

NA 05-0166-C H/H Mullikin v IN-KY Electric Corp
Judge David F. Hamilton

Signed on 04/25/07

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

JEFFERY MULLIKIN,)	
)	
Plaintiff,)	
vs.)	NO. 4:05-cv-00166-DFH-WGH
)	
INDIANA-KENTUCKY ELECTRIC)	
CORPORATION,)	
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

JEFFERY MULLIKIN,)
)
 Plaintiff,)
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 v.) CASE NO. 4:05-cv-0166-DFH-WGH
)
 INDIANA-KENTUCKY ELECTRIC CORP.,)
)
 Defendant.)

ENTRY ON DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

Plaintiff Jeffery Mullikin has brought this action against his former employer, Indiana-Kentucky Electric Corporation (“IKE”), under the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 621 *et seq.*¹ Mullikin claims that IKE unlawfully discriminated against him because of his age when it terminated his employment in October 2004. Mullikin was 44 years old when he was fired. IKE contends it fired Mullikin not because of his age but because he was caught cheating on a workplace safety test by having another employee take the exam for him. IKE has moved for summary judgment. For the reasons explained below, IKE’s motion for summary judgment is granted.

¹In his complaint, Mullikin also alleged sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* He has abandoned this claim due to insufficient evidence. See Pl. Br. at 1 n.1.

Summary Judgment Standard

Summary judgment must be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The motion should be granted so long as no rational fact finder could return a verdict in favor of the non-moving party. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Thus, a court’s ruling on a motion for summary judgment is akin to that on a directed verdict. The essential question for the court on both is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Id.* at 251-52. When ruling on the motion, the court must construe the evidence in the light most favorable to the non-moving party and draw all reasonable inferences therefrom in that party’s favor. *Id.* at 255. If the non-moving party bears the burden of proof on an issue at trial, that party “must set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e); see also *Silk v. City of Chicago*, 194 F.3d 788, 798 (7th Cir. 1999). The moving party need not positively disprove the opponent’s case; rather, it may prevail by establishing the lack of evidentiary support for that case. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In light of the summary judgment standard, the facts stated below are not necessarily true, but reflect the evidence in the record in the light

reasonably most favorable to plaintiff Mullikin, giving him the benefit of conflicts in the evidence and favorable inferences from the evidence.

Facts for Summary Judgment

IKE is an electric utility company that owns and operates a power plant in Madison, Indiana. In 1998, IKE hired Mullikin as a laborer at the Madison plant. After three years, Mullikin was promoted to the position of maintenance mechanic in IKE's Slag Blower Group.

Mullikin's immediate supervisor was Mike Cosby. Pl. Dep. at 19, 27. Further up the chain of command was Greg Muncie, the manager of the maintenance department. *Id.* at 19. The manager of the entire Madison plant was Ray Wilson. *Id.* As plant manager, Wilson was the decision maker in matters regarding employee discipline. Wilson Aff. ¶ 7. Cosby, Muncie, and Wilson are all older than Mullikin. Pl. Dep. at 19.

I. *IKE's Safety Testing Policy*

Like all IKE employees, Mullikin was required to take a number of tests on job safety issues. In any given year, employees were expected to take eight to ten such tests on different topics. Cosby Dep. at 13-14. These tests were computerized and could be completed any time at IKE's facility. IKE tracked the completion of these tests by requiring employees to log on to a test computer

using a personal identification number. After logging on, an employee would select a particular test and answer a number of questions on that subject. Pl. Dep. at 20.

There is some evidence that Cosby, Mullikin's immediate supervisor, undermined IKE's safety testing policy. Teresa Keller, another maintenance worker within Cosby's group, testified that Cosby instructed her in 2001 or 2002 to take a safety test using his log-in account so that Cosby could avoid taking the test himself. Keller Dep. 18-19. Keller testified that this was not an isolated incident. She identified sixteen occasions when Cosby instructed her to take safety tests for other employees. *Id.* at 20. Keller helped at least one employee, Erik Feider, who was younger than Mullikin. *Id.* at 26. There is no evidence that more senior members of IKE management knew that Cosby had been subverting the safety testing program.

II. *Mullikin's Termination*

In October 2004, Cosby told IKE employee Judith Grant to take Mullikin's computer test for him. Pl. Dep. at 29. She did so. IKE human resources assistant Josh Wilber happened to notice Grant taking the test in the computer room. Because Wilber knew that Grant had already completed her required training for the year, he checked computer records and discovered that Grant was taking the test using Mullikin's log-in account. Wilber passed his findings on to

William Hart, IKE's human resources supervisor. Hart and maintenance department manager Muncie interviewed both Mullikin and Grant separately. Mullikin admitted that he knew Grant was taking the test for him. Grant also admitted her role in the test-taking scheme. Though they were told that this was a serious violation, neither Mullikin nor Grant told the investigating officials that they were acting under orders from Cosby. For his part, Cosby was present during Mullikin's interview and said nothing. Cosby Dep. at 19-20.

Hart and Muncie passed their findings on to plant manager Wilson, the IKE official who had the authority to determine what discipline Mullikin and Grant should face. Wilson determined that Mullikin and Grant committed a serious violation of IKE's rules of conduct and decided to terminate the pair on October 28, 2004. Pl. Ex. F. Mullikin was 44 years old at the time. The undisputed evidence shows that when the decision to terminate was made, Wilson, Hart, and Muncie were all unaware that other IKE employees had also been cheating on their safety tests. When Cosby reviewed Mullikin's termination letter before it was sent, he said nothing to more senior IKE managers. Cosby Dep. at 25.

III. *After Mullikin's Termination*

Days after Wilson terminated Mullikin and Grant, information began coming to light that other IKE employees had been cheating on their tests as well. IKE

employee Chester Zuckschwerdt told Hart that he “believed that some [IKE] employees felt that they could help one another on computer based training.” Hart Aff. ¶ 12. Zuckschwerdt refused, however, to name any employees or supervisors involved in the scheme. *Id.* In early November 2004, Hart received a letter from Mullikin’s and Grant’s attorney stating that other employees were also cheating on the tests. *Id.* at ¶ 13. In light of this information, Hart approached Mike Cosby and asked if he had instructed Grant to take Mullikin’s test. Cosby denied any involvement in the scheme. Hart Aff. ¶ 14.

In January 2005, the parties appeared for a hearing before an administrative law judge (“ALJ”) with the Indiana Department of Workplace Development. The ALJ considered whether IKE had just cause for terminating Mullikin and Grant. As part of their case, Mullikin and Grant subpoenaed five former co-workers.² Three testified that Cosby had instructed them to cheat on their safety tests. The other two testified that while they did not cheat, they heard Cosby instruct other employees to do so. Hart Aff. ¶ 17. After the hearing, Wilson considered taking action against the three employees who admitted cheating, but he chose not to do so “based on the possible legal ramifications of disciplining employees who had been required by subpoena to divulge information to their detriment.” Wilson Aff. ¶ 14.

Discussion

²All five of these former co-workers are older than Mullikin.

Mullikin claims that when IKE terminated him in October 2004, it violated the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* The ADEA makes it unlawful for employers to “discharge 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). The court will find an ADEA violation “when a plaintiff presents evidence that demonstrates that age was a determining factor in a discharge decision.” *Michas v. Health Cost Controls of Illinois, Inc.*, 209 F.3d 687, 692 (7th Cir. 2000).

Mullikin acknowledges that he cannot offer *any* evidence – either direct or indirect – that plant manager Ray Wilson was motivated by a discriminatory bias against him. The undisputed facts show that Wilson believed he was firing Mullikin for cheating on the safety test, and that Wilson was unaware that younger employees were also guilty of similar infractions. In most cases, this undisputed fact would entitle IKE to summary judgment without further ado. See *Smart v. Int’l Brotherhood of Elec. Workers*, 315 F.3d 721, 728 (7th Cir. 2002) (granting summary judgment against a Title VII plaintiff when the defendant was unaware of similarly situated employees); *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1366 (7th Cir. 1988) (holding that the party responsible for termination must also know about similarly situated employees to sustain liability).

Mullikin believes he has indirect evidence that Mike Cosby (his immediate supervisor) harbored an age-related bias against him. Pl. Br. at 11. Though Mullikin agrees that Wilson was the decision-maker who actually terminated him, he argues that IKE is nevertheless liable because Cosby made Wilson into his “cat’s paw.” According to plaintiff’s version of events, Cosby acted with discriminatory intent when he refused to vouch for Mullikin during the course of IKE’s investigation, thereby tainting Wilson’s disciplinary decision. The Seventh Circuit has recognized that where the nominal decision maker is not aware of unlawful bias on the part of a lower-level manager or co-worker, the employer itself may still be liable if it acted as the conduit of that manager’s or co-worker’s prejudice. See *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990). In other words, liability arises when a nominal decision-maker is nothing more than the functional decision-maker’s “cat’s paw.” *Id.* Mullikin contends that Cosby would have been more forthcoming with “exculpatory evidence” if Mullikin had been younger. Pl. Br. at 11. Plaintiff’s attempt to impose ADEA liability on IKE based on Cosby’s alleged bias fails on two levels.

I. *Indirect Evidence of Cosby’s Bias*

First, Mullikin’s offer of indirect evidence would not allow a reasonable jury to conclude that Cosby harbored an age-related bias. Cosby himself is an older individual, 60 years old at the time of Mullikin’s firing, and 16 years older than Mullikin himself. See *Mills v. First Fed. Savings & Loan Ass’n*, 83 F.3d 833, 842

(7th Cir. 1996) (observing in an age discrimination case that it was “significant, though perhaps not dispositive, that [the allegedly biased decision maker] himself was 55 years old”). Mullikin offers one key fact in his effort to survive summary judgment: that Cosby authorized several younger employees (like Eric Feider) to cheat on their tests, but that unlike Mullikin, none of these employees were fired.

Because Mullikin’s younger co-workers were not similarly situated for comparison purposes, the evidence cannot support an inference of age bias on the part of Cosby. Cosby was not responsible for initiating the disciplinary investigation against Mullikin, nor did he take an active role during that investigation. Cosby’s only alleged discriminatory act was his failure to vouch for Mullikin during the investigation. The critical difference is that younger co-workers like Feider were never caught cheating by members of IKE’s management. Cosby never had the opportunity to vouch for – or to remain silent against – these employees.

The situation would be different if, for example, Mullikin and a younger co-worker were both caught cheating on the test, and Cosby had stepped forward to defend only the younger co-worker, or if Cosby had turned Mullikin in to upper management but had not reported a younger worker engaged in the same behavior. Either might constitute circumstantial evidence that Cosby harbored bias towards Mullikin based on his age. On this record, a jury could conclude only that Cosby was a bad supervisor but not a discriminatory one. He ordered

several employees to cheat on their safety tests. When one was caught by upper management, he chose to protect himself by remaining silent. A reasonable jury could not find that age played any part in that picture.

II. *Cosby's Influence Over the Decision to Terminate*

Second, even if Cosby had harbored bias against Mullikin because of his age, he did not exercise the “singular influence” over Wilson necessary to justify liability under the cat’s paw theory. See *Rozskowiak v. Village of Arlington Heights*, 415 F.3d 608, 613 (7th Cir. 2005). The Seventh Circuit recently reviewed the “cat’s paw” line of cases in detail and clarified how much influence an employee must exercise over a nominal decision-maker before liability attaches to the employer. In *Brewer v. Board of Trustees of the University of Illinois*, 479 F.3d 908 (7th Cir. 2007), Brewer alleged he was fired from his university job for engaging in behavior authorized by his immediate supervisor. Brewer claimed that this supervisor harbored a racial animus towards him and therefore remained silent when the office manager terminated him for this behavior. Affirming summary judgment for the employer, the Seventh Circuit concluded that a jury could find that the immediate supervisor harbored racial animus towards Brewer. The court nevertheless rejected Brewer’s argument that “cat’s paw” liability could reach the university:

Even if we were to assume that a lesser degree of influence over an employment decision might trigger Title VII liability in other contexts, such as the context of a regularized, formal performance evaluation, we do not think that such an approach can affect the outcome in a case like this that concerns an employee’s discipline for particular misconduct. The line of cases addressing this particular situation is univocal, and indicates that even where a biased employee may have leveled false charges of misconduct against the plaintiff, the employer does not face Title VII liability so long as the decision maker independently investigates the claims before acting.

Id. at 920.

In this case, even if Cosby harbored a bias towards Mullikin based on age, IKE managers nevertheless engaged in their own investigation of Mullikin's transgression. On October 27, 2004, IKE employee Josh Wilber witnessed Grant taking the computerized safety test while using Mullikin's log-in account. He reported the incident to William Hart, IKE's human resources supervisor at the time. Hart and Greg Muncie interviewed both Mullikin and Grant the same day. During their respective interviews, Mullikin and Grant eventually admitted their roles in the scheme. When given the opportunity, neither accused employee mentioned that Cosby had authorized their actions. Based on the independent findings of Hart and Muncie, Wilson decided to terminate Mullikin and Grant the next day. IKE's senior managers thus did enough under *Brewer* to ensure that discrimination did not taint Wilson's decision. See *Brewer*, 479 F.3d at 921 (observing that "there is probably no practical step an employer can take beyond independently investigating the misconduct charges that will reduce the chances of an employee's racism influencing its behavior"). "Cat's paw" liability could not apply here even if a jury might find that Cosby was biased because of age.

Conclusion

Because Mullikin failed to offer any evidence that supervisor Mike Cosby was biased against him based on age, or that IKE was effectively acting as Cosby's

cat's paw, IKE's motion for summary judgment is GRANTED. Final judgment will be entered accordingly.

So ordered.

Date: April 25, 2007

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

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