UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-6034
Summary Calendar

GEORGE JOHNSON, JR. and JOHNSON PROGRAMMING SERVICES, INC.,

Plaintiffs-Appellants,

versus

SHELL OIL COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Texas
(CA-H-89-3412)

(December 9, 1992)

Before POLITZ, Chief Judge, WIENER, and DeMOSS, Circuit Judges.

POLITZ, Chief Judge:[*]

George Johnson appeals an adverse jury verdict in his 42 U.S.C. § 1981 suit against Shell Oil Company in which he alleged unlawful racial discrimination. On appeal he challenges the

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

district court's exclusion of evidence of prior discriminatory acts and for precluding his expert's testimony as a discovery sanction. For the reasons assigned we affirm.

Background

Johnson operated a computer service company which provides part-time programmers to companies in the Houston area. This is a highly competitive business and during the last half of the 80's decade over three score such companies inundated the Houston market.

Shell often called on these outside vendors when it faced a particularly burdensome task. It was common for Shell, and other large companies, to use several contractors. Apparently the process by which Shell chose outside programmers was less than well-organized; Shell project leaders would submit requests for part-time help to the personnel department which would recommend a company. In 1986 Mary Titus assumed the responsibility of locating such part-time assistance. Titus used companies on a list provided to her when she assumed the job; she did not know how this list had been compiled.

Titus and members of the personnel department subsequently sought to develop a more structured regimen for selecting programmers. She established a primary and secondary list of programming companies. The list of primary vendors consisted of the four companies having the most contract programmers at Shell at the time. One of these companies was black-owned. Under this

newly devised system, project leaders would submit their request for assistance, specifying the particular objectives of the job and the commensurate characteristics of the part-time programmers. Looking first to the primary list, Titus would invite vendors to submit resumes of their programmers. Titus would review these resumes to find the best match. If there were no suitable candidates on the primary list Titus would use the secondary list in like fashion.

At about this time, Shell voluntarily sought to increase its use of minority-owned agencies. By February of 1988 three more vendors were added to the primary list; two of those, including Johnson, were black-owned.

Johnson's company responded to seven requests for programmers. In all but one of those instances, the person responsible for choosing the programmer(s) was not aware of Johnson's race. Juan Hidalgo, a contract programmer submitted by Johnson, was interviewed for two projects. Arlene Shepherd, who happens to be black and a "team leader" responsible for selecting the programmers, conducted one of those interviews. Shepherd did not hire Hidalgo; she hired Fennis Wilson, black, whom she felt to be more qualified than Hidalgo. Cindy Lura also interviewed Hidalgo but choose to hire other programmers, one of whom was black.

In March of 1988, after Shell learned from a story in the Houston Chronicle that Johnson had been convicted of tax fraud, he was removed from the list. This suit followed.

Analysis

Johnson argues on appeal that the district court committed reversible error by excluding evidence of Shell's alleged history of discrimination against him despite the staleness of that alleged prior discrimination. The district court granted Shell's request for an **in limine** order prohibiting Johnson's introduction of acts of discrimination which occurred before the two-year statute of limitations. Shell's motion was grounded in Federal Rule of Evidence 403.

The only evidence excluded by the order consisted of Johnson's own testimony about events in 1979. In his narrative offer of proof, Johnson claimed that he would have established that within a year after he first contacted Shell in 1979, Shell hired one of his programmers but subsequently refused to hire more after Johnson came on-site with the programmer. The reason given was that he had placed the programmer with another firm, making him unavailable when Shell asked for his return. Johnson now claims that this explanation was pretextual and that the refusal to use his services in 1979 resulted from Shell's discovering that he was black.

Exclusion of evidence warrants reversal only if it affects a substantial right of the proponent.[1] After reviewing the record, we conclude that the disputed evidence could not have supported a jury verdict in Johnson's favor. Accordingly, the error, if any, was harmless.

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[1] **Munn v. Algee**, 924 F.2d 568 (5th Cir.), cert. denied, _____ U.S. _____, 112 S.Ct. 277 (1991).

The uncontroverted evidence establishes that individuals at Shell who were aware of Johnson's race gave him a substantial benefit because he was black: they placed him on the primary list of programming companies and submitted to him a number of work requests. Such work requests were submitted as recently as a month before the Houston Chronicle reported Johnson's fraud conviction. Evidence from nearly a decade earlier that different personnel stopped hiring Johnson's programmers after he came on site will not support a finding that Shell's proffered rationale for taking Johnson off the programmer's list in 1988 -- the fraud conviction -- is pretextual.

Based on the record before us, we are convinced beyond peradventure that no reasonable juror could have found discrimination with or without the excluded evidence. Johnson's contention to the contrary is totally without merit. Because of this holding, we do not reach the issue of damages and need not consider the expert witness issue.

The judgment is AFFIRMED.