pieces of property for electrical wires, substations and the like.

In 1982, KGE underwent a major restructuring. The workload in the Right of Way department was substantially decreased after acquisition of the easements for the Wolf Creek Nuclear Power Plant was completed. As a consequence, Winterburg's job in Right of Way was eliminated or consolidated in late 1982 or early 1983.

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[1] Winterburg also alleged that KGE had demoted him from Right of Way agent to Statistical Analyst because of his age. The trial court granted KGE's motion for directed verdict on the issue and this decision has not been appealed.

[2] During much of his tenure at KGE, Winterburg also worked part-time at the Sedgwick County Clerk's office. His responsibilities included making maps and charts for the purpose of facilitating accurate assessment and collection of property taxes.

Subsequently, KGE executives created the job of statistical analyst in the Transmission and Distribution department for Winterburg, apparently in recognition of his long years of service, experience, and expectations. Winterburg's prime responsibility was the development of an annual report which would detail technical advances and economic savings for KGE directly traceable to the Transmission and Distribution department. While there is conflicting evidence regarding the difficulty of this assignment, it is clear that Winterburg was expected to gather data from various sources in the company, interpret the data and organize it into graphs and charts. He also directed the activity of a company photographer to obtain visual complements for the report.

In the course of preparing the report, Winterburg asked Norva Lee Kolar, a part-time typist who worked with him at the Sedgwick County Clerk's office, to type a portion of the report in draft form. It is undisputed that Winterburg had part of the report typed outside of KGE. It is also undisputed that the typist was on county time when he asked her to do the typing. There is, however, a sharp conflict over whether he specified that she was not to do KGE work on county time or with county equipment. The uncontradicted evidence shows that, regardless of whether Winterburg so instructed her, Kolar typed the work on county time and with county equipment. A short time later, she became dissatisfied with her job at the clerk's office and resigned.

On or about May 5, 1983, Kolar contacted a reporter from the Wichita Eagle-Beacon to air her grievances. She stated that, while a county employee, she had been asked to type private work on county time. The reporter talked to Winterburg about the allegations, and on Sunday, May 8, published a story detailing Kolar's charges. The story indicated that Winterburg claimed to have offered to pay for the typing, presumably to be done on Kolar's own time. KGE was mentioned by name as the company for which the typing was done.

Following that article, there were two other newspaper items about the situation. On May 10, 1983, the Eagle-Beacon ran a follow-up story announcing a district attorney investigation of Kolar's charges. On Thursday, May 12, 1983, the paper ran an editorial criticizing the practice of using taxpayers' employees for private work. In each of these items, KGE was named as the private firm for which the typing was done. Testimony indicated that KGE was particularly sensitive to public criticism because of the outcry surrounding its construction of the Wolf Creek nuclear power plant.

After cursory discussion, KGE executives decided to fire Winterburg. On Friday, May 13, 1983, he was called into the office of KGE Vice President Kent Brown and told he was terminated, effective immediately. Winterburg claims that in explaining his discharge, Brown stated, "[Y]ou must be old and senile, because you have embarrassed the company." III R. 354. See also id. at 452. Brown denied having said it. For the purpose of our analysis, however, we will assume that Winterburg's report of the termination interview is accurate.

It is clear from the record that KGE did very little investigation into the situation before firing Winterburg. The company compiled a collection of the clippings and fired Winterburg in what must be termed a summary fashion.

Winterburg was fired on a Friday afternoon. The following Monday, Kent Brown composed a memo regarding the incident in which he stated, "[r]eason for dismissal was unauthorized release of company documents . . . . Mr. Winterburg expressed surprise and shock and his extreme apologies and regrets for embarrassment caused to the company as a result of his actions . . . ." Brief of Appellant, App. A. Winterburg denied that Brown mentioned unauthorized release of company documents during the termination interview.

There was no written KGE policy prohibiting the release of non-confidential company documents. There was, however, a blanket statement in the company's discipline policy pamphlet regarding company expectations that workers will act in such a way as to not tarnish KGE's public image. Uncontradicted testimony indicated that Winterburg was terminated because of the public outcry that resulted from his using county employees to type his KGE work. While the evidence conflicts regarding whether Brown referred to Winterburg as old and senile, everyone agrees that Winterburg was charged with embarrassing the company.

It is Winterburg's position that Brown's statement constitutes direct evidence of unlawful age bias in violation of 29 U.S.C. § 623, which states "[i]t shall be unlawful for an employer--to . . . discharge any individual . . . because of such individual's age." Id. Winterburg also alleges that KGE's failure to follow its progressive disciplinary policy with regard to his actions indicates that it was improperly motivated to discharge him.

To withstand a motion for a directed verdict or a judgment notwithstanding the verdict, a party must present evidence upon which the jury could properly find a verdict for that party. Hurd v. American Hoist & Derrick Co., 734 F.2d 495, 498-99 (10th Cir. 1984). There must be more than a scintilla of evidence in a party's favor. Brady v. Southern Railway Co., 320 U.S. 476, 479-80 (1943); Cooper v. Asplundh Tree Expert Co., 836 F.2d 1545, 1547 (10th Cir. 1988). A reviewing court, in determining the appropriateness of a directed verdict or judgment n.o.v., "must view the evidence most favorably to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the evidence." Brown v. McGraw-Edison Co., 736 F.2d 609, 613 (10th Cir. 1984). This court may not, of course, weigh credibility of witnesses or resolve factual conflict in contradiction to the findings of the jury.

In viewing this case through the rigorous lens described above, we conclude with confidence that the trial court erred in refusing to direct a verdict in favor of KGE or in refusing to grant KGE's motion for a judgment n.o.v. We note that the issue of the appeal is not whether Winterburg made out a prima facie case but whether there was substantial evidence from which a reasonable jury could determine that discrimination had occurred. *See* *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S.

711, 714-15 (1983) (once case has been fully tried on merits, courts should focus on sufficiency of evidence of discrimination not on niceties of orderly presentation of evidence).

Winterburg introduced three kinds of evidence in attempting to show that KGE was improperly motivated to terminate him: (1) the statement of Brown, (2) hiring practices of KGE regarding older persons, and (3) KGE's failure to take a less severe disciplinary action before firing Winterburg. We deal with this evidence in turn.

II

Winterburg's claim rests primarily on the statement, attributed to Brown, "[Y]ou must be old and senile, because you have embarrassed the company." III R. 354. This one statement is insufficient to justify the jury verdict. In contrast to other cases, where we have found repeated references to the plaintiff's age sufficient to sustain a jury verdict, this statement is one isolated and ambiguous reference. This case is, therefore, not analogous to Smith v. Consolidated Mutual Water Co., 787 F.2d 1441 (10th Cir. 1986), in which the plaintiff's supervisor referred to him often as "an old goat," and where company evaluations referred to his age in derogatory terms. Id. at 1442. Despite many more references to the plaintiff's age, this court, in Smith, held that his case was marginal. It was sufficient to go to the jury, but was "thin and circumstantial." Id. Winterburg introduced evidence of no other references, no other comments, no mistreatment. In fact, the overwhelming evidence indicated that KGE developed the job of statistical analyst in order to continue

Winterburg's employment when KGE could have terminated him during the restructuring of the Right of Way department in 1982-83.

Contrary to Winterburg's arguments we do not think that this one ambiguous statement, standing alone, constitutes direct and sufficient proof of discriminatory animus to survive a motion for directed verdict.

III

The other two categories of evidence do not support Winterburg's position at all. KGE introduced evidence of its favorable hiring practices regarding older persons. Winterburg's counsel argued in response that KGE hires older people because they will have lower pension and vacation benefits, since these are determined by length of employment. Winterburg thus contends that this hiring practice constituted evidence of a discriminatory pattern in KGE's treatment of older workers, which creates the implication that he was discriminated against because of his age. Winterburg did not, however, introduce any evidence at all that KGE's hiring of older persons was undertaken to replace workers within the protected group who had built up higher levels of employee benefits through longer service. Nor was there any evidence that Winterburg himself was replaced by such a newly hired person. While we express no view as to whether in other contexts a practice of hiring older employees in this manner could serve as evidence of discriminatory motive, we note that in this case the evidence in fact seems to bolster KGE's, and not Winterburg's position.

