IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 91-2844

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JESUS R. URESTI,

Plaintiff-Appellant,

versus

SOUTHWESTERN BELL TELEPHONE COMPANY,

Defendant-Appellee.

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Appeal from the United States District Court for the Southern District of Texas

(CA-H-87-1871)

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(December 10, 1993)

Before JOHNSON, GARWOOD, and WIENER, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Plaintiff-appellant Jesus R. Uresti (Uresti) sued his employer under Title VII and 42 U.S.C. § 1981 for allegedly discharging him because of his national origin. He brings this appeal from the district court's pretrial dismissal of his section 1981 claim and from an adverse judgment following a bench trial on his Title VII

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

claim. We affirm.

Facts and Proceedings Below

Uresti was discharged from defendant-appellee Southwestern Bell Telephone Company (Southwestern Bell) in Houston on April 22, 1986, after twelve and a half years of employment. On June 9, 1987, after having complied with the Title VII prerequisites contained in 42 U.S.C. § 2000e-5, he commenced this suit. In his complaint, Uresti, a Mexican-American, alleged that he was fired because of his national origin and in retaliation for opposing a discriminatory performance appraisal and a discriminatory denial of a pay raise. He further alleged that the stated reason for his terminationSQthat he conducted personal business on company timesSQwas pretextual. Southwestern Bell's conduct, the complaint charged, was in violation of Title VII and 42 U.S.C. § 1981.

On July 28, 1989, Southwestern Bell moved to strike Uresti's section 1981 claim based on the Supreme Court's holding in *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989), decided on June 15, 1989. The motion further argued that, because only the Title VII claim would remain, Uresti's demand for a jury trial should be denied. The district court granted this motion on December 27, 1990, and set the case for a bench trial.

In the four-day bench trial conducted by the parties' consent before a magistrate judge on April 15-19, 1991, Uresti testified as to the basis for his claim that he was discriminated against as a network services supervisor for Southwestern Bell. Uresti was a first-level supervisor in charge of a crew of eight installation technicians. He testified that Ron Rieger (Rieger), a second-level

supervisor who became his immediate manager in 1983, had treated him differently from the other first-level supervisors. Uresti testified that although it was company practice for supervisors to allow subordinates to fill in for them in order to develop management skills, Rieger allowed the other first-level supervisors (who were not Hispanic) but not Uresti to fill in for him. He also testified that when Rieger visited the office in which Uresti worked, Rieger would visit socially with the other first-level supervisors but exclude Uresti.

Uresti acknowledged that beginning in 1982 he had begun to explore the idea of starting a business that designed and sold gloves for weight-lifters, and that he had incorporated a mail-order business of that nature in January 1984.

In August 1985, Uresti testified, Rieger had called Uresti and another first-level supervisor into his office after having received reports that two of his supervisors had been going to the downtown YMCA during the day to exercise, and that one of the supervisors had his own business on the side. Uresti testified that he had volunteered to Rieger at the meeting that he was the employee conducting an outside business, and that Rieger had told him there was no problem as long as it did not interfere with his responsibilities to Southwestern Bell.

Uresti further testified that on March 17, 1986, after having received the highest performance rating (either "accomplished" or "satisfactory plus") in the first two years under Rieger's supervision, he had received his appraisal for 1985 indicating that

he had been downgraded to "successful." When Uresti had gone in to discuss the performance appraisal with Rieger, he claimed, Rieger had told him that the lower rating was based on Uresti's immaturity, evidenced by Uresti's tendency to air previous disputes with Rieger to the district manager and to second-level supervisors. Uresti refused to sign the performance appraisal.

Uresti introduced into evidence a report or memorandum written by Rieger on April 7, 1986, describing the dispute with Uresti. The memo stated that in addition to Uresti's immaturity, the lower rating was based on Uresti's refusal to address any of the deficiencies in his performance that Rieger had previously discussed with him. The memo listed fourteen such deficiencies, including conducting personal business on company time, soliciting investments for his business from crew members under his supervision on company time, driving a company vehicle on company time to receive an investment from a fellow employee, and visiting the downtown YMCA for extended periods in the middle of the day. Also listed were being late to meetings, repeatedly falling asleep at meetings, arriving to work too late, not being aware of the status of projects in his territory, and not being able to produce monthly quality inspections.

