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IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

WILLIAM FREITAG,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO. 88-0269-A
	)	
PAN AMERICAN WORLD AIRWAYS,	)	
INC.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter is before the Court on the defendant's motion for summary judgment pursuant to Fed. R. Civ. P. 56(b).

William Freitag was a Ramp Operations Supervisor (ROS) at Pan Am's Dulles office. After eighteen years with Pan Am, the plaintiff was laid off at age 52. He alleges that he was laid off because of age and brings this suit pursuant to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, et seq.

It is well settled that summary judgment is appropriate only where there are no genuine issues of material fact; there is no controversy as to the inferences that reasonably could be drawn from any undisputed material facts; and the moving party is entitled to judgment as a matter of law. Phoenix Savings and Loan, Inc. v. Aetna Casualty & Surety Co., 381 F.2d 245 (4th Cir. 1967). Moreover, the party opposing a motion for summary judgment is entitled to the benefit of all favorable inferences that can be drawn from the facts. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). In this instance, the facts create inferences from which a reasonable trier of fact could

conclude that Pan Am discriminated against the plaintiff because of his age. Consequently, Pan Am's motion for summary judgment is denied.

When Freitag came to Pan Am's Dulles operation in 1985, he was responsible for, among other things, coordinating the operations of an independent contractor who performed the ground handling functions (the "ramp" functions), for preparing flight folders for plane crews, ensuring that the crews had lodgings during layovers, and providing for the proper weight and balance on the aircraft ("operation" functions). In early 1986 Pan Am made plans to transfer operation functions handled by ROS's from management to non-management employees. In late 1986, as a part of additional reorganization, Pan Am changed the nature of the ROS position. The airlines began using its own employees to administer ground handling functions, jobs which previously had been the responsibility of an independent contractor. ROS's were to supervise the ground handling crew. To fill these new positions, Pan Am promoted three relatively young employees from its non-management ranks and transferred a comparatively young manager from its New York office. The older ROS's, both in terms of age and seniority, were assigned to manage the operation tasks that ROS's were responsible for and given the title, among Pan Am managers, of "Ops Reps." The operation tasks were those that Pan Am had previously decided to eventually turn over to non-management employees.

When the time came to implement Pan Am's re-organization

plans, the airlines laid off the older ROS's and kept the younger ones who remained responsible for managing the ground handling operations.

To prevail on his claim of age discrimination, Freitag must prove that he was "(a) an employee covered by the act (b) [who] has suffered an unfavorable employment action by an employer covered by the act (c) under circumstance in which the employer's age was a determining factor in the action in the sense that 'but for his age, he would not [have suffered the action.]'" Lovelace v. Sherwin Williams Co., 681 F.2d 230, 238-39 (4th Cir. 1982). He must also demonstrate that he was in a protected age group-- i.e. over 40; he suffered an adverse change in his employment status; at the time of the change he was performing up to his employer's legitimate expectations; and his duties were subsequently performed by someone outside the protected class. EEOC v. Western Electric Co., 713 F.2d 1011, 1014 (4th Cir. 1983). In the Fourth Circuit, a plaintiff can still state a claim if he can show that although no one subsequently performed his duties, he can produce other evidence demonstrating that his employer did not treat age neutrally in reducing the work force. Id. at 1015.

Pan Am contends that Freitag was not performing up to its expectations at the time he was terminated and that Freitag can offer no proof that age factored into its business decision to eliminate the ROS's who handled programing. There is a factual dispute concerning Freitag's performance at the time of his

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PAN AMERICAN WORLD AIRWAYS, )  
INC., )  
Defendant. )  
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ORDER

This matter is before the Court on the defendant's motion for summary judgment, pursuant to Fed. R. Civ. P. 56(b).

For the reasons stated in the accompanying memorandum opinion, the defendant's motion is DENIED.

Let the Clerk send a copy of this order to all counsel of record.

8/29/88  
DATE

Richard L. Williams  
UNITED STATES DISTRICT JUDGE

BENCHMEMO: WILLIAM FREITAG v. PAN AMERICAN WORLD AIRWAYS, 88-269-A, defendant's motion for summary judgment

ATTORNEYS: Plaintiff: Michael Smith  
Defendant: Sue Bohringer and Joe Wiggs (local  
counsel)

Judge, this age discrimination case is before you on the defendant's motion for summary judgment pursuant to Fed. R. Civ. P. 56(b). Absent being persuaded otherwise at oral arguments, I believe you should take the matter under advisement.

William Freitag was a Ramp Operations Supervisor at Pan Am's Dulles office. He was 52 when he was laid off after 18 years on the job. He had received a satisfactory rating the year prior to being laid off. He claims that Pan Am retained Ramp Operations Supervisors who were younger than him and who had less seniority, although he does not dispute that these ramp operator supervisors had responsibilities different from his own.

During his tenure at Pan Am, Freitag has been stationed at Seattle, Maimi, and New York. He has often not lived where he is stationed--i.e. he worked in New York and lived in Baltimore prior to the job at Dulles.

Pan Am claims that when Freitag came to Dulles in 1985, the airline was in the midst of making some changes. Although a ramp supervisor, most of Freitag's responsibilities were in the office and not on the ramps. In early 1987, Pan Am entered into a contract with the union for Pan Am employees to do all the ramp work. Pan Am then had the need for supervisors to do the outside ramp work, and it hired four new people---Cutler, Harrell, Post, and Witt. Freitag worked inside, in the office, with other ramp supervisors Augenbaugh and Kummel. Freitag argues that when the

decision was made to hire new ramp supervisors and to place him on the inside, rather than actually supervising on the ramp, Pan Am knew that they would soon be phasing out the job he held. Yet, Pan Am withheld this information from him. In the summer of 1987, one of Freitag's co-workers--Augenbaugh--transferred out of the ramp services division. That left two ramp supervisors inside, one of which being Freitag, and three ramp supervisors on the outside. (Culter transferred too).

While these changes were being made, Pan Am reorganized its Northeast Region and changed the manager in charge of Dulles. He eliminated the job of inside ramp supervisor--the position which Freitag held. Following notification that his job was being terminated, Freitag was offered a job at teh Departure Control Center in New York. He declined the offer. When he left the payroll, Pan Am contends he received the servance and vacation pay he was due.

In addition to alleging age discrimination, Freitag also alleges that Pan Am has not been forthcoming with severance benefits he claims he is entitled to. He claims this is a breach under ERISA and a breach of him employment contract. He also throws in a claim that Pan Am has violated the reporting requirements of ERISA.

#### ADEA

The elements of Freitag's ADEA claim are "(a) that an employee covered by the act (b) has suffered an unfavorable employment action by an employer covered by the act (c) under circumstances in which the employer's age was a determining

factor in the action in the sense that 'but for his age, he would not [have suffered the action]' "Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 238-39 (4th Cir. 1982).

The same ping pong formula used in race discrimination cases under Title VII applies here. Plaintiff has burden of establishing a prima facie case; once done, the defendant must articulate legitimate, non-discriminatory reasons for his action; and if done, the plaintiff must prove the offered reason is but a mere pretext.

To establish a prima facie case, Freitag must show (1) he was in a protected age group--i.e. over 40; (2) he suffered an adverse change in his employment status; (3) at the time he was performing up to his employer's legitimate expectations; and (4) his duties were subsequently performed by someone outside the protected class. EEOC v. Western Electric Co., 713 F.2d 1011, 1014 (4th Cir. 1983). In the Fourth Circuit, a plaintiff can still state a claim if he can show that instead of (4) above, he can produce some other evidence that the employer did not treat age neutrally in reducing its work force. Id. at 1015. But a plaintiff must at least demonstrate all four elements.

Pan Am argues that Freitag has only satisfied 2 of the 4 requirement. He is in the protected age group and there was an adverse action taken against him. Pan Am claims that Freitag in 1986 was not performing up to their expectations. Although he scored a 3 -- "meets requirements" -- Pan Am contends that it was a low 3 and that Freitag scored low on station dependability, he operation was the only one not to pass station evaluation, and

his supervisor suggested he claimed too much overtime. I think this argument is suspect. When all hearts were pure, Pan Am gave him a satisfactory rating. After the suit has been brought, it now says "we didn't really mean it." Pan Am went back and deposed fellow workers and supervisors who seem in retrospect not to have been pleased with Freitag's performance. Pan Am also argues that a "satisfactory" job rating is not up to their "legitimate expectations." To me, this is semantic hairsplitting and a self-serving confession of grade inflation.

Pan Am also contends that Freitag has not satisfied the fourth element of a prima facie case. Pan Am argues that the decision to terminate Freitag's job was a pure business decision. His job was phased out. Everyone who held it was offered another job in the airlines or was terminated. The affidavits and depositions of those who made the decision are offered in support of this assertion.

As further evidence that its decision was age neutral, Pan Am notes that it offered Freitag another job at the same pay in New York. (Pan Am does some fancy foot work to demonstrate that it is not inconsistent to offer employment to an employee whose performance they are not happy with.) At least one district court has ruled that an offer of another job defeats a claim of age discrimination as a matter of law. Dodd v. Singer Co., 669 F. Supp. 1079, 1085 (N.D. Ga. 1987).

Even if Freitag can present a prima facie case, Pan Am argues it has presented a legitimate, non-discriminatory reason for terminating Freitag. The airline was trying to cut costs.



Without even identifying who held those jobs, a Pan Am manager determined that the inside ramp operators' jobs could be better handled by existing union labor that was doing similar work. In fact, to substantiate its claim, Pan Am notes that no Pan Am managers handle the jobs vacated by Freitag and but are being handled by non-manager employees.

Freitag contends that Pan Am's decision had disparate impact because the jobs it chose to eliminate were held by those older than the outside ramp supervisors. The three outside ramp supervisors were 39, 44, and 35. Moreover, the sample is very small--comparing three people to four. Hence, the statistical analysis is not helpful in establishing discriminatory intent.

In sum Pan Am notes that Freitag cannot state a prima facie case and in no respect can he rebut Pan Am's proffered legitimate, non-discriminatory rationale for eliminating his job.

#### ERISA

Freitag claims that Pan Am terminated him to interfere with his receipt of and attainment of pension benefits in violation of 29 U.S.C. §1140.

Pan Am reiterates that Freitag's job was eliminated for business reasons. Moreover, the fact that they offered him another job defeats any possible inference that they fired him to prevent him from receiving or obtaining pension benefits.

Pan Am also claims that it gave Freitag all the benefits and information he was entitled to under ERISA. There is an outstanding claim of \$670 for moving expenses in 1985, but Pan AM takes the position that this claim was not plead in the

complaint.

Breach of contract

Freitag has apparently abandoned this claim.