IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-6065

RONALD HARRIS,

Plaintiff-Appellant,
Cross-Appellee,

VERSUS

AT & T INFORMATION SYSTEMS, INC.,

Defendant-Appellee,
Cross-Appellant.

Appeals from the United States District Court
for the Southern District of Texas
(CA 88 2307)

(January 27, 1993)

Before REAVLEY, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Ronald Harris sued his employer, AT & T Information Systems, Inc. ("AT & T"), claiming that AT & T terminated him because he is black. The district court found for Harris and awarded him $87,464.01 in damages. Harris appeals the judgment, seeking

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[*] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

further relief. AT & T cross-appeals the determination of liability. Finding that the district court's decision was not clearly erroneous, we affirm the judgment in all respects, except that we reduce the attorneys' fees the district court awarded Harris to pursue this appeal.

I.

Harris started to work for Southwestern Bell in 1975. He became an account executive ("AE") in 1981. In 1984, he became an AE in AT & T's Houston General Business Systems Office. An AE is a salesman responsible for selling AT & T equipment to various customers. An AE's sales territories are defined by postal zip codes, and his compensation consists of a salary, plus commissions based upon telephone and computer sales.

In March 1985, Laurene Breitkreutz (known as "Breit") became Harris's sales manager. Breit's immediate supervisor was Clayton Clements, the branch manager. Shortly after Breit took over, she placed Harris, Ron Gorelick (a white male), and Lindy Stumberg (a white female) on termination warning for failure to meet sales quotas.

Although Breit subsequently fired Stumberg, she took Gorelick off termination warning after he reached his year-to-date quota in July 1986. Harris reached his year-to-date quota in August, yet Breit extended his termination warning through March 1986. In October 1985, Breit restructured sales territories in order, she claimed, to "shake things up" and increase sales. This restructur-

ing had the effect of removing thirty-six zip code territories from Harris's responsibility.

In mid-1986, a controversy arose involving the 1986 compensation plan. Breit held a meeting to explain the plan to her AE's.[1] The 1986 plan apparently differed slightly from the 1985 plan in that the new plan seems to have required active involvement by an AE in a sale to a Value Added Reseller ("VAR")[2] in order for the AE to receive a commission on that sale. The plan required an AE to document the sale of AT & T equipment within his sales territory by obtaining invoices on sales of equipment from the VAR. An AE received referral credit once AT & T headquarters obtained the invoice information.

In June 1986, Harris filed twenty-two requests for referral credits based upon invoices he had received from sales of computers made by a Softec store in Harris's sales territory. Harris received $758.20 in commissions for these referrals.[3]

In August 1986, branch manager Clements, suspicious of the large number of referral credits from one AE, sent out a memorandum requesting AE's to disclose any potential irregularities in their

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[1] Several witnesses, including Janice Hale, testified that Breit informed them that no direct referral requirement existed in order to receive a referral credit. Some AT&T witnesses, including Ron Gorelick, on the other hand, testified that Breit never informed her AE's that they could receive referral credits for customers they had not directly referred to a dealer.

[2] A VAR sells software and service in addition to hardware.

[3] Harris claims that his understanding of the 1986 plan led him to believe he was entitled to claim these referrals despite not having directly referred the customer to Softec. Several witnesses testified that based upon Breit's initial explanation of the new policy, they understood that they did not have to make a direct referral to a VAR in order to receive credit for a referral. AT & T disputes this.

claims for credits. On September 3, 1986, Harris sent a memo to Breit requesting that she obtain a branch ruling on his twenty-two referrals. Later in September, Clements, believing that Harris had claimed compensation to which he was not entitled, requested an AT & T security investigation of Harris's referrals.

Just at this time, Harris started suffering from a stress disorder and took a lengthy leave of absence, whereupon AT & T suspended the security investigation. When Harris returned to work at the end of October 1987, AT & T re-opened its investigation. On November 4, 1987, Clements terminated Harris, alleging that he improperly had requested referral credits for sales of computers in which he was not directly involved.

On November 17, 1987, Harris filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), which issued a right-to-sue letter; Harris brought suit under title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 et seq., against AT & T in federal district court in 1988. The case was tried to the court without a jury in August 1991. The district court entered judgment in favor of Harris on August 30, 1991.

The district court based its decision upon several findings of fact. First, the court found that the "disparate treatment of Harris with regard to termination warnings, coupled with the rearrangement of zip code territories, resulted from decisions made on the basis of subjective criteria. Those decisions related directly to Harris's race." Next, the court found that Breit instructed her AE's that they could receive credit for referrals on

sales of AT & T equipment by VAR's within their zip code territories.

The court further found that Harris had processed the twenty-two referral credits based "on a good-faith belief that he was following proper procedure as outlined by Breitkreut." The court noted that when another of Breit's AE's, Karen Wooldridge, a white female, had filed three referral credits with "at least one of the indicia upon which Harris's investigation was based," AT & T did not initiate an investigation of Wooldridge.

The court also pointed out that another internal investigation of an AE, Linda Jacobs, a white female, in AT & T's Dallas-Fort Worth branch yielded a different interpretation of the 1986 compensation plan)) an interpretation that did not lead to the termination of Jacobs, even though she did not directly refer customers on whose invoices she claimed referral credits. The court determined that AT & T had decided to investigate and discharge Harris because of his race and that AT & T's stated basis for the termination)) violation of the 1986 compensation plan)) was merely a pretext for race-based discrimination.

The court awarded Harris damages of $87,464.01, representing $4,600 per month for eighteen months from the time of his termination, plus $4,664.01 in health insurance benefits. Because of the potential for future hostility in the workplace, the court refused to reinstate Harris. The court also refused to order full back pay or future lost wages and noted that any additional lost wages would be offset by Harris's failure to mitigate. The court also awarded

Harris prejudgment interest and attorneys' fees; additional, potential attorneys' fees of $25,000 if AT & T unsuccessfully appealed; and $10,000 if AT & T eventually unsuccessfully sought review in the Supreme Court.

Harris now appeals only the portion of the district court judgment that declines to order reinstatement, full back pay, or future lost wages. AT & T cross-appeals the court's finding of liability.

II.

The Supreme Court laid out the basic framework to use in evaluating a title VII discrimination claim in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). First, the plaintiff must establish a prima facie case of racial discrimination by showing that he belongs to a minority group, that he was qualified for his job, and that he was subjected to adverse employment action. Id. Once he makes this showing, the employer must rebut the presumption of illegal discrimination by articulating a legitimate, nondiscriminatory reason for terminating the employee. Id. In Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981), the Court went on to require the plaintiff to show that the employer's proffered reason for discharge was but a pretext for a racially motivated discharge. The plaintiff wins his case if he shows that the employer's proffered reason is "unworthy of credence." Id.

Although we have declared that the need for a trial court

stringently to follow the McDonnell Douglas analysis is limited,[4] the district court in this case tracked the title VII inquiry under the McDonnell Douglas framework. It determined that Harris had made out a prima facie case of discrimination by showing that he was a member of a protected group, that he was qualified for the position from which he was fired, and that he suffered adverse employment action in the form of extended placement on termination warning, reduction of his sales territories, and investigation and eventual termination for his violation of AT & T policy.

The court then found that AT & T failed the second part of the analysis because it did not articulate a legitimate business reason for extending Harris's termination warning. The court said that the proffered legitimate business reason)) to bring Harris up to 100 percent of his year-to-date quota by the end of 1985)) was not supported by the evidence, as Harris reached 100 percent of his quota by August 1985.

In addition, the court determined that although AT & T presented a legitimate business reason for the investigation and termination of Harris, the stated reason was a pretext for discrimination. The court found pretext because (1) a white female AE engaged in behavior similar to Harris's without being fired;

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[4] See Lyford v. Schilling, 750 F.2d 1341, 1345 (5th Cir. 1985) (per curiam). There, we stated that the duty of the district court was simply to "decide whether plaintiff has proved by a preponderance of the evidence that defendant violated Title VII by intentionally discriminating against her." Id. at 1344. We based this standard upon United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714-15, where the Court said that once the defendant offers a reason for the discharge and the factfinder searches for discriminatory intent, the McDonnell "presumption `drops from the case.'" (Citation omitted.)

(2) Breit's statements led Harris to act as he did; (3) AT & T's investigation was inadequate; and (4) the 1986 compensation plan was not interpreted uniformly throughout all AT & T branches.

We review a district court's decision in a title VII discrimination suit under the clearly-erroneous standard. Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982). We may not set aside a district court's findings of fact, including a finding of discriminatory purpose in an employer's termination of an employee, unless that finding is clearly erroneous. In Lyford, 750 F.2d at 1344, we quoted United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948), to emphasize that "`[a] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.'"

III.

In the case at hand, although we may not have evaluated the evidence in the same manner as did the district court, and even may not have reached the same conclusions, we do not find that the district court's findings reached the level of clearly erroneous. Evidence in the record supports the conclusions that the district court drew, and we cannot firmly state that a mistake has been made.

A.

The district court's initial finding that AT & T offered no

legitimate business reasons for its extension of Harris's termination warning and reduction of his sales territories was not clearly erroneous. The record shows that while Breit took Gorelick, a white AE, off termination warning when he reached 100 percent of his year-to-date sales quota, Breit extended Harris's termination warning when he reached 100 percent. Harris claimed this showed disparate treatment based upon race; AT & T maintained that it kept Harris on warning to help improve his sales skills. The district court weighed the evidence and found disparate treatment. We cannot say that the district court's conclusion was clearly erroneous.

B.

Additionally, Harris alleged that Breit reduced his sales territory, while he was on termination warning, because of racial animosity. AT & T countered that Breit changed Harris's sales territory to get different AE's into new territories in order to increase sales. The district court, faced with conflicting explanations, believed that AT & T's actions showed a discriminatory motive. Once again, although we might not have reached the same conclusion, we do not believe the district court's finding was clearly erroneous.

C.

Most important to the district court's judgment was its determination that AT & T's stated reason for discharging Harris))

violation of the 1986 compensation plan with respect to referral credits)) was a pretext for race-based discriminatory acts. First, the court found that AT & T treated Karen Wooldridge, a white female AE, differently from Harris, because she was not investigated even though she apparently had done similar things as Harris had with some of her invoices. Harris claims that Wooldridge dated her referrals two months after the date of sale and got one referral for a sale to an individual outside of her proper sales channel.

Although these irregularities might have violated the 1986 compensation plan, they did not lead to an investigation of Wooldridge. By contrast, AT & T strictly construed the plan against Harris and investigated him. AT & T responds that there was no reason to investigate Wooldridge because she had but three referrals versus Harris's twenty-two.

The district court found that AT & T did not apply its policy uniformly to all employees. It apparently felt that AT & T's choosing to investigate Harris for questionable referrals and refusing to investigate a white female AE, who also had questionable referrals, were part of a pattern of discrimination.

Second, the district court found that Breit's statements led Harris to file the referrals as he did. Harris claims that he filed the referrals, even though he had not personally referred the sales