At trial, Uresti discussed the basis for some of these alleged shortcomings. He acknowledged, for instance, that he had sometimes been late arriving to work and that he had fallen asleep in meetings, but maintained that this conduct was not unusual in the office, and that it had never before been the subject of serious

criticism. He also admitted to having driven a company vehicle to receive an investment from a co-employee for his personal business, but maintained that he had also had company business to attend to at the same location. Uresti stated at trial that many of the things on the list had never been discussed with him and that he never saw the April 7 memo itself until after his discharge.

Uresti testified that as of March 1, 1986, the management system had been realigned and that Larry Stevens (Stevens) had become his direct supervisor instead of Rieger. Uresti had requested a meeting with Stevens to discuss his performance appraisal, and had met with him on April 1, 1986. At that time, he had asked for a meeting with Stevens and with the district manager Raymond Monroe (Monroe) to discuss his personal history file. He attended such a meeting on April 4, 1986. When he arrived at that meeting, Uresti testified, Monroe had immediately begun to question him about his business on Shepherd Avenue (where Uresti had leased office space to handle his glove business) and about telephone calls and time during the day devoted to the glove business. Monroe had informed him that Southwestern Bell's security team had conducted a two-day investigation into his whereabouts during office hours and had observed and photographed him driving about Houston conducting personal business. Uresti, flustered by these unexpected questions, had refused to discuss his activities on the days in question. He had left the meeting after being told by Monroe that his employment was terminated.

The Southwestern Bell security agent testified at trial that

he had begun his investigation after receiving an anonymous call from someone in Uresti's office. The caller indicated that Uresti came to work in the morning, did the necessary paperwork to arrange for his crew's daily activity, and then went about personal business until late in the afternoon. Through the security agent's testimony and report and through Uresti's cross and direct examinations it was determined that on March 25, 1986, the first day on which Southwestern Bell had conducted surveillance on him, Uresti had left work at 9:10 a.m. to buy some flowers for a friend who was arriving in Houston that day, had dropped the flowers off at a hotel, and had gone to the airport to meet his friend. He had then gone with his friend to traffic court to take care of a traffic citation, to his business on Shepherd Avenue, to a furniture store to attend to furniture rental for his Shepherd Avenue office, and then to a downtown ticket office to check on his friend's tickets for her return flight. Uresti had not returned to Southwestern Bell until 4:00 in the afternoon. He testified, though, that he had notified a subordinate employee that he would be absent from the office, and that he had carried a pager and checked in at the office several times during the day. On the second day, March 27, Uresti had again left the office at about 9:00 in the morning and gone to his business on Shepherd Avenue. He and his partner in the glove business had gone to their attorney's office, and Uresti had not returned to work until 2:14 p.m.

At trial Uresti also testified that he knew of several other

Southwestern Bell employees who had engaged in personal income-producing activities during their working hours. He introduced evidence in an effort to show that one of them had been disciplined by a six-percent reduction in salary and reprimand, rather than termination. Uresti did not otherwise testify that the others' activities ever came to the attention of the Southwestern Bell management. Uresti also relied upon the testimony of the only other two Hispanic supervisors in Uresti's unit during the time of his employment, both of whom had voluntarily taken demotions from their supervisory positions and gone back to positions as technicians. Thomas Alvarez (Alvarez), a supervisor in 1974, testified that he had asked for his old job back because he did not feel qualified for the supervisor's position and because the hours made it difficult for him to attend night classes at the university. Armando Galvan (Galvan) testified that he had left his supervisory position because the increase in pay was not worth the extra hours required. Galvan testified that he believed that he was discriminated against at Southwestern Bell because of his Hispanic background, but that he had no evidence or proof. He referred to no specific incident, and expressly stated that his request for a demotion had had nothing to do with discrimination. Alvarez testified that he had overheard a second-level supervisor say regarding one of the workmen on Alvarez's crew that he was going to "fire that dumb Mexican," but Alvarez did not claim to have been discriminated against at Southwestern Bell because of his Hispanic origin.

On May 8, 1991, the magistrate judge entered his findings of fact and conclusions of law. The magistrate judge concluded that Uresti had not established a *prima facie* case of discrimination for a disparate-treatment Title VII case because he had not shown that non-Hispanic employees were permitted to operate personal businesses during company hours. The court further concluded that Uresti's lower performance rating was directly due to his poor performance and refusal to follow instructions, and that Uresti had failed to establish that the stated reasons for his discharge were a pretext for discrimination. The court entered judgment on May 23, 1991, ordering that Uresti take nothing.

On November 21, 1991, after Uresti had filed a notice of appeal to this Court, Congress passed the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991 Act). Section 101 of the 1991 Act amended 42 U.S.C. § 1981 so as to overrule the construction given that statute by the Supreme Court in *Patterson v. McLean Credit Union*. Specifically, whereas the Court had held that section 1981's guarantee of equal rights to "make and enforce contracts" could not be construed as a prohibition of racial discrimination within an existing employment relationship except to the extent that the discrimination impaired an employee's ability to enforce through legal process his established contract rights, *Patterson*, 109 S.Ct. at 2373, section 101 of the 1991 Act added to section 1981 a provision that "the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits,

privileges, terms, and conditions of the contractual relationship."

Uresti contends in this appeal that section 101 of the 1991 Act should be applied to his case, requiring both that his section 1981 claim be reinstated and that, in order to preserve his right to a jury determination of all issues common to his section 1981 and Title VII claims, the Title VII judgment be vacated and remanded as well. In the alternative, he challenges the magistrate judge's disposition of his Title VII claim, arguing that the magistrate judge misplaced the burden of proof and that the magistrate judge's finding of a lack of discrimination was clearly erroneous.

Discussion

I. Retroactive Application of the Civil Rights Act of 1991

Our decisions compel rejection of Uresti's contention that the 1991 Act applies to cases pending on appeal at the time of its enactment. *Valdez v. San Antonio Chamber of Commerce*, 974 F.2d 592, 595 (5th Cir. 1992); *Wilson v. UT Health Center*, 973 F.2d 1263, 1267 (5th Cir. 1992), *cert. denied sub nom. Hurst v. Wilson*, 113 S.Ct. 1644 (1993); *Landgraf v. USI Film Products*, 968 F.2d 427, 432-33 (5th Cir. 1992), *cert. granted*, 113 S.Ct. 1250 (1993); *Rowe v. Sullivan*, 967 F.2d 186, 194 (5th Cir. 1992); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1372-74 (5th Cir. 1992). The majority of other circuits are in accord. *See Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992); *Harvis v. Roadway Express*, 973 F.2d 490 (6th Cir. 1992), *cert. granted*, 113 S.Ct.1250 (1993); *Luddington v. Indiana Bell Telephone*, 966 F.2d 225 (7th Cir. 1992);

Mozee v. American Commercial Marine Service Co., 963 F.2d 929 (7th Cir. 1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992). *Contra: Davis v. City and County of San Francisco*, 976 F.2d 1536, 1549-1556 (9th Cir. 1992) (expert fees), *on reh'g vacated in relevant part as moot*, 984 F.2d 345 (9th Cir. 1993).

The decisions of this Court cited by Uresti are not controlling on this issue.[1]

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[1] Though some of them are subsequent to *Bennett v. New Jersey*, 105 S.Ct. 1555, 1560 (1985), none of the cases cited by Uresti remotely establishes that a different rule prevails in this Circuit, *i.e.*, that notwithstanding *Bennett* we have construed the presumption of immediate applicability to pending cases established by *Bradley v. Richmond School Board*, 94 S.Ct. 2006 (1974), to apply even where a statute affects substantive rights and obligations. He refers us to *Carroll v. General Accident Insurance Co. of America*, 891 F.2d 1174 (5th Cir. 1990). *Carroll*, however, applied a judicial decision (the *Patterson* decision) to a pending case, a determination that has always been guided by a presumption of retroactivity. *See, e.g.*, *United States v. Security Industrial Bank*, 103 S.Ct. 407, 413 (1982) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student."). He also refers us to two cases in which statutory amendments were applied to pending appeals, *Louviere v. Marathon Oil Co.*, 755 F.2d 428 (5th Cir. 1985) (per curiam), and *Lunsford v. Price*, 885 F.2d 236 (5th Cir. 1989). Both, however, involved express statutory directions that the enactments be applied to pending claims, rendering it unnecessary to rely on any presumption. *See Louviere*, 755 F.2d at 430 ("Congress provided that these amendments applied to all pending claims"); *Lunsford*, 885 F.2d at 240 (the act, "by its terms, applies to pending cases"). *See also Turboff v. Merrill Lynch, Pierce, Fenner & Smith*, 867 F.2d 1518, 1521 (5th Cir. 1989) (concluding that an amendment to the Federal Arbitration Act eliminating this Court's jurisdiction over appeals from orders compelling arbitration could be applied to pending cases because it "introduces procedural changes to the enforcement of arbitration clauses; it does not affect substantive rights").

We note that the original panel opinion in *Ayers v. Allain*, 893 F.2d 732 (5th Cir.), *rev'd en banc on other grounds*, 914 F.2d 676 (5th Cir. 1990), *vacated sub nom. United States v. Fordice*, 112 S.Ct. 2727 (1992), which indicates that retroactive application of a statutory amendment may be appropriate when

Uresti also argues that even if this Court applies a presumption of nonretroactivity when the enactment affects substantive rights, section 101 does not implicate that concern and should be applied retroactively. He notes that racial discrimination within an existing employment relationship was already forbidden by Title VII. Therefore, he suggests, the net effect of the 1991 Act's broadening of section 1981 was simply to make available for such claims the particular procedures and remedies that had previously been applicable to section 1981 but not Title VII (*e.g.*, compensatory damages and a jury trial). This argument is misplaced because, although it may accurately describe the implications of section 101 of the 1991 Act for this particular suit, it is inaccurate as a characterization of the overall effect of section 101. Section 1981, which section 101 broadens, contains a general assurance of equal rights "to make and enforce contracts," and thus applies in many areas beyond the employment context governed by Title VII. *See, e.g.*, *Runyon v. McCrary*, 96 S.Ct. 2586, 2595 (1976) (racial exclusion practiced by a private school violates section 1981's assurance of equal rights to contract); *see also Gresham v. Chambers*, 501 F.2d 687, 691 (2d Cir. 1974) (Title VII "does not cover the entire subject matter of" section 1981, but rather "was intended to buttress and supplement § 1981 in a specific area"). Moreover, certain employers are

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Congress acts to overrule a Supreme Court construction of the statute and "thereby return[s] the law to its previous posture," *id*. at 755, is not valid precedent in this Circuit. The effect of granting rehearing *en banc* was to vacate the panel opinion. *See* 5th Cir. Loc. R. 41.3.

excluded from the provisions of Title VII, *see* 42 U.S.C. § 2000e(b), but are subject to section 1981. As a consequence, at least for this group of excluded employers and in contexts other than employment that involve the making and enforcement of contracts, section 101 has the effect of making illegal conduct that was not previously prohibited.

We think it clear that focusing on the enactment, rather than on the facts of the particular case, is appropriate in making a retroactivity determination. This Court's decision in *Griffon v. United States Department of Health and Human Services*, 802 F.2d 146 (5th Cir. 1986), is especially instructive on this point. In that case, Griffon challenged the retroactive application of the Civil Monetary Penalties Law (CMPL) to impose on him fines for fraudulent Medicaid claims submitted two years before enactment of the CMPL. The CMPL was passed in 1981 to provide an alternative procedure for penalizing conduct already generally prohibited by the False Claims Act (FCA). The CMPL, though it essentially tracked the civil penalty provision of the FCA, gave the Secretary of Health and Human Services an enforcement mechanism that would be available even when the Justice Department declined to prosecute under the FCA. The CMPL also, however, created new substantive liability by providing for penalties if a person filing claims had "reason to know" that the claims were false. To avoid due process problems that might arise from wholesale retroactive application of the CMPL, the Secretary promulgated regulations allowing the CMPL to be applied only to pre-enactment conduct that was already prohibited

by the FCA, and conforming the evidentiary burden and allowable fines to those that would have pertained under the FCA. In considering whether Griffon could be fined for 1979 conduct under the CMPL pursuant to these regulations, we observed that the issue was how the CMPL should be classified for purposes of applying the two competing canons of statutory construction that substantive legislation applies prospectively but procedural legislation may be given retroactive effect. *Id*. at 147. The Secretary contended that the CMPL was procedural because the only effect as applied to Griffon was that his conduct would be assessed in a hearing before an Administrative Law Judge rather than in a trial in federal district court. *Id*. at 153. Griffon countered that the enactment was substantive because it created "reason to know" liability that had not previously existed. *Id*. at 153 n.14. Observing that "[c]haracterization of a statute does not depend on its particular application, but on its very nature," we accepted the latter argument even though Griffon himself had not lacked actual knowledge in filing his claims. *Id*. at 154.

Although issues concerning the retroactivity of the 1991 Act are pending before the Supreme Court pursuant to its grant of *certiorari* in *Landgraf* and *Harvis*, our precedents compel the conclusion that section 101 of the 1991 Act, which by its terms creates new substantive liability, is not applicable to conduct occurring before its enactment. Accordingly, Uresti's section 1981 claim was governed by *Patterson*. Uresti does not claim on appeal that the district court misapplied *Patterson* in its pretrial

dismissal of his section 1981 claim. We therefore affirm the dismissal of Uresti's section 1981 claim.[2]

II. Title VII Claim

Uresti contends that he presented ample evidence of national origin discrimination to place his case within the category of "mixed motives" cases governed by *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989), and that the trial court therefore erred in not placing upon Southwestern Bell the burden of proving by a preponderance of the evidence that it would have discharged Uresti even absent a discriminatory motive.

Uresti's characterization of the case as one of "mixed motives," however, was not accepted by the trial court. In order to trigger the "affirmative defense" scheme of *Price Waterhouse*, *id*. at 1788, a plaintiff must initially prove that the illegitimate factor "played a motivating part in an employment decision." *Id*. at 1787 (plurality opinion); *see also id*. at 1795 (White, J., concurring in the judgment), 1798 (O'Connor, J., concurring in the judgment) (both stating the plaintiff's initial burden is to show that an unlawful motive was a "*substantial* factor" in the adverse employment decision). The magistrate judge's findings of fact and conclusions of law clearly show that he did not find Uresti's status as a Mexican-American to have been a motivating factor in

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[2] Uresti makes no contention that he was entitled to a jury on his Title VII claim if his section 1981 claim was properly dismissed prior to trial. *See Harrison v. Associates Corp. of North America*, 917 F.2d 195, 198 (5th Cir. 1990).

his discharge. Uresti therefore cannot successfully assert error in the trial court's failure to shift the burden to Southwestern Bell unless he first shows that the trial court clearly erred in refusing to find that discrimination played a motivating part in his discharge. *See Carter v. South Central Bell*, 912 F.2d 832, 841-42 (5th Cir. 1990) (magistrate's ruling in a Title VII case is reviewed under clearly erroneous standard), *cert. denied*, 111 S.Ct. 2916 (1991).

Uresti has demonstrated no clear error in the magistrate judge's findings. Nothing in Uresti's own account of his employment with Southwestern Bell proves that the decisions made regarding his employment were driven in any way by national-origin considerations, and the inferences he relies on from other employees' testimony and treatment are very weak. Both Alvarez and Galvan testified that their demotions were voluntary and unrelated to discrimination, and Galvan testified only to a vague feeling that he was discriminated against at Southwestern Bell. Uresti's reliance on the fact that another employee (whom Uresti testified was Caucasian) was only disciplined by a reduction in salary for conducting an outside business is unavailing, in part because Uresti did not provide enough evidence of the circumstances of that case to allow a comparison of the severity of that employee's violation to Uresti's. Moreover, the exhibit offered by Uresti was a memorandum recommending discharge for that employee because of his operation of a side business and other conduct.

If an employee fails to show that a forbidden motive played a

part in the employment decision, so as to invoke the *Price Waterhouse* standards for mixed-motive cases, then he can prevail only by making a *prima facie* case of discrimination and then proving that the employer's stated reason for its decision is pretextual, according to the standards of *McDonnell Douglas Corp. v. Green*, 93 S.Ct. 1817 (1973), and *Texas Department of Community Affairs v. Burdine*, 101 S.Ct. 1089 (1981). *Price Waterhouse*, 109 S.Ct. at 1789 n.12. The magistrate judge concluded that Uresti had not made a *prima facie* case of disparate treatment, and additionally that he had not demonstrated that Southwestern Bell's asserted basis for the discharge was pretextual. We consider these to be permissible conclusions based on the evidence as set forth above. *See also Young v. City of Houston*, 906 F.2d 177, 180 (5th Cir. 1990) (an allegation that a supervisor had talked and laughed more with co-workers of her own race than with the plaintiff did not constitute *prima facie* evidence under *McDonnell Douglas*).

Finally, Uresti argues that because he presented "direct evidence" of discrimination, his case should not have been subject to the *McDonnell Douglas* framework, and that instead he was entitled to have the ultimate burden of persuasion shifted to Southwestern Bell. *See Trans World Airlines v. Thurston*, 105 S.Ct. 613, 621-22 (1985); *Lee v. Russell County Board of Education*, 684 F.2d 769, 774 (11th Cir. 1982); *Guillory v. St. Landry Parish Police Jury*, 802 F.2d 822, 824 (5th Cir. 1986), *cert. denied*, 107 S.Ct. 3190 (1987). Uresti's case, however, consists entirely of the type of circumstantial evidence for which the *McDonnell Douglas*

test was designed. The only piece of evidence that conceivably might directly show an improper animusSQthe "dumb Mexican" slur testified to by AlvarezSQwas uttered many years prior to the conduct at issue in this case, was a reference to an employee other than Uresti, and was uttered by a supervisor who was not in charge of Uresti's employment after December 1982.[3] Therefore, it is not even remotely the type of evidence we have indicated might suffice to shift the burden of persuasion, *i.e.*, "direct evidence that racial discrimination was a substantial motivating cause of [the plaintiff's] termination, such as a statement or written document showing discriminatory motive on its face." *Guillory*, 802 F.2d at 824.

Conclusion

Because we find Uresti's contentions unavailing, the judgment below is

AFFIRMED.

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[3] This Court has on at least two occasions declined to decide whether racial remarks, taken alone, can constitute direct evidence of discrimination. *See Young*, 906 F.2d at 180-81; *Kendall v. Block*, 821 F.2d 1142, 1145-46 (5th Cir. 1987). On the closely analogous question of what evidence suffices to discharge the plaintiff's initial burden in a mixed-motives case, however, Justice O'Connor in her concurrence in *Price Waterhouse* indicated that neither stray remarks in the workplace nor statements by persons not involved in the challenged decision would suffice. *Price Waterhouse*, 109 S.Ct. at 1804-05 (O'Connor, J., concurring).