

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 6th day of October, two thousand and four.

Present: JOSEPH M. McLAUGHLIN,
 ROSEMARY S. POOLER,
 RICHARD C. WESLEY,
 Circuit Judges.

KENNETH GRAHAM,

Plaintiff-Appellant,

-v-

(03-9262)

E-J ELECTRIC INSTALLATION COMPANY and RADIO
TELEVISION BROADCAST ENGINEERS LOCAL 1212
INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, AFL-CIO,

Defendant-Appellees.

Appearing for Plaintiff-Appellant: Daryll Boyd Jones, Laurelton, NY.

Appearing for Defendant-Appellee E-J Electric Installation Company:

 Colin Page, Proskauer Rose LLP, Newark, NJ.

Appearing for Defendant-Appellee Radio Television Broadcast Engineers Local 1212:

 Richard Markowitz, Philadelphia, PA.

Appeal from the United States District Court for the Southern District of New York (Hellerstein, J.).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the District Court's order be **AFFIRMED**.

Plaintiff-Appellant Kenneth Graham appeals from a summary judgment order of the district court dismissing his race and age discrimination claims as well as his claims against his

employer and union for violations of the collective bargaining agreement. We assume the parties' familiarity with the underlying facts, procedural history and specification of appellate issues and hold as follows.

This court reviews the district court's decision to grant summary judgment de novo. James v. New York Racing Ass'n, 233 F.3d 149, 152 (2d Cir. 2000). In making our determination we must resolve all ambiguities and draw all permissible factual inferences in favor of the non-moving party. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

Graham, a 56-year-old African-American male, claims that his employer discriminated against him based on age and race by demoting him and replacing him with a younger white woman. The court's review of both of Graham's discrimination claims follows the McDonnell Douglas burden-shifting framework. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); James, 233 F. 3d at 153 (applying McDonnell Douglas to age discrimination claim). Upon reviewing the record, we agree with the district court that: (1) Graham established a prima facie case of discrimination, shifting the burden to the employer; (2) the employer satisfactorily presented a nondiscriminatory reason for its employment action, shifting the burden to Graham; and (3) Graham subsequently did not carry his burden of presenting evidence from which the fact finder could reasonably find that the employer's reasons were a pretext for discrimination. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981); Patterson v. County of Oneida, 375 F.3d 206, 221 (2d Cir. 2004). Thus, Graham failed to carry this burden by a preponderance of the evidence and summary judgment dismissing these claims was appropriate. See Burdine, 450 U.S. at 253.

Graham's collective bargaining related claims against the union and the employer are based on his assertion that the union breached its duty of fair representation when it declined to bring his grievance to arbitration. If a union breaches its duty of fair representation, an employee can also bring suit against his employer. See Vaca v. Sipes, 386 U.S. 171, 186-87 (1967). To breach its duty of fair representation, a union's actions must be "arbitrary, discriminatory or in bad faith," and seriously undermine the arbitral process. Barr v. United Parcel Serv. Inc., 868 F.2d 36, 43 (2d Cir. 1989) (citations omitted). Upon reviewing the record, we agree with the district court's conclusion that it was reasonable for the union to determine that the collective bargaining agreement allowed the employer to make merit-based demotions and did not mandate that all grievances needed to be arbitrated. Because we agree that the union did not violate its duty of fair representation, Graham's claims against the union and the employer are properly dismissed.

We therefore affirm the judgment of the district court.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
By:
