

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 1677

MICHAEL T. PAWLUS

VERSUS

TWENTY-FIRST JUDICIAL DISTRICT PUBLIC DEFENDER

Judgment Rendered: September 14, 2011.

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On Appeal from the
21st Judicial District Court,
in and for the Parish of Tangipahoa
State of Louisiana
District Court No. 2005-001414

The Honorable Bruce C. Bennett, Judge Presiding

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21st Judicial District Public Defender

* * * * *

BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

CARTER, C.J.

The plaintiff appeals a summary judgment, dismissing his suit for wrongful termination on the basis of age discrimination. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

The plaintiff, Michael Pawlus, began working as an attorney for the Twenty-First Judicial District Public Defender's Office (OPD) in 1984. During his time with the office, he worked in Hammond City Court and, later, in Support Enforcement. Near the end of 2004, the OPD was experiencing financial difficulties. On December 28, 2004, Chief Public Defender Reginald McIntyre sent a letter to the plaintiff notifying him that due to funding cuts, the full time non-support position that the plaintiff held would be terminated effective January 1, 2005. The letter asked the plaintiff to contact the office to discuss possible contract work. Checks were issued to the plaintiff for the months of January and February 2005 at his \$35,000 per year salary; however, the plaintiff never picked the checks up from the office.

In April 2005, the plaintiff filed the present suit against the Twenty-First Judicial District Public Defender seeking damages and reinstatement. The plaintiff alleged that he was wrongfully terminated due to his age. In response, the defendant filed a motion for summary judgment. Judge Ernest G. Drake, Jr. signed a judgment denying the motion on July 13, 2009. Later, Judge Drake signed an order self-recusing, and the case was re-allotted to Judge Bruce C. Bennett.

The defendant re-urged its motion for summary judgment before Judge Bennett, offering additional evidence in support thereof. The motion for summary judgment was granted, and the plaintiff's suit was dismissed with prejudice. The plaintiff appeals, alleging the summary judgment was entered in error as material issues of fact remain in dispute.

DISCUSSION

A summary judgment is reviewed on appeal *de novo*, with the appellate court using the same criteria that govern the trial court's determination of whether summary judgment is appropriate. *Samaha v. Rau*, 07-1726 (La. 2/26/08), 977 So. 2d 880, 882-83. A motion for summary judgment will 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 as to material fact, and that mover is entitled to judgment as a matter of law." La. Code Civ. Proc. Ann. art. 966B. Summary judgment procedure is favored. La. Code Civ. Proc. Ann. art. 966A(2).

The burden of producing evidence at the hearing on the motion for summary judgment is placed initially on the mover, who can ordinarily meet that burden by submitting depositions or affidavits or by pointing out the lack of factual support for an essential element in the opponent's case. *See* La. Code Civ. Proc. Ann. art. 966C(2); *Cheremie Services, Inc. v. Shell Deepwater Production, Inc.*, 09-1633 (La. 4/23/10), 35 So. 3d 1053, 1059. At that point, the party who bears the burden of persuasion at trial must come forth with evidence that demonstrates he will be able to meet his

burden at trial. *Cheremie*, 35 So. 3d at 1059; see La. Code Civ. Proc. Ann. art. 966C(2). Once the motion for summary judgment has been properly supported by the moving party, the failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion. *Cheremie*, 35 So. 3d at 1059; see La. Code Civ. Proc. Ann. art. 966C(2). A fact is material when its existence or nonexistence may be essential to a plaintiff's cause of action under the applicable theory of recovery. *Cheremie*, 35 So. 3d at 1059. Facts are material if they potentially insure or preclude recovery, affect a litigant's ultimate success, or determine the outcome of the legal dispute. *Id.*

The motion for summary judgment at issue herein arises in the context of a suit for wrongful termination based on age discrimination. The Louisiana Employment Discrimination Law makes it unlawful for an employer to discharge any individual or otherwise discriminate against any individual with respect to his compensation or his terms, conditions, or privileges of employment because of the individual's age. La. Rev. Stat Ann. § 23:312. To establish a claim for age discrimination, an employee must first make a *prima facie* showing that: (1) he is between 40 and 70 years of age; (2) his employment was involuntarily terminated; and (3) he was qualified to perform the job that he was employed to perform. *Taylor v. Oakbourne Country Club*, 02-1177 (La. App. 3 Cir. 5/14/03), 846 So. 2d 959, 963, writ denied, 03-2025 (La. 11/7/03), 857 So. 2d 494. The Louisiana Supreme Court has referred to this third criterion as the

employee's qualification to perform "the job at issue." *LaBove v. Raftery*, 00-1394 (La. 11/28/01), 802 So. 2d 566, 573.

After the employee satisfies the criteria to make a *prima facie* case, the burden shifts to the employer to produce evidence that the employee was terminated for a legitimate non-discriminatory reason. *LaBove*, 802 So. 2d at 573. The employer's burden in rebutting a *prima facie* case is one of production, not persuasion. *LaBove*, 802 So. 2d at 573-74. Although the evidentiary burden shifts, the ultimate burden of proving by a preponderance of the evidence that the employer intentionally discriminated against the employee on the basis of age remains with the employee at all times. *See LaBove*, 802 So. 2d at 574. An employee's subjective belief of discrimination cannot be the basis of judicial relief. *Montgomery v. C&C Self Enterprises, Inc.*, 10-705 (La. App. 3 Cir. 3/30/11), 62 So. 3d 279, 287, *writ denied*, 11-0873 (La. 6/3/11), 63 So. 3d 1016. To prevail, the employee must show that the protected trait, herein age, "actually motivated the employer's decision" and was "a determinative influence on the outcome." *LaBove*, 802 So. 2d at 574.

The defendant concedes that the plaintiff set forth a *prima facie* case of age discrimination, and the record supports the same. At the time the full-time non-support position was terminated, the plaintiff was 60 years old. McIntyre testified that the plaintiff was competent to work in non-support. Moreover, the plaintiff was offered future work with the OPD handling

arraignments, bond reductions, and bond hearings, albeit at reduced pay for the reduced hours of work.¹

As the plaintiff established a *prima facie* case of age discrimination, it was incumbent on the defendant to produce evidence that the plaintiff was terminated for a legitimate non-discriminatory reason. In his deposition, McIntyre stated that the plaintiff's position was terminated due to a lack of funds. In McIntyre's own words: "I didn't terminate the individual. I terminated the job." The plaintiff, however, maintains that material issues of fact remain in dispute regarding the OPD's financial constraints. The plaintiff suggests that the OPD had sufficient funds to cover his monthly salary.

The plaintiff's salary was only one of the OPD's expenses. At the end of 2004, the OPD had less than \$40,000 in the bank, which included \$31,000 borrowed from the state at the end of the year. The account balance at the end of 2004 was well below the ideal. The OPD's average monthly expenses ranged from \$80,000 to \$100,000. Best practices called for an

¹ During McIntyre's deposition, it was suggested that the plaintiff was not welcome or qualified to be re-assigned to Hammond City Court, if such a position should become available. In response to the defendant's motion for summary judgment, the plaintiff offered the affidavits of Hammond City Court Judge Grace Bennett Gasaway and Hammond City Court Chief Deputy Clerk Shirley Smith to establish that there were no complaints about his performance in Hammond City Court. However, the "job at issue" was as an attorney assigned to non-support, not as an attorney assigned to Hammond City Court, and it is undisputed that the plaintiff is competent to handle non-support cases. Moreover, the defendant alleges the plaintiff's position was terminated due to a shortage of funding, not because the plaintiff was incompetent. Therefore, evidence regarding the plaintiff's re-assignment to Hammond City Court is not dispositive of the ultimate legal issue to be decided: Did the plaintiff's age actually play a role or act as a determinative influence in the defendant's decision to terminate the position of full-time non-support attorney with the OPD? See *LaBove*, 802 So. 2d at 577.

escrow equal to three months of expenses (\$280,000 to \$300,000 dollars). McIntyre stated that the OPD's financial concerns were discussed with everyone in the office; the employees were warned that salary cuts might occur if sufficient funding could not be obtained.

According to McIntyre, in 2004, of the 41 judicial districts in Louisiana, only a handful of OPDs provided full-time attorneys for non-support. Support enforcement was not generating enough funds; therefore, in December 2004, McIntyre asked the judges of the Twenty-First Judicial District Court for \$50,000 to pay for a non-support attorney. The request was denied.² Due to the lack of funds, McIntyre made the decision to terminate the full-time non-support position and notified the court of the same in December 2004. As an additional cost-saving measure, Assistant Public Defender Warren Comish's salary was cut.

To further set forth the financial crisis in 2004, the defendant offered the affidavits of five members of the 2004 Public Defender Board for the Twenty-First Judicial District: Rodney Erdey, Nita Gorrell, Charles Genco, Ron Macaluso, and Bruce Simpson. All five attested to the insufficient funds in the OPD operating budget. Each board member stated that upon the receipt of additional funds in the early part of 2005, a position was offered to the plaintiff at a lower rate of pay so that the plaintiff could keep his retirement. However, the plaintiff did not accept the offer. Each 2004 board member states:

² Later, in February 2005, the judges allotted \$25,000 to the OPD.

The board did not make any personnel decisions based upon age while [the board member] was serving on the board, and in particular, no adverse action was taken against Mr. Pawlus because of his age.

In January 2005, the OPD received \$160,000 from the state as part of the OPD's annual budget. That same month, McIntyre personally spoke with the plaintiff and offered him a position handling arraignments, bond reductions, and bond hearings. McIntyre explained to the plaintiff that he could only guarantee him \$25,000 for this new position. He advised him, however, that if by the middle of the year the OPD was taking in enough money, the plaintiff would be put back into the non-support position at his original salary. The plaintiff indicated he would think about it, but McIntyre stated that he never heard back from the plaintiff.

By the end of 2005, sufficient funds were secured, and in March 2006, the OPD hired attorney Vanessa Williams to work in non-support.³ The OPD also was able to reinstate attorney Comish's earlier reduced salary.

In McIntyre's January 14, 2009, affidavit, he stated that he has never terminated anyone from the OPD due to age. At the time the plaintiff's position was eliminated, Al Clark, age 56, and Billy Quinn, age 63, were working for the OPD. Both men continued to work for the OPD until their deaths. At the time the affidavit was signed, the OPD had seven employees between the ages of forty and seventy.

³ After the plaintiff's departure and prior to Williams's hiring, the OPD would send a duty attorney to court only if requested and only to handle "emergency" non-support situations.

In conclusion, there is simply no evidence that the OPD used its unquestionable financial constraints as a pretext for improper age discrimination or that the plaintiff's age was a determining fact in the decision to terminate the full-time non-support position that the plaintiff held. "Financial and business considerations are necessarily a part of personnel decisions and are not always improper." *Taylor*, 846 So. 2d at 967.

CONCLUSION

The plaintiff set forth a *prima facie* case of age discrimination. The defendant came forth with unrefuted evidence that the plaintiff's position was terminated for a legitimate, non-discriminatory reason—lack of funds. In a suit for wrongful termination based on age, the plaintiff bears the ultimate burden of proving intentional discrimination. Herein, the plaintiff failed to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proving that the plaintiff's age actually played a role or was a determinative influence on the defendant's decision to terminate his position. Therefore, there is no genuine issue of material fact, and summary judgment was properly entered in favor of the defendant. For these reasons, the trial court's summary judgment in favor of the defendant and dismissing the plaintiff's suit with prejudice is affirmed. Costs of this proceeding are assessed to the plaintiff, Michael Pawlus.

AFFIRMED.