IV

Finally, Winterburg argues that KGE's animus may be inferred from its failure to follow its own policy of progressive discipline which would have required that Winterburg be warned verbally, then in writing, then be suspended and demoted before being fired. Although a failure to follow company policy may create the inference of discriminatory treatment when combined with other evidence, we do not find that such a combination exists in this case. First, we note that causing public embarrassment to the company is mentioned in the company discipline pamphlet only in the context of the previously mentioned blanket statement. It is not clear what the appropriate disciplinary procedure is for violation of this "public relations" mandate. Second, the pamphlet, on its face, provides for exceptions to the progressive discipline policy for more grievous violations and such exceptions are discretionary. Thus, it is unclear whether Winterburg's firing was in fact a violation of KGE policy.

Regardless of whether his termination was a violation of company disciplinary policy, however, Winterburg introduced no evidence contextualizing his termination; that is, there is no evidence that he was treated any differently than a younger employee would be in a similar situation. See, e.g., Cooper, 836 F.2d at 1547-48 (comparing disciplinary treatment of older employees with that of younger); Nulf v. International Paper Co., 656 F.2d 553, 559 (10th Cir. 1981) (same in sex discrimination context). If a younger employee would have been equally treated by KGE, then even if KGE's actions were inherently unfair, they were not discriminatory.

This case differs from Blim v. Western Electric Co., 731 F.2d 1473 (10th Cir. 1984), which is relied on by Winterburg. In Blim, while plaintiffs had no direct evidence of discriminatory animus, they introduced extensive pattern/practice evidence that they were not promoted while younger employees were promoted around them. The comparison of the treatment between employees within the protected age range and those outside of it allowed the court to draw inferences from treatment differences. No such comparisons are possible in this case and no inferences can be drawn. We note further that the situation in which Winterburg found himself--that is having been the sole cause of some highly critical publicity for KGE--was considered extraordinary by the company. Thus, comparisons of company behavior in analogous situations are difficult to undertake.

V

We hold as a matter of law that there is insufficient evidence of age discrimination for a jury determination on the issue. It is undisputed that Winterburg did take information out of KGE and release it to the public in a manner that resulted in great embarrassment to the company. While we might deplore the heartlessness of a company that fires a loyal, twenty-six-year employee because of one error in judgment (no matter how grievous), Winterburg introduced no substantial evidence that the decision resulted from an improper motive to eliminate older employees.

We are guided in our decision by an analogous case from the Sixth Circuit, Wilkins v. Eaton Corp., 790 F.2d 515 (6th Cir.

1986). In that case a pilot was fired for refusing to use a flight checklist. He introduced evidence that the checklist discriminated aginst older, more experienced pilots, that the average age of pilots employed by defendant was decreasing, and that younger pilots who did not use the checklist were not fired. Because the evidence introduced by plaintiff was inconclusive on the issues of pilot age and treatment of younger pilots, the Sixth Circuit held that

> [e]ven when combined with other pieces of evidence offered by the plaintiff, the result is a mere scintilla of evidence from which no rational jury could have found a violation of the ADEA . . . . We believe that the jury verdict resulted from mere speculation, and perhaps a dislike of [defendant's] business judgment. However, the fact that a talented pilot was fired over a checklist which had questionable value cannot, by itself, form the basis of a finding of age discrimination.

Id. at 523. As was the Sixth Circuit, "[w]e are convinced that the evidence 'does not suffice to support as a reasonable probability the inference that but for claimant's age he would not have been discharged.'" Id. (quoting Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 243 (4th Cir. 1982)).

Accordingly, the judgment of the district court is REVERSED, the jury verdict is VACATED, and this case is REMANDED with instructions to enter a directed verdict in favor of KGE.

Entered for the Court

James K. Logan
Circuit Judge