NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued August 6, 2024
Decided August 14, 2024

Before

FRANK H. EASTERBROOK, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

JOSHUA P. KOLAR, *Circuit Judge*

No. 23-3302

MILOS TORBICA, *Plaintiff-Appellant*,	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
v.	No. 3:22-CV-20 DRL-MGG
HORIZON BANK, *Defendant-Appellee*.	Damon R. Leichty, *Judge*.

ORDER

Milos Torbica contends that his former employer, Horizon Bank, discharged him because of his age in violation of the Age Discrimination in Employment Act. 29 U.S.C. §§ 621–34. The district court entered summary judgment for Horizon. Because Torbica has not provided evidence that could reasonably persuade a jury that his age was the "but-for" cause of his discharge, we affirm.

We construe all facts in the light most favorable to Torbica, the nonmoving party. *Martino v. MCI Commc'ns Servs., Inc.*, 574 F.3d 447, 449–50 (7th Cir. 2009). Horizon hired

Torbica in 2014 to manage and supervise its mortgage loan originators in Indiana, from LaPorte County to Indianapolis. The bank hired two more managers in the following years: Mary Kay Gaboyan in 2015, who took over "the northeastern portion of Indiana," and Larry Simmons in 2018, who managed the Indianapolis area, where he had connections. Torbica continued to manage LaPorte and Lake Counties. Keene Taylor, the three managers' then-supervisor, set their compensation structures and paid Torbica less than the other two.

In 2019, Taylor retired, and Noe Najera began to supervise the three managers. Torbica asserts (and Najera denies) that Najera treated him poorly: Najera "consistently" asked Torbica when he was planning to retire, and he communicated more regularly with the other two managers.

Each manager received mid-year and annual performance evaluations. Torbica was rated "Meets Expectations" in 2018, 2019, and 2020. Gaboyan received "Meets Expectations" in 2018 and early 2019, and "Exceeds Expectations" later in 2019 and on both evaluations in 2020. Simmons received "Exceeds Expectations" on both reviews in 2020.

In the summer of 2020, during the COVID-19 pandemic, Najera considered reducing Horizon's number of loan origination managers to cut costs. He considered each manager's regions, potential cost savings, performance, and who could grow the market. Najera worked with Jim Neff, president of Horizon, to create a spreadsheet with information about the managers, including salary, performance rating, number of reports, age, gender, and minority status.

In October 2020, during the fall budgeting process, Najera suggested discharging Torbica. Najera wanted to retain Simmons because of his connections in Indianapolis and that market's growth potential. And Najera noted that Torbica had weaker performance, recruitment, and production than Gaboyan. Najera made his recommendation to Neff, the Vice President, and the Chief Executive Officer, who collectively approved and finalized it. Torbica's position was eliminated in early 2021. At the time, Torbica was 61 years old; Gaboyan was 55; Simmons was 53. Gaboyan absorbed Torbica's responsibilities.

Torbica then sued Horizon, alleging that the bank discharged him because of his age; his other contentions are abandoned on appeal. The district court entered summary judgment for Horizon, reasoning that the evidence was insufficient for a jury to find age discrimination.

We review summary judgment de novo. *Martino*, 574 F.3d at 449–50. Because of his age, 61, Torbica is in the protected class of workers 40 years or older. 29 U.S.C. § 631(a). To stave off summary judgment, he had to present evidence sufficient to persuade a rational jury that his "age was the 'but-for' cause" of his being discharged. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177–78 (2009). "[I]t's not enough to show that age was *a* motivating factor. The plaintiff must prove that, but for his age, the adverse action would not have occurred." *McDaniel v. Progress Rail Locomotive, Inc.*, 940 F.3d 360, 367 (7th Cir. 2019) (citation omitted). On appeal, Torbica argues that he did so and that the district court improperly "broke the evidence apart rather than consider it together."

The legal standard used to evaluate a discrimination claim 'is simply whether the evidence,' considered as a whole, 'would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action.'" *Abrego v. Wilkie*, 907 F.3d 1004, 1012 (7th Cir. 2018), quoting *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760, 765 (7th Cir. 2016).

We have sometimes referred to the *McDonnell Douglas* burden-shifting framework as an "indirect" way of proving up discrimination. *Ortiz*, 834 F.3 766; *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 793 (1973). Under this method, Torbica's initial burden is light: He need only show that he is in the protected class, he met Horizon's legitimate expectations, he was discharged, and he was treated less favorably than those outside the protected class. *Martino*, 574 F.3d at 452. If he does, then Horizon must furnish a legitimate reason for the discharge, and if Horizon does, then Torbica must adduce evidence that the reason is pretextual. *Id.* at 453. Under any standard of proof, Torbica's evidence must permit a reasonable inference that age was the "but-for" cause of his discharge, *Fleishman v. Cont'l Cas. Co.*, 698 F.3d 598, 603–04 (7th Cir. 2012), and it does not.

Torbica lacks sufficient evidence to show that age motivated the bank's decision to discharge Torbica, let alone that it was the "but-for" factor. He relies on four facts: Najera inquired into when Torbica planned to retire; Najera wrote the managers' ages on the spreadsheet when considering whom to discharge; he paid Simmons and Gaboyan more than Torbica during their joint employment; and he began thinking about a reduction in force in the summer of 2020, before the fall's budgeting process.

These four facts, considered individually or collectively, do not reasonably suggest an age bias. First, a manager who asks an employee "if he considered retirement" does not suggest "a desire to remove [the employee] because of his age" when the undisputed facts present an innocuous explanation for the inquiry. *See, e.g.*, *Fleishman*, 698 F.3d at 605–06. Najera was entitled to assess the prospective longevity of the staff he inherited, particularly when the pandemic might induce employees to retire voluntarily. *See id.* Second, Najera's spreadsheet—which included the managers' ages, among other demographic data—shows only that Najera knew their ages. But mere knowledge of an employee's age does not create an inference of discrimination, *Gustovich v. AT&T Commc'ns, Inc.*, 972 F.2d 845, 849 (7th Cir. 1992), and employers might include this type of information for any number of innocent reasons (including a desire to *avoid* liability for age discrimination, *see Courtney v. Biosound, Inc.*, 42 F.3d 414, 420 (7th Cir. 1994)). Third, Najera's predecessor set the compensation structures that favored Gaboyan and Simmons, and Torbica only speculates that Najera maintained these structures out of bias. Finally, Najera's consideration of a reduction in force in summer 2020, rather than the fall, does not evince age bias; it merely shows that Najera was considering cost-cutting measures to benefit Horizon sooner rather than later.

Even if the above evidence might persuade a reasonable jury that age was a motivating factor in Torbica's discharge, Torbica must lose unless he can show that, if not for his age, Horizon would not have discharged him. *See Schuster v. Lucent Techs., Inc.*, 327 F.3d 569, 579 (7th Cir. 2003). He has not: Horizon provided unrebutted evidence that legitimate reasons *independent* of age led it to discharge Torbica instead of the two other managers.

It is undisputed that Horizon reduced its workforce to save labor costs, and that Najera determined whose position to terminate based on performance and growth potential. Cost-cutting, performance, and business growth are all age-neutral factors. *See id.* at 578 (affirming summary judgment on age-discrimination claim where company reduced staff to cut costs and attract investors and selected who to discharge based on performance). Torbica fared worse on these factors because his past performance was weakest and he did not have Simmons's business contacts.

Furthermore, Torbica has not supplied evidence suggesting that Gaboyan's slightly younger age (55) mattered to Horizon. Because the age disparity between Torbica and Gaboyan is less than 10 years, it does not presumptively create an inference of age discrimination. *Pitasi v. Gartner Grp., Inc.*, 184 F.3d 709, 717 (7th Cir. 1999). To show that there is a genuine issue of material fact, Torbica had to provide evidence showing that this six-year disparity was significant to Horizon, *see Hartley v. Wis. Bell, Inc.*, 124 F.3d 887, 893 (7th Cir. 1997), and he has not.

Torbica replies that Horizon's reasons of cost-cutting, performance, and business contacts are not genuine. He argues that Horizon's rationale for discharging him shifted from a "reduction in force" to his performance, and this shift suggests pretext. But these explanations are compatible: It can be true both that Horizon wanted to reduce costs and that the managers' performance reviews influenced the decision of whom to discharge. *See Martino*, 574 F.3d at 451 (no age discrimination where employer selected plaintiff for reduction-in-force based on his performance). Torbica also argues that he deserved a rating of "Far Exceeds Expectations" in mid-2020, but he does not back up this argument with evidence suggesting that Najera down-rated his work while up-rating equivalent work completed by the other two managers. *See Pitasi*, 184 F.3d at 718. Finally, Torbica argues that Simmons did not have robust contacts in Indianapolis because he had recently lived on the east coast. But even if this is true, it suggests only that Horizon's rationale was mistaken, not insincere or pretextual. *Brooks v. Avancez*, 39 F.4th 424, 435–36 (7th Cir. 2022). Thus, because Torbica lacks evidence that Horizon "did not honestly believe" that Simmons and Gaboyan were of higher value to the company than Torbica, Horizon supplied unrebutted, legitimate reasons for retaining those two over Torbica. *Pitasi*, 184 F.3d at 718.

AFFIRMED