Smith v. City of Jackson

United States District Court for the Southern District of Mississippi, Jackson Division
September 6, 2002, Decided ; September 6, 2002, Filed
CIVIL ACTION NO. 3:01-CV-367BN

Reporter: 2002 U.S. Dist. LEXIS 27284
AZEL P. SMITH, ET AL., PLAINTIFF VS. CITY OF JACKSON, MISSISSIPPI, ET AL., DEFENDANT

Subsequent History: Affirmed in part and vacated in part by, Remanded by Smith v. City of Jackson, 351 F.3d 183, 2003 U.S. App. LEXIS 23125 (5th Cir. Miss., 2003)

Disposition: [*1] Defendant's motion for summary judgment granted in its entirety. Plaintiff's motions deemed moot and denied.

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For CITY OF JACKSON, MISSISSIPPI, POLICE DEPARTMENT OF THE CITY OF JACKSON, MISSISSIPPI, defendants: Samuel L. Begley, BEGLEY LAW FIRM, Jackson, MS.

For CITY OF JACKSON, MISSISSIPPI, POLICE DEPARTMENT OF THE CITY OF JACKSON, MISSISSIPPI, defendants: J. Anthony Williams, MISSISSIPPI DEPT. OF TRANSPORTATION, Jackson, MS.

Judges: William Barbour, UNITED STATES DISTRICT JUDGE.

Opinion by: William H. Barbour

Opinion

OPINION AND ORDER

This cause is before the Court on the Motion of Defendant for Summary Judgment. Having considered the Motion, Response, Rebuttal, attachments to each, and supporting and opposing authority, the Court finds that the Motion is well taken and should be granted.

I. Background and Procedural History

Plaintiffs are police officers for the City of Jackson, Mississippi, ("the City") all of whom are 40 years of age or older. [*3] On October 1, 1998, the City adopted a pay plan granting raises to all city employees. The City revised that pay plan on March 1, 1999, as to employees of the Police and Fire Departments. The revised pay plan granted raises to all police officers and police dispatchers. However, those officers and dispatchers with five years or less tenure with the department received proportionately greater raises when compared to their former pay than those with more than five years tenure. The plan accordingly created three categories for the purpose of the analysis of this case: 1) those officers and dispatchers with less than five years of tenure, most, if not all, of whom would have been under 40 years of age; 2) those 40 years of age or older, most, if not all, of whom would have had more than five years of tenure, and; 3) those under 40 years of age with more than five years of tenure. The issue presented by this case is whether such a plan based directly on tenure as opposed to age violates the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq.

Plaintiffs make two claims of discrimination under the ADEA. The first claims intentional discrimination, [*4] or disparate treatment. The second claims unintentional discrimination, or disparate impact.

Defendant filed this motion for summary judgment on both claims. Regarding the claim of disparate treatment, Defendant argues (1) that Plaintiffs cannot make a prima facie case to shift the burden to Defendants, and (2) even if Plaintiffs could make a prima facie case, Defendant had a legitimate, non-discriminatory, market-driven rationale for the pay plan. Regarding the claim of disparate impact, Defendant argues (1) that such a claim is not cognizable under the ADEA, (2) even if such claim is cognizable, Plaintiffs cannot make out a prima facie case, and (3) even if Plaintiffs could make a prima facie case, Defendant had a legitimate, non-discriminatory, market-driven rationale for the pay plan.

Regarding their claim of disparate treatment, Plaintiffs argue that summary judgment is inappropriate for several reasons. [1] First, there has not been an opportunity for adequate discovery. Second, Defendant has failed to meet its burden of establishing that there are no genuine issues of material fact. Third, summary judgment is inappropriate where a rational factfinder could conclude that the [*5] employer's action was discriminatory. Fourth, Plaintiffs argue that the Defendant had knowledge that the pay plan considered length of tenure. Plaintiffs argue that such knowledge creates a jury question regarding Defendant's intent. Fifth, Plaintiffs argue that Defendant used terms indicating age-based bias, and that such use defeats summary judgment.

Regarding their claims of disparate impact, Plaintiffs argue that summary judgment is also inappropriate. First, statistical evidence indicating a disparate impact on Plaintiffs creates a jury question. Second, Fifth Circuit precedent recognizes claims for disparate impact under [*6] the ADEA.

The material facts are not in dispute. [2] Both sides agree that the City implemented a pay plan that increased police salaries. Both sides agree that all police officers received some level of pay increase. Both sides agree that some younger officers received higher raises than some older officers, when viewed as a percentage of previous salary.

II. Legal Standard

Rule 56 of the Federal Rules of Civil Procedure provides, in relevant part, that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show [*7] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *FED. R. CIV. P. 56(c)*. The United States Supreme Court has held that this language "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *see also Moore v. Mississippi Valley State Univ.*, 871 F.2d 545, 549 (5th Cir. 1989); *Washington v. Armstrong World Indus.*, 839 F.2d 1121, 1122 (5th Cir. 1988).

The party moving for summary judgment bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record in the case which it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The movant need not, however, support the motion with materials that negate [*8] the opponent's claim. *Id.* As to issues on which the non-moving party has the burden of proof at trial, the moving party need only point to portions of the record that demonstrate an absence of evidence to support the non-moving party's claim. *Id.* at 323-24. The non-moving party must then go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." *Id.* at 324.

Summary judgment can be granted only if everything in the record demonstrates that no genuine issue of material fact exists. It is improper for the district court to "resolve factual disputes by weighing conflicting evidence, . . . since it is the province of the jury to assess the probative value of the evidence." *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 892 (5th Cir. 1980). Summary judgment is also improper where the court merely believes it unlikely that the non-moving party will prevail at trial. *National Screen Serv. Corp. v. Poster Exchange, Inc.*, 305 F.2d 647, 651 (5th Cir. 1962).

III. Analysis

A. Disparate Treatment

In order to make a prima facie case of discrimination under the ADEA, Plaintiffs [*9] must demonstrate that

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[1] Plaintiffs have filed additional motions to support their opposition to summary judgment, including a Motion in Limine to Strike Portions of Defendants' Expert Witnesses' Reports and Testimony, and a Motion for Sanctions, a Default Judgment, Attorneys' Fees and Expenses, Expert Witness Fees and a Continuance, and a Motion to Strike Exhibits to Defendants' Motion for Summary Judgment.

[2] Plaintiffs argue that the date of implementation of the pay plan is in dispute. Testimony varies as to whether the plan was implemented in October of 1998 and amended in March of 1999, or whether it was first implemented in March of 1999. The Court finds this distinction to be immaterial to determining whether Plaintiffs' claims may go forward.

they are members of the protected class, that they suffered an adverse employment decision, and that the adverse decision was motivated by unlawful age discrimination. *Ross v. University of Texas at San Antonio*, 139 F.3d 521, 525 (5th Cir. 1998). Here, the Plaintiffs are all members of the protected class. For the purpose of deciding this Motion for Summary Judgment, the Court assumes arguendo that Plaintiffs' evidence is sufficient to demonstrate that Plaintiffs suffered an adverse employment decision.

Even so, Plaintiffs fail to demonstrate that the City was motivated by unlawful age discrimination. Plaintiffs proffer two pieces of evidence in favor of a finding of age discrimination. First, Plaintiffs point to comments made by Dr. George Terry, who was the Personnel Director for the City of Jackson at the time. Dr. Terry's comments came at an employee grievance hearing held on May 20, 1999. Several of the Plaintiffs were allegedly present at the hearing. According to Plaintiffs, the following exchange took place between Dr. Terry and an unidentified police officer:

> OFFICER??: Let me ask you a question, the pay plan shows that you didn't [*10] even consider longevity on the department [inaudible] What does longevity mean for the department [inaudible]
>
> TERRY: I think the only response that I can make to that is that the pay plan considered tenure only once. Five years or less and more than five years. There was no other consideration for, for, for tenure.Plaintiffs' Response in Opposition to the Defendants' Motion for Summary Judgment, Exhibit B.

Dr. Terry's comments merely demonstrate that the City knowingly considered length of service as a factor in its pay plan. Consideration of length of service is not the same as consideration of age. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611, 123 L. Ed. 2d 338, 113 S. Ct. 1701 (1993). Rather, "an employee's age is analytically distinct from his years of service…. [Therefore] an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age based.'" *Hazen Paper*, 507 U.S. at 611. See also Williams v. General Motors Corp., 656 F.2d 120, 130 n.17 (5th Cir. 1981) ("seniority and age discrimination are unrelated. The ADEA targets discrimination against [*11] employees who fall within a protected age category, not employees who have attained a given seniority status…. We state without equivocation that the seniority
a given plaintiff has accumulated entitles him to no better or worse treatment in an age discrimination suit"). Thus, Dr. Terry's comments are not enough for Plaintiffs to demonstrate an unlawful motive on the part of the City.

The second piece of evidence on which Plaintiffs rely is the Supplemental Combined Responses of All Plaintiffs to Defendants' First Combined Interrogatories and Request for Production of Documents. Defendants' Motion for Summary Judgment, Exhibit 9. Therein, several Plaintiffs provide a response to an Interrogatory from Defendant asking for the nature and details of each alleged act of intentional discrimination against them. Several plaintiffs claim to have been subjected to comments relating to their age, but fail to attribute such comments to Defendant. The only individuals to whom comments are attributable are Dr. Terry, Officer Deric Hearn, and Deputy Chief Cleon Butler. Because neither Officer Hearn, Deputy Chief Butler, nor any other police officer played any role as a decision-maker with regard [*12] to the implementation of the pay plan, any comments made by them are irrelevant to this matter. *See Wyvill v. United Cos. Life Ins. Co.*, 212 F.3d 296, 304 n.5 (5th Cir. 2000).

Additionally, "in order for an age-based comment to be probative of an employer's discriminatory intent, it must be direct and unambiguous, allowing a reasonable jury to conclude without any inferences or presumptions that age was a determinative factor in the decision to terminate the employee." *Wyvill*, 212 F.3d at 304. None of the comments attributable to any individual here satisfies this test. Thus, the Plaintiffs' Combined Responses do not demonstrate an unlawful motive on the part of the City.

Even if Plaintiffs could produce enough evidence of unlawful motive by the City, that would only serve to shift the burden to the City to demonstrate a "legitimate non-discriminatory reason for the employment decision." *Ross*, 139 F.3d at 521. Here, the City has demonstrated such a reason: to bring starting salaries for police officers up to the regional average, to develop a more generous pay scale within the confines of the city budget, and to consider tenure [*13] as one factor in the pay scale. Once such a non-discriminatory reason is demonstrated, the burden shifts back to Plaintiffs. *Ross*, 139 F.3d at 525.

Thus, the "plaintiff is left with the ultimate burden of presenting evidence from which a reasonable trier of fact could infer age discrimination. *Ross*, 139 F.3d at 525. To do so, Plaintiff must present evidence that "(1) rebuts the employer's non-discriminatory reason, and (2) creates an inference that age was a determinative factor in the challenged employment decision." *Id.* Here, Plaintiffs have presented no such evidence. Thus, Plaintiffs cannot maintain their burden.

Because the Court finds that Plaintiffs cannot meet their burden of proof for claims of disparate treatment under the ADEA, the other motions of Plaintiff in opposition to the Motion of Defendant for Summary Judgment related to claims for disparate treatment are moot. Accordingly, the Motion for Summary Judgment of Defendant is granted with respect to Plaintiffs' claims of disparate treatment under the ADEA.

B. Disparate Impact

Plaintiffs claim that even in the absence of evidence of intent, their claims for disparate impact [*14] should survive summary judgment. To the extent that claims of discrimination by disparate impact exist, no discriminatory motive need by proved. *Hazen Paper*, 507 U.S. at 609. Instead, it is sufficient to demonstrate that facially neutral employment practices impact a protected group more harshly than other groups. *Id.*

The United States Supreme Court has "never decided whether a disparate impact theory of liability is available under the ADEA." *Hazen Paper*, 507 U.S. at 610. The Circuit Courts that have considered the issue are split. To this point, four circuits have expressly held that the ADEA does not allow for claims of disparate impact. [3] Two circuits have withheld so holding, but have stated strong doubts as to whether the ADEA allows for claims of disparate impact. [4] Three circuits have held that the ADEA does allow for claims of disparate impact. [5] The Fifth Circuit Court of Appeals has not addressed the issue. [6] [*15]

[*16] This Court agrees that the ADEA does not allow for claims of disparate impact. The text of the ADEA provides that "an employer may 'take any action otherwise prohibited…where the differentiation is based on reasonable factors other than age.'" *Adams v. Florida Power Corp.*, 255 F.3d 1322, 1325 (11th Cir. 2001) (quoting 29 U.S.C. § 623 (f)(1)). Several courts have noted that this language seems to eliminate the possibility of a disparate impact claim. *See, e.g., Adams*, 255 F.3d at 1325; *Mullin*, 164 F.3d at 702. Additionally, although the Supreme Court did not answer the question in *Hazen Paper*, language therein strongly suggests that no disparate impact claim should lie in cases such as this one. As the Eleventh Circuit states:

> First, the Court noted that "disparate treatment…captures the essence of what Congress sought to prohibit in the ADEA." *Hazen*, 507 U.S. at 610, 113 S. Ct. at 1706. In addition, the Court reiterated that, in making employment decisions, the use of factors correlated with age, such as pension status, did not rely on "inaccurate and stigmatizing stereotypes" [*17] and was acceptable. *Id.* at 611, 113 S. Ct. at 1706-07. That position is inconsistent with the viability of a disparate impact theory of liability, which requires no demonstration of intent, but relies instead on the very correlation between the factor used and the age of those employees harmed by the employment decision to prove liability.*Adams*, 255 F.3d at 1326 (quoting *Hazen Paper*, 507 U.S. 604, 123 L. Ed. 2d 338, 113 S. Ct. 1701 (1993)).

Because the Court finds that the ADEA does not allow for claims of disparate impact, the other motions of Plaintiff in opposition to the Motion of Defendant for Summary Judgment related to claims for disparate impact are moot. Accordingly, the Motion for Summary Judgment of Defendant is granted with respect to Plaintiffs' claims of disparate impact under the ADEA.

IV. Conclusion

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[3] *Mullin v. Raytheon Co.*, 164 F.3d 696 (1st Cir.1999), cert. denied, *528 U.S. 811, 145 L. Ed. 2d 40, 120 S. Ct. 44 (1999)*; *E.E.O.C. v. Francis W. Parker School*, 41 F.3d 1073 (7th Cir. 1994), cert. denied, *515 U.S. 1142, 132 L. Ed. 2d 828, 115 S. Ct. 2577 (1995)*; *Ellis v. United Airlines*, 73 F.3d 999 (10th Cir. 1996), cert. denied *517 U.S. 1245, 135 L. Ed. 2d 191, 116 S. Ct. 2500 (1996)*; *Adams v. Florida Power Corp.*, 255 F.3d 1322 (11th Cir. 2001), cert. granted *122 S. Ct. 643, 151 L. Ed. 2d 561, 534 U.S. 1054 (2001)*, cert. dismissed as improvidently granted 535 U.S. 228, 122 S. Ct. 1290, 152 L. Ed. 2d 345 (2002).

[4] *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719 (3d Cir. 1995), cert. denied *516 U.S. 916, 133 L. Ed. 2d 210, 116 S. Ct. 306 (1995)*; *Lyon v. Ohio Educ. Ass'n and Prof'l Staff Union*, 53 F.3d 135 (6th Cir. 1995).

[5] *Crilev v. Delta Airlines*, 119 F.3d 102 (2d Cir. 1997), cert. denied *522 U.S. 1028, 139 L. Ed. 2d 607, 118 S. Ct. 626 (1997)*; *Lewis v. Aerospace Cmt. Credit Union*, 114 F.3d 745 (8th Cir. 1997), cert. denied *523 U.S. 1062, 140 L. Ed. 2d 651, 118 S. Ct. 1392 (1998)*; *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000), cert. denied *532 U.S. 914, 149 L. Ed. 2d 154, 121 S. Ct. 1247 (2001)*.

[6] Plaintiffs cite several cases within the Fifth Circuit for the proposition that "the district courts have uniformly applied the disparate impact analysis to age discrimination cases." Memorandum in Opposition to Defendants' Motion for Summary Judgment, p. 10. The Court points out that the district court cases cited are not controlling. However, the Court also finds that none of the cited cases is directly on point.

IT IS THEREFORE ORDERED that the Motion of Defendant for Summary Judgment is hereby granted in its entirety. A separate Final Judgment will be entered this day.

IT IS FURTHER ORDERED that the following Motions of Plaintiff are moot and, accordingly, are denied: (1) Motion in Limine to Strike Portions of Defendants' Expert Witnesses' [*18] Reports and Testimony, (2) Motion for Sanctions, a Default Judgment, Attorneys' Fees and Expenses, Expert Witness Fees and a Continuance, and (3) Motion to Strike Exhibits to Defendants' Motion for Summary Judgment.

SO ORDERED this the 6th day of September, 2002.

William Barbour

UNITED STATES DISTRICT JUDGE

FINAL JUDGMENT

In accordance with the Opinion and Order entered this day granting the Motion of Defendant for Summary Judgment, this cause is hereby dismissed with prejudice.

SO ORDERED this the 6th day of September, 2002.

William Barbour

UNITED STATES DISTRICT JUDGE