IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOHN BALDERSTON and
JOHN GABRIEL,

OPINION AND
ORDER

Plaintiffs,

02-C-210-C

v.

FAIRBANKS MORSE ENGINE,
COLTEC INDUSTRIES, INC. and
GOODRICH CORPORATION,

Defendants.

- -

This is a civil action for declaratory, injunctive and monetary relief, brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. §§ 623-634. Plaintiffs John Balderston and John Gabriel contend that defendants retaliated against them when defendants refused to allow them to attend a meeting of the company's "Quarter Century Club" because plaintiffs had filed an age discrimination lawsuit against defendant Fairbanks Morse Engine. Subject matter jurisdiction is present under 28 U.S.C. § 1331.

Presently before the court is defendants' motion for summary judgment. Defendants contend that their conduct does not constitute "adverse employment action" and, therefore,

they cannot be held liable for retaliation under the ADEA. Alternatively, they contend that they had a non-discriminatory reason for excluding plaintiffs from the meeting, that plaintiffs failed to mitigate their damages and that defendant Goodrich Corporation is not a proper party and should be dismissed.

I conclude that defendants' decision not to invite plaintiffs to the meeting was not "discrimination" against plaintiffs within the meaning of the ADEA. I will grant defendants' motion for summary judgment without addressing defendants' alternative arguments.

From the proposed findings of fact and the record, I find that the following facts are material and undisputed.

UNDISPUTED FACTS

On October 8, 1998, defendant Fairbanks terminated plaintiffs as part of a reduction in force. (Defendant Fairbanks was an operating division of defendant Coltec at least until July 12, 1999, when defendant Goodrich acquired defendant Coltec.) After receiving a right to sue letter from the Equal Employment Opportunities Commission in 2000, plaintiffs filed a lawsuit in this court, alleging that defendant Fairbanks fired them because of their age in violation of the Age Discrimination in Employment Act. (The case was decided in favor of defendant Fairbanks on summary judgment. See Balderston v Fairbanks Morse Engine Division, 00-C-68-C, December 21, 2000 Opinion and Order, dkt. #147.)

After leaving Fairbanks, plaintiff Balderston was hired by Fagan Chevrolet on December 7, 1998, and remains employed there currently. Plaintiff Gabriel is currently employed by Roehl Transportation, which hired him in May 1999.

In August 2000, John Bottorff, the vice president of human resources of defendant Fairbanks, told plaintiffs that they were not invited to the upcoming meeting of the company's "Quarter Century Club" that defendant Fairbanks created and operates. Membership in the club is open to employees of defendant Fairbanks who have provided at least 25 years of service to the company. Induction into the club is a distinction in honor of the employee's services. Both current and former employees may be members. The main activity of the club is an annual meeting that includes a dinner and other social activities.

Although both plaintiffs had provided more than 25 years of service to defendant Fairbanks and had been invited to previous meetings, Bottorff explained to plaintiffs that their presence at the 2000 meeting would not be appropriate because plaintiffs' lawsuit against defendant Fairbanks was in the discovery phase. Plaintiffs informed Bottorff that they planned to attend the meeting anyway. In response, Bottorff wrote to plaintiffs, stating that he believed it was in everyone's best interest that plaintiffs not attend the meeting. He asked them again not to attend. He also notified security of the hotel where the meeting was being held that uninvited guests would attempt to attend the meeting.

When plaintiffs arrived at the meeting, they were confronted in the parking lot by

security officers, who asked plaintiffs to leave the premises. Several of plaintiffs' co-workers and friends witnessed the confrontation.

OPINION

Under 29 U.S.C. § 623(d), the retaliation provision of the Age Discrimination in Employment Act, it is unlawful for an employer to "discriminate against any of his employees" because the employee "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter." It is undisputed that plaintiffs "made a charge" and "participated" in litigation under the ADEA. The two key words in the statute for the purpose of this case are "discriminate" and "employees." It is undisputed that plaintiffs were terminated from employment with defendant in 1998 and that plaintiffs were told they could not attend the meeting in 2000. The parties agree that the meaning of "employees" in the ADEA can include "former employees," at least in the context of retaliation, but they disagree over the extent that former employees are protected.

Citing Reed v. Shepard, 939 F.2d 484 (7th Cir. 1991), and Veprinsky v. Fluor Daniel, Inc., 87 F.3d 881 (7th Cir. 1996), defendants argue that "only actions that impact the [former] employee's future job prospects are actionable." Dfts.' Br., dkt. #22, at 5. In Reed, the plaintiff alleged that she had been terminated because of her sex in violation of Title VII. In addition, she alleged that after her termination, her employer retaliated against

her by making threatening phone calls, arranging a physical assault against her and urging her to drop her lawsuit against the employer. The court concluded that the plaintiff did not have an actionable retaliation claim because the alleged events were "subsequent to and unrelated to [the plaintiff's] employment." Reed, 939 F.2d at 493.

In Veprinsky, 87 F.3d 881, the court revisited the same issue: whether and to what extent former employees can sue for retaliation under Title VII. After reviewing the language, history and purpose of Title VII and the retaliation provision, the court concluded that Title VII protects both current and former employees against retaliation. Although the defendant contended that the court had rejected this conclusion in Reed, the court interpreted Reed as limiting former employees from suing for retaliation only when the actions do not "impinge[] on their future employment prospects or otherwise [have] a nexus to employment." Veprinsky, 87 F.3d at 891. Thus, under Veprinsky, any retaliatory action that has a "nexus to employment" is potentially actionable; limiting future employment prospects is merely one example of such an action.

More recent decisions of the Supreme Court and the Court of Appeals for the Seventh Circuit suggest that even the "nexus to employment" requirement no longer exists. See Herrnreiter v. Chicago Housing Authority, No. 01-3202, slip. op. at 5-6 (7th Cir. Dec. 30, 2002) (concluding that retaliation does not have to involve adverse *employment* action); Aviles v. Cornell Forge Co., 183 F.3d 598, 605-06 (7th Cir. 1998) (holding that under Title VII

current employee did not have to show that retaliation was related to employment); see also Robinson v. Shell Oil Co., 519 U.S. 337 (1997) (holding that retaliation provision in Title VII protects current and former employees equally). This makes sense because, unlike the disparate treatment provision, the language of the retaliation provision in Title VII does not limit its scope to employment related actions. Compare 42 U.S.C. § 2000e-3(a) with 42 U.S.C. § 2000e-2(a)(1). Defendants do not seriously argue that the club meeting had no relation to employment.

The case law interpreting the retaliation provision under Title VII applies to the retaliation provision under the ADEA; the retaliation provisions under both statutes are nearly identical, compare 29 U.S.C. § 623(d) with 42 U.S.C. §2000e-3(a); and both statutes include very similar definitions of "employee," both of which are ambiguous. Compare 29 U.S.C. § 630(f) (defining "employee" in part as "an individual employed by any employer") with 42 U.S.C. § 2000e(f) (defining "employee" in part as "an individual employed by an employer"). In Veprinsky, 87 F.3d at 884-85 & n.1, the court noted that the two provisions were "parallel" and cited several cases from other jurisdictions interpreting the ADEA's retaliation provision as support for its conclusion that former employees are "employees" within the meaning of Title VII's retaliation provision. I conclude that plaintiffs are not barred from recovering for retaliation under the ADEA simply because they were not employed by defendants at the time the alleged retaliation took place.

The primary question is whether defendants' refusal to allow plaintiffs to attend the meeting constitutes retaliation or, in the language of the statute, whether defendants "discriminate[d]" against plaintiffs by denying them an invitation. 29 U.S.C. § 623(d). Courts have framed the question as whether the decision was sufficiently "adverse." As noted recently, the Court of Appeals for the Seventh Circuit has generally assumed that the same standard of "adverse" action applies to both disparate treatment and retaliation claims. Herrnreiter, slip op. at 7. Herrnreiter itself involved a claim of disparate treatment rather than retaliation. Nevertheless, the court relied on several cases involving retaliation to demonstrate the types of employer conduct that constitute discrimination. However, the court cautioned that the two standards may have differences. It concluded:

> This is not an issue to be resolved in this case, however, which does not involve retaliation, and we mention it only to emphasize that in citing retaliation cases for their discussion of what 'materially adverse employment action' means we do not necessarily endorse the view that such an action is always required to make retaliation actionable under Title VII.

Id. Thus, the court suggested that employer conduct that did not constitute discrimination in a disparate treatment case could constitute discrimination in a retaliation case. Although the court did not state expressly what the standard should be in the context of retaliation, it expressed concern that the test be broad enough to encompass employer actions that deter the protected activity. Id.

This standard would be consistent with the one applied by the Court of Appeals for

the Ninth Circuit and derived from the EEOC Compliance Manual: "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity." Ray v. Henderson, 217 F.3d 1234, 1242-43 (9th Cir. 2000). This is a reasonable definition, particularly in light of the purpose of anti-retaliation provisions as stated by the Supreme Court: "[m]aintaining unfettered access to statutory remedial mechanisms." Robinson, 519 U.S. at 346. In Herrnreiter, the court cited Ray and the EEOC Compliance Manual with approval, suggesting again that the focus should be on protecting employees from actions that will dissuade them from exercising their rights.

Thus, I agree with plaintiffs' contention that the correct standard was articulated in Ray. Nevertheless, no reasonable jury could find that being denied an invitation to the club meeting would be sufficient to prevent plaintiffs from pursuing their discrimination claim. It is undisputed that the meeting is primarily a social gathering. It would be unreasonable to infer that an individual would give up his or her discrimination claim in exchange for a night of socializing. Plaintiffs' case is readily distinguishable from other cases involving former employees in which the employer made threats or prevented the former employee from obtaining or keeping a new job. See, e.g., Berry v. Stevinson Chevrolet, 74 F.3d 980, 986 (10th Cir. 1996) (instigation of criminal theft and forgery charges); Charlton v. Paramus Bd. of Education, 25 F.3d 194 (3d Cir. 1994) (pursuing revocation of teacher's license);

Caudhill v. Farmland Industries, 919 F2d 83 (8th Cir. 1990) (persuading current employer to terminate employee).

Plaintiffs cite no supporting case law involving facts analogous to theirs. The closest they come is Passer v. American Chemical Society, 935 F.2d 322 (D.C. Cir. 1991), in which the plaintiff was a chemist for the American Chemical Society, who sued his employer for age discrimination when he was required to retire at age 70. After he filed the lawsuit, his former employer cancelled a special symposium it was planning to hold in the plaintiff's honor and for which it had sent announcements to several thousand chemists from around the country. On the basis of the plaintiff's allegations that he had intended to use the conference to make contacts that would lead to new employment, the court concluded that the plaintiff had stated a claim for retaliation under the ADEA. Because the court was reviewing a motion to dismiss, it accepted as true the plaintiff's allegation that he was humiliated by the cancellation and harmed in his ability to procure future employment.

Although the facts in plaintiff's case bear a superficial similarity to those in Passer, it lacks critical facts that existed in Passer (or were presumed to exist because it was a motion to dismiss). Unlike the symposium in Passer, the club meeting was primarily social in nature, if not entirely so. Moreover, plaintiffs were already employed in August 2000 and they have presented no evidence that the meeting was used to conduct business or make contacts. Furthermore, in Passer the employee was humiliated in front of *thousands* of other

chemists across the nation, making it more difficult for him to find new employment. Although plaintiffs may have been embarrassed by not being invited to the meeting, they have presented no evidence that their professional or personal reputations were damaged as a result.

Plaintiffs have proposed a number of facts about the events that took place when they tried to attend the meeting and were denied entry by security. To the extent that their reputations may have been damaged by their confrontation with security, this was a result of their own actions, not those of defendants. Plaintiffs cannot argue successfully that defendants knew that when Bottorff decided not to invite plaintiffs, plaintiffs would attempt to attend the meeting anyway, causing public embarrassment for themselves. It is undisputed that plaintiffs had notice that they were not invited to attend the meeting. When they decided to ignore defendants' instructions and attend anyway, they had to take responsibility for the consequences.

Accordingly, I conclude that defendants did not "discriminate" against plaintiffs within the meaning of 29 U.S.C. § 623(d) when they did not invite plaintiffs to a meeting of the Quarter Century Club. Defendants' motion for summary judgment will be granted. It is unnecessary to take up defendants' alternative grounds for summary judgment or

defendant Goodrich's motion to dismiss.

ORDER

IT IS ORDERED that the motion for summary judgment of defendants Fairbanks Morse Engine, Coltec Industries, Inc. and Goodrich Corporation is GRANTED. The clerk of court is directed to enter judgment in favor of defendants and close this clase.

Entered this 27th day of January, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge