IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BRUCE A. COLEMAN,

Plaintiff,

v.

ROBINSON BROTHERS ENVIRONMENTAL, INC.,

Defendant.

OPINION and ORDER

06-C-0492-C

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GREGORY T. HUNT,

Plaintiff,

v.

ROBINSON BROTHERS ENVIRONMENTAL, INC.,

Defendant.

OPINION and ORDER

06-C-0493-C

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In January 2005, plaintiffs Bruce A. Coleman and Gregory T. Hunt applied for mechanical insulator positions with defendant Robinson Brothers Environmental, Inc. and were denied employment. In these actions for monetary relief, plaintiffs contend that defendant's decision not to hire them was based on their age, in violation of the Age

Discrimination in Employment Act, 29 U.S.C. §§ 621-634. Jurisdiction is present. 28 U.S.C. § 1331.

On September 5, 2006, plaintiffs Coleman and Hunt filed two separate cases as pro se litigants; the cases were assigned numbers 06-C-492-C and 06-C-493-C. However, the cases share all material facts and claims. In addition, plaintiffs Coleman and Hunt are now represented by the same lawyer, who has submitted identical materials on behalf of both plaintiffs to support their positions on summary judgment. Therefore, for the purposes of efficiency and consistency, this opinion applies to both cases. In addition, because there seems to be no good reason for trying these cases separately, I will try both during the week now set aside for trial of plaintiff Hunt's case (September 10-16), unless any party can show good cause not to do so.

Now before the court are defendant's motions for summary judgment. Defendant is not entitled to summary judgment on plaintiffs' disparate treatment claims because there is sufficient circumstantial evidence from which a reasonable jury could infer that defendant's decision not to hire plaintiffs was based on their age. However, defendant is entitled to partial summary judgment to preclude plaintiffs from recovering damages they have already recovered in their National Labor Relations Board settlement. Plaintiffs may seek any additional relief available under the Age Discrimination in Employment Act that was not considered in the National Labor Relations Board settlement agreement.

From the parties' proposed findings of fact, I find the following to be material and undisputed.

FACTS

Defendant Robinson Brothers Environmental, Inc. provides environmental abatement services, including asbestos, lead and mold abatement services, duct cleaning, mechanical insulation, site work and demolition. Plaintiffs Bruce A. Coleman and Gregory T. Hunt are both members of the Heat & Frost Insulators Union Local 19, based in Milwaukee, Wisconsin. Plaintiff Coleman is a lead organizer for the local. He was born on September 5, 1957. Plaintiff Hunt is the local's business agent. He was born on October 6, 1952.

In early January 2005, plaintiff Coleman telephoned defendant's office and asked Mike Robinson, Jr. whether defendant was hiring. Robinson, Jr. is a supervisor in defendant's insulation department. Robinson, Jr. told plaintiff Coleman that defendant was hiring.

On approximately January 12 or 13, 2005, plaintiffs Coleman and Hunt went to defendant's office and told the staff at the front counter that they were union members and would like to apply for jobs. Mike Robinson, Sr., defendant's president, met with plaintiffs and informed them that defendant was not hiring at that time but that they could complete applications. Plaintiffs completed and submitted applications for employment as mechanical

insulators. The application form did not have a place for date of birth; however, the application submitted by plaintiff Coleman contained a handwritten page listing his additional qualifications, including his service of a four-year U.S. Department of Labor apprenticeship with the Heat and Frost Insulators beginning in 1972, and his journeyman status with the Heat and Frost Insulators since 1982. Additionally, he noted in his application that he had attended the University of Wisconsin-Milwaukee between 1982 and 1989.

On May 17, 2005, plaintiff Coleman telephoned Michael Robinson, Jr. to ask whether defendant had hired any employees since plaintiffs had submitted their applications in January 2005. Plaintiff Coleman taped the telephone call. A portion of the exchange was recorded as follows:

Coleman:	Okay. Let me ask you, have you guys hired anybody since I applied in January?
Robinson, Jr.:	We've brought on some younger guys.
Coleman:	Okay.
Robinson, Jr.:	Not younger guys, but new guys.
Coleman:	Okay.
Robinson, Jr.:	Just to uh — sometimes it's just easier to train 'em. An easier way.

