[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10433
Non-Argument Calendar

D.C. Docket No. 2:17-cv-00262-WC

JAMES W. MENEFEE,

Plaintiff-Appellant,

versus

SANDERS LEAD COMPANY, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Alabama

(September 18, 2019)

Before ROSENBAUM, BRANCH and FAY, Circuit Judges.

PER CURIAM:

James W. Menefee, a 62-year-old male, appeals a magistrate judge's grant of summary judgment in favor of his former employer, Sanders Lead Company, Inc. ("Sanders Lead"), in his employment discrimination suit under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623, and the Alabama Age Discrimination in Employment Act ("AADEA"), Ala. Code §§ 25-1-20 to -29. We affirm.

I. BACKGROUND

Menefee filed the present suit against Sanders Lead, alleging that, in 1989, Sanders Lead hired him as a foreman; in 2015, he was the department manager at the slag plant, at which time, Will Sanders ("Will") was the assistant plant manager, and Bart Sanders ("Bart") was the plant manager. On September 24, 2015, Will and Jim Roach, the human resources manager, met with Menefee and told him that they had pictures of him smoking in an unauthorized area in the slag plant; on October 1, 2015, he was terminated. Bart asked Menefee his age prior to, and on the day of, his termination. Sanders Lead chose Aaron Bryan, who was in his twenties and also smoked on the plant premises, to replace Menefee as department head; however, after Menefee complained about age discrimination, Sanders Lead named Mark Kilpatrick as department head. Accordingly, Menefee raised an age discrimination claim under the ADEA and AADEA.

Sanders Lead moved for summary judgment. A magistrate judge issued a written opinion, granting summary judgment in favor of Sanders Lead. The judge determined that Menefee had established a *prima facie* case of age discrimination because he showed that he was qualified for his job and had been replaced with someone substantially younger, regardless of whether it was Kilpatrick or Bryan. The judge found that Sanders Lead had proffered legitimate, nondiscriminatory reasons for Menefee's termination, including smoking, not disciplining subordinate employees, covering up for hourly employees, and poor management of the slag department in 2008; additionally, Menefee failed to show that those reasons were pretext for age discrimination.

In his response to the motion for summary judgment, Menefee had attached several items in support, including deposition transcripts and a comparator chart. His comparator chart listed several comparators, including Antonio Brown, Stephen Coleman, Anthony Finney, and Brandon Moultry.[1] The magistrate judge determined that Brown, Coleman, Finney, and Moultry were not proper comparators because they were not supervisors and, as Bart described it, were not

[1] Menefee's comparator chart had 29 comparators that included their birth years and the penalties they had received for various violations; he did not, however, identify their job titles. Additionally, Menefee only named five of the comparators from his chart in his opposition to the motion for summary judgment—Brown, Coleman, Finney, Moultry, and Kenyatta Jones. The magistrate judge noted that Menefee's comparator chart was devoid of citations to supporting documentation and decided that he would not comb through 600 pages of supporting documentation to find foundational support for the chart. He decided to only address the five comparators from the chart that were discussed in Menefee's motion.

held to a higher standard of conduct; additionally, Menefee's conduct went beyond smoking. With respect to Will, the magistrate judge found that, although he had committed serious misconduct by bringing a firearm to work and discharging it, the evidence showed that he had remained employed not because of his age but because his father was Bart; while nepotism may be an unfair basis for disparate treatment in the workplace, it alone did not permit the inference that Menefee was discriminated against because of his age.

With respect to Kenyatta Jones, who was 23 years younger and allowed his subordinates to smoke, the magistrate judge determined that Sanders Lead produced evidence that he was a foreman, not a supervisor, and it did not appear that Jones had refused to reveal the identities of other employees who were smoking, as Menefee had. The judge further found that Sanders Lead's alleged departure from the employee handbook did not establish pretext because the handbook gave management discretion in the administration of penalties. The judge determined that Bart's questions about Menefee's age also did not show pretext because they were stray remarks and not linked to his termination.

Finally, the magistrate judge determined that Sanders Lead's reference to Menefee's poor work performance did not establish pretext because, although Menefee perceived himself to be a good worker, he failed to show that Sanders Lead did not actually consider him to have poor management skills. Accordingly,

the judge granted summary judgment in favor of Sanders Lead and against Menefee.

On appeal, Menefee argues that the magistrate judge erred by granting summary judgment because he had shown that Sanders Lead's proffered legitimate, nondiscriminatory reasons for his termination—smoking in a prohibited area, failing to perform job duties, and insubordination—were pretext for age discrimination.

II. DISCUSSION

We review a district court's grant of summary judgment *de novo*, viewing the evidence in the light most favorable to the nonmoving party. *Castleberry v. Goldome Credit Corp.*, 408 F.3d 773, 785 (11th Cir. 2005). Summary judgment is appropriate if the record evidence, including depositions, declarations, and admissions, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a), (c).

The ADEA prohibits employers from discharging an employee who is at least 40 years of age "because of" that employee's age. *See* 29 U.S.C. §§ 623(a)(1), 631(a). The AADEA provides that it is unlawful for an employer to "[f]ail or refuse to hire or discharge an individual, or otherwise discriminate against an individual with respect to compensation, terms, or privileges of employment, because of the age of the individual." Ala. Code § 25-1-22. Age

discrimination claims brought under the AADEA are considered within the same framework used to decide actions under the ADEA. *See Lambert v. Mazer Disc. Home Ctrs., Inc.*, 33 So. 3d 18, 23 (Ala. Civ. App. 2009). The plaintiff must prove by a preponderance of the evidence that age was the "but for" cause of the employer's adverse decision. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180, 129 S. Ct. 2343, 2352 (2009).

Where, as here, a plaintiff seeks to establish age discrimination through circumstantial evidence, we use the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1358 (11th Cir. 1999). Under that framework, the plaintiff must first establish a *prima facie* case of discriminatory discharge by demonstrating that: (1) he was a member of the protected group; (2) he was subject to an adverse employment action; (3) a substantially younger person filled the position from which he was discharged; and (4) he was qualified to do the job for which he was rejected. *Id.* at 1359. If a plaintiff successfully establishes a *prima facie* case, the burden then shifts to the employer to proffer legitimate, nondiscriminatory reasons for its employment decision. *Id.* at 1361. If the employer successfully meets this burden of production, then the burden shifts back to the plaintiff to show that the employer's proffered reasons were pretext for discrimination. *Id.*

In order to show pretext, the plaintiff must demonstrate that the proffered reason was not the true reason for the employment decision. *Brooks v. Cty. Comm'n of Jefferson Cty. Ala.*, 446 F.3d 1160, 1162-63 (11th Cir. 2006) (Title VII case). An employee can show that the employer's articulated reason was not believable by pointing to "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in the proffered explanation. *Id.* at 1163 (quoting *Jackson v. Ala. State Tenure Comm'n*, 405 F.3d 1276, 1289 (11th Cir. 2005)). However, a reason is still not a pretext for discrimination unless it is shown both that the reason was false and that discrimination was the real reason. *Id.*

A plaintiff cannot show pretext by recasting an employer's proffered nondiscriminatory reason or substituting his business judgment for that of the employer's. *Chapman v. AI Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000) (en banc). Rather, provided that the proffered reason is one that might motivate a reasonable employer, the plaintiff must meet the reason "head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason." *Id.* Ultimately, our inquiry is limited to "whether the employer gave an honest explanation of its behavior." *Id.* (quoting *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991)).

The inquiry into pretext centers on the employer's beliefs, not the employee's. *Alvarez v. Royal Atl. Developers, Inc.*, 610 F.3d 1253, 1266 (11th Cir.

2010) (Title VII case). When an employer asserts that it fired the plaintiff for poor performance, it is not enough for the plaintiff to show that his performance was satisfactory. *Id.* Rather, he must demonstrate that the employer did not believe that his performance was lacking, and merely used that claim as a cover for discriminating against him based on his age. *Id.* Random and isolated remarks unrelated to the challenged employment decision are not direct evidence of discrimination; however, such comments can contribute to a circumstantial case for pretext. *Rojas v. Florida*, 285 F.3d 1339, 1342-43 (11th Cir. 2002) (Title VII case).

Evidence introduced to establish the *prima facie* case may be considered to establish pretext. *Hairston v. Gainesville Sun Publ'g Co.*, 9 F.3d 913, 921 (11th Cir. 1993). A plaintiff must show that he and his comparators are "similarly situated in all material respects." *Lewis v. City of Union City*, 918 F.3d 1213, 1224 (11th Cir. 2019) (en banc). A plaintiff does not necessarily need to prove purely formal similarities, such as identical job titles. *Id.* at 1227. We have explained the sorts of similarities that will underlie a valid comparison. *Id.* For instance, we noted, a similarly situated comparator will have engaged in the same basic conduct or misconduct as the plaintiff, will have been subject to the same employment policy, guideline, or rule as the plaintiff, will ordinarily have been under the jurisdiction of the same supervisor as the plaintiff, and will share the plaintiff's

employment or disciplinary history. *Id.* at 1227-28. A valid comparison turns "not on formal labels, but rather on substantive likenesses." *Id.* at 1228. "An employer is well within its rights to accord different treatment to employees who are differently situated in 'material respects'—*e.g.*, who engaged in different conduct, who were subject to different policies, or who have different work histories." *Id.*

As the district court properly found, Menefee established a *prima facie* case of discrimination because he belongs to a protected class of persons, suffered an adverse employment action, was qualified for the position, and was replaced by someone younger. *See Damon*, 196 F.3d at 1359. And, because Sanders Lead set forth legitimate, nondiscriminatory reasons for Menefee's termination—smoking in a prohibited area, failing to perform job duties, and insubordination—Menefee needed to show that its reasons were pretextual, which he failed to do. *See id.* at 1361. It is undisputed that Menefee was fired for smoking in a prohibited area, failing to discipline or discourage his subordinates from smoking, and refusing to reveal the other employees who were smoking. Menefee admitted that he allowed his subordinates to smoke because he felt "sympathetic" to them, and he did not dispute that he refused to tell management who else was smoking. Additionally, Bart told Menefee in his termination meeting that he had lost confidence in his ability to keep the company's interests at heart, and Menefee's personnel form stated that he was found smoking and "caught covering for hourly employees

smoking in work area by his own admission. We have lost confidence in his management abilities." Sanders Lead provided an explanation for its employment decision that qualifies as a legitimate business reason; it is not our role to second-guess its business decision and Menefee "cannot succeed by simply quarreling with the wisdom of that reason." *See Chapman*, 229 F.3d at 1030.

Additionally, neither Sanders Lead's alleged deviation from its employee handbook, its problems with Menefee's work performance, nor the plant manager's questions about Menefee's age prior to his termination show pretext. First, the employee handbook gives management the discretion to impose penalties for various policy violations; even assuming that Sanders Lead did not adhere to its policy of progressive discipline, Sanders Lead had the authority to consider many factors to discern whether to terminate or retain Menefee. Second, while Menefee perceives himself to be a good worker because he had received a raise and a promotion in the year before his termination, his perception of himself is not relevant. *See Alvarez*, 610 F.3d at 1266. Rather, the inquiry focuses on how Sanders Lead perceived him as an employee, and there is no genuine dispute that Sanders Lead perceived Menefee to have a history of poor work performance and his work-performance history contributed to his termination. *See id.* at 1266-67. Finally, Bart's questions about Menefee's age also did not establish pretext because Menefee did not describe the context in which they were made, and they

appeared to be random comments not linked to the decision to terminate him. *See Rojas*, 285 F.3d at 1342-43.

Menefee also failed to show that his proposed comparators were similarly situated in all material respects.[2] Although his comparators were substantially younger than him and remained employed despite some misconduct, they either did not engage in the same type of behavior or have a similar position as Menefee within the company. Based on the material differences between Menefee and his proposed comparators, Menefee did not show that any of them had substantive likenesses to him. *See Lewis*, 918 F.3d at 1228. Accordingly, the magistrate judge did not err by granting summary judgment in favor of Sanders Lead.[3]

AFFIRMED.

[2] To the extent that Menefee argues that he showed pretext based on the similar or worse conduct of the comparators in his comparator chart, excluding Brown, Coleman, Finney, Moultry, and Jones, his argument is waived because he did not make that specific argument before the magistrate judge. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004) (recognizing that, generally, we do not consider issues not raised in the district court).

[3] Because Menefee's AADEA claim is evaluated under the same framework as his ADEA claim, the magistrate judge correctly granted summary judgment on that claim as well. *See Lambert*, 33 So. 3d at 23.