Coleman: Oh sure. I understand. Were they asbestos certified too, or were they just pipe insulators? Or?

Robinson, Jr.: That's what we're looking for is cross training.

Coleman: Yeah. Were the new hires cross trained? Or did they have cards? They work?

Robinson, Jr.: They get cross trained.

Coleman: Okay. So you hire them and then you get them the asbestos?

Robinson, Jr.: Yeah.

Coleman: Would you — Hey, that's terrific. That's a nice option that you offer. Would you do that for me? I'd love to do that and I'd be supervisor for you in asbestos.

Robinson, Jr.: Would you be willing to get trained in that?

Coleman: Sure. Absolutely.

In June 2005, plaintiff Coleman submitted an application for a "multi-functional position," saying he was willing to perform asbestos abatement, lead abatement, mechanical insulation, duct cleaning, sand blasting and general labor.

On July 1, 2005, plaintiffs, filed an unfair labor practices charge against defendant with the National Labor Relations Board, alleging that defendant had "failed and refused to consider for employment [plaintiffs] . . . because of their membership in activities in support of the Union, and in order to discourage employees from membership in, and activities in

support of, the Union or other labor organizations." This charge was in connection with plaintiffs' applications in January 2005, as well as the additional application submitted by plaintiff Coleman in June 2005.

The charge was investigated by the National Labor Relations Board and resolved by a settlement agreement approved September 5, 2006, which resulted in defendant's making payments to plaintiffs of $5,000 each, without an admission of liability. The settlement agreement read in part:

> BACKPAY - Within 14 days from approval of this agreement the Charged Party will make whole Bruce Coleman and Greg Hunt, by payment of $5,000 to each of the ($10,000 total). The Charged Party will make appropriate withholdings for each named employee.
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> . . . .
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> SCOPE OF THE AGREEMENT - This Agreement settles only the allegations in the above-captioned case(s), and does not constitute a settlement of any other case(s) or matters.

On approximately August 25, 2005, plaintiff Coleman filed a charge of age discrimination against defendant with the United States Equal Employment Opportunity Commission, contending that defendant's failure to hire him, and hiring "younger guys" instead was a violation of the Age Discrimination in Employment Act of 1967, as amended. This charge related only to his application submitted in January 2005, in which he applied for a mechanical insulator position and did not mention the application he submitted in June 2005 for a multi-functional position. Plaintiff Hunt filed a similar charge on

September 30, 2005.

Sometime before January 2005, defendant had implemented policies regarding workforce management. Under its standard business practice, both before and after January 2005, defendant expected its employees to be able to perform all services provided by the company, including asbestos abatement, lead abatement, mechanical insulation, duct cleaning, sand blasting and general labor services.

At the time plaintiffs submitted their applications, defendant assigned five employees to the mechanical insulation department. The ages of these five employees at that time were 32, 35, 43, 52 and 53. Each of these employees had started in the asbestos department and was transferred later to the mechanical insulation department.

Michael Robinson, Sr. made all hiring decisions for defendant in 2005, along with Mike Bricco, defendant's vice president. All employees newly hired by defendant in 2005 were hired before August 25, 2005, when plaintiff filed his ADEA charge. Defendant hired 26 new employees in 2005. Of these, four were over the age of 40. It is unknown what position each of these new employees had applied for because, at some time during 2005, defendant destroyed all old applications and starting using a revised application form for all new applicants.

OPINION

The Age Discrimination in Employment Act makes it unlawful for an employer "to

fail or refuse to hire or to discharge any individual . . . because of such individual's age." 29 U.S.C. § 623. The United States Supreme Court has recognized that an employer may be held liable for violating the ADEA under both disparate treatment and disparate impact theories of liability. Smith v. City of Jackson, 544 U.S. 228 (2005). In their briefs in response to defendant's motions for summary judgment, plaintiffs argue that defendant is liable under both disparate treatment and disparate impact theories.

As an initial matter, defendant contends that it cannot be held liable under either theory because the decisionmakers were unaware of plaintiffs' ages when the hiring decision was made. However, plaintiffs dispute this and present evidence from which a reasonable jury could conclude that defendant was aware of plaintiffs' ages. First, plaintiff Coleman noted in his application that his employment experience extended back to 1972 and that he attended the University of Wisconsin-Milwaukee between 1982 and 1989. It is reasonable to infer that this information would give a reader of plaintiff Coleman's application the understanding that plaintiff Coleman was over the age of 40. Additionally, Michael Robinson, Sr., met with both plaintiffs Coleman and Hunt in January 2005. At that time, plaintiff Coleman was 47 and plaintiff Hunt was 52. Plaintiffs assert that they look their ages and that a reasonable jury could conclude that Robinson, Sr. would have known from plaintiffs' appearances that they were over the age of 40. Defendant asserts that Robinson, Sr. thought plaintiff Coleman looked to be in his "early to mid-thirties," but it is the

province of the jury and not this court to weigh the credibility of witnesses and determine whether defendant's assertion is believable.

In its reply brief, defendant also argues that plaintiffs cannot raise a disparate impact claim at this stage of the litigation because their complaint contains no reference to such a claim. However, it is well-established that a plaintiff does not have to assert legal theories in a complaint. McCullah v. Gadert, 344 F.3d 655, 659 (7th Cir. 2003). Moreover, defendant has addressed in its reply brief the arguments presented by plaintiffs under the disparate impact theory. Because defendant does not argue that it was unable to respond adequately to plaintiffs' arguments, I will consider both plaintiffs' disparate treatment and disparate impact claims.

A. Disparate Treatment

A plaintiff bringing a disparate treatment claim under the ADEA may attempt to prove his case directly or through the burden-shifting method first established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Olson v. Northern FS, Inc., 387 F.3d 632 (7th Cir. 2004). Under either the direct or indirect method, plaintiffs must prove that their age played a role in defendant's decision making process and was determinative in the outcome. Schuster v. Lucent Technologies, Inc., 327 F.3d 569, 573 (7th Cir. 2003). Summary judgment in defendant's favor is inappropriate

if a plaintiff "offers evidence from which an inference of discrimination may be drawn." Miller v. Borden, Inc., 168 F.3d 308, 312 (7th Cir. 1999).

Under the direct method of proof, plaintiffs must present either direct evidence (an acknowledgment of discriminatory intent by defendant), Gusewelle v. City of Wood River, 374 F.3d 569, 574 (7th Cir. 2004), or construct a "convincing mosaic" of circumstantial evidence that provides the basis for an inference of intentional discrimination, Cerutti v. BASF Corp., 349 F.3d 1005, 1061 (7th Cir. 2003).

Plaintiffs point to Michael Robinson, Jr.'s statement that defendant had decided to bring on "some younger guys" as direct evidence of defendant's discriminatory intent. However, a statement made by a non-decisionmaker in the hiring process is not direct evidence of discriminatory intent by the defendant. Davis v. Con-Way Transportation Central Express, Inc., 368 F.3d 776, 783 (7th Cir. 2004). Because Michael Robinson, Sr. and Mike Bricco made all of the hiring decisions in 2005, only their statements would be a direct acknowledgment of discriminatory intent by defendant. The statements made by Robinson, Jr. cannot be characterized as direct evidence. Because plaintiffs have offered no other direct evidence of defendant's discriminatory intent, they must rely instead on constructing a "convincing mosaic" of circumstantial evidence to provide the basis for an inference of intentional discrimination. Cerutti, 349 F.3d at 1061.

The Court of Appeals for the Seventh Circuit has identified three different types of

circumstantial evidence that may establish intentional discrimination: Troupe v. May Department Stores Co., 20 F.3d 734, 736 (7th Cir. 1994). "The first consists of suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group and other bits and pieces from which an inference of discriminatory intent might be drawn." Id. The second type of evidence shows the systematically better treatment of employees similarly situated to the plaintiff who do not share the "forbidden characteristic." Id. The third type of evidence shows that the plaintiff was qualified for the job but was "passed over in favor of (or replaced by) a person not having the forbidden characteristic and that the employer's stated reason for the difference in treatment is unworthy of belief, a mere pretext for discrimination." Id. Regardless of the form it takes, circumstantial evidence must "point directly to a discriminatory reason for the employer's action." Adams v. Wal-Mart Stores, Inc., 324 F.3d 935, 939 (7th Cir. 2003).

In this case there is evidence of the first type from which a reasonable inference of discrimination may be drawn. The first and critical piece of evidence is the statement made by Robinson, Jr. that defendant had brought on some "younger guys." Again, a statement made by a non-decisionmaker regarding a hiring decision is generally precluded as direct evidence of discriminatory intent because it typically amounts "to mere speculation as to the thoughts of the decisionmaker." Cerutti, 349 F.3d at 1062. However, this general rule does not bar the jury from considering such statements as indirect evidence when the "employee

who is outside the chain of decision . . . has valuable information bearing on the charge of discrimination." Fortino v. Quasar Co., 950 F.2d 389, 396 (7th Cir. 1991) (excluding non-probative statements made by non-decisionmakers who worked in different department from affected employees, but recognizing value of considering non-decisionmaker's statements in other circumstances). From the evidence presented by both parties I find that Robinson, Jr. is well positioned to offer "valuable information" that bears on this case. Robinson, Jr. is the supervisor of the insulation department and he spoke with plaintiff Coleman about the hiring process and decisions related to the hiring of employees for the positions for which plaintiffs applied. It was in the context of discussing the hiring decision in question that Robinson, Jr. made the critical statement. This being the case, Robinson, Jr.'s statement could reasonably be construed as being more than speculation. It would be reasonable to conclude that his statement is evidence "pointing directly to a discriminatory reason for the employer's action." Adams, 324 F.3d at 939. While it may be possible to interpret the conversation differently, interpretation is for trial and not for summary judgment. Shager v. Upjohn Co., 913 F.2d 398, 402 (7th Cir. 1990) ("the task of disambiguating ambiguous utterances is for trial, not for summary judgment").

Plaintiff also presents evidence that of the 26 new employees hired by defendant in 2005, only three were over the age of 40. Only one of these three was hired between the time that plaintiffs submitted their original application in January 2005 and plaintiff Coleman's

conversation with Michael Robinson, Jr. on May 17, 2005. Although "statistical evidence, standing alone, is generally insufficient to prove intentional discrimination," Bennett v. Roberts, 295 F.3d 687, 697 (7th Cir. 2002), when the employment statistics are viewed together with the May 17, 2005 statement made by Robinson, Jr., a factfinder could find reasonably that they complete a "convincing mosaic" of proof that age was a determinative factor in defendant's decision not to hire plaintiffs.

Because plaintiffs have offered evidence from which a reasonable jury could infer discrimination based on plaintiffs' ages, defendant's motion for summary judgment will be denied with respect to plaintiffs' disparate treatment claims.

B. Disparate Impact

In Smith, 544 U.S. 228, the Supreme Court held that the Age Discrimination in Employment Act authorizes recovery under a disparate impact theory of liability. Unlike disparate treatment claims, Disparate impact claims do not require evidence of an employer's subjective intent to discriminate. Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 646 (1989). Disparate impact is based on the notion that policies or practices that are neutral on their face but discriminatory in effect violate anti-discrimination statutes. Teamsters v. United States, 431 U.S. 324, 349 (1977). To establish a prima facie case of disparate impact, a plaintiff must "isolate and identify a specific employment practice that is allegedly

responsible for any observed statistical disparities," Cerutti, 249 F.3d at 1067, and "establish a causal connection between the employment practice and the statistical disparity, offering statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotion because of their membership in a protected group." Bennett, 295 F.3d at 698.

Plaintiffs argue that defendant has acknowledged a hiring practice that gives preferential treatment to less experienced "entry level" employees. Plaintiffs contend that because age and experience are often linked, defendant's hiring practice results in a disparate impact on older applicants. However, this argument is nothing more than speculation. Plaintiffs have introduced no evidence suggesting that older applicants were disproportionately among those who were not hired by defendant. The fact that applicants with more experience may tend to be older individuals does not prove that this was true in this case. Without more evidence, it is not possible for plaintiffs to establish a prima facie case of disparate impact.

C. Election of Remedies

Defendant contends that, even if I conclude that it is not entitled to summary judgment on plaintiffs' age discrimination charge, I should nonetheless employ the election of remedies doctrine to bar plaintiffs from recovering damages that have already been

awarded by the National Labor Relations Board settlement. The election of remedies doctrine generally seeks to prevent double recovery for a single injury. Olympia Hotels Corp. v. Johnson Wax Development Corp., 908 F.2d 1363 (7th Cir. 1990). Defendant contends that the National Labor Relations Board settlement agreement made plaintiffs whole for defendant's failure to hire them and that plaintiffs may not recover twice for the same injury under an alternate legal theory. In response to defendant's argument, plaintiffs contend that because they were not parties to the National Labor Relations Board settlement agreement (the union brought and settled the unfair labor practice charge), they should not be bound by that agreement. Their argument is unpersuasive. The United States Supreme Court has observed that "national labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining." NLRB v. Allis-Chalmers Manufacturing Co., 388 U.S. 175, 180 (1967). With this in mind, courts require that, absent unusual circumstances, individual union members be "bound by the union's decisions." McLeod v. Arrow Marine Transport, Inc., 258 F.3d 608, 613 (7th Cir. 2001); see also Meza v. General Battery Corp., 908 F.2d 1262, 1268 (5th Cir. 1990). Plaintiffs do not assert that the union represented their interests inadequately in entering into the settlement agreement. Moreover, plaintiff Coleman himself signed the National Labor Relations Board charge as the union's lead organizer. Therefore, I find no reason why

plaintiffs should not be bound by the agreement.

Plaintiffs contend also that the meaning of the term "made whole" is different in the context of an unfair labor practice charge from its meaning in an Age Discrimination in Employment Act charge. Plaintiffs argue that in the context of an unfair labor charge, the term "made whole" may or may not include back wages and therefore a settlement of an unfair labor practice charge cannot be considered to be a payment for back wages unless it is explicitly designated as such. However, the terms of the agreement are organized under a paragraph entitled "BACKPAY." It is unclear how much more explicit this designation could be. Whether it is true in general that "made whole" in the context of an unfair labor charge may or may not include back wages is irrelevant. This agreement *did* include such wages and therefore plaintiffs are precluded from recovering their back pay again.

Finally, plaintiffs contend that even if they may not recover their lost back wages, they should be allowed to pursue the additional relief available for their Age Discrimination in Employment Act claims. Under the Age Discrimination in Employment Act, in some circumstances, a successful plaintiff may recover other equitable and monetary relief in addition to the payment of back wages. 29 U.S.C. § 626. Defendant does not appear to contest the availability of this additional relief. Therefore, it would be inappropriate to preclude plaintiffs from seeking such relief at trial. I will grant defendant's motion for partial summary judgment insofar as the back wages are concerned. However, plaintiffs may seek

any additional relief available under the Age Discrimination in Employment Act that was not considered in the National Labor Relations Board settlement.

ORDER

IT IS ORDERED that

1. Defendant Robinson Brothers Environmental, Inc.'s motion for summary judgment is DENIED with respect to plaintiffs Bruce A. Coleman and Gregory T. Hunt's claims of age discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634.

2. Defendant Robinson Brothers Environmental, Inc.'s motion for partial summary judgment is GRANTED with respect to the preclusion of back wages from the remedies plaintiffs Bruce A. Coleman and Gregory T. Hunt may seek at trial.

3. The parties may have until July 23, 2007, in which to advise the court whether

good cause exists for not trying both these cases together during the week beginning September 10, 2007.

Entered this 9th day of July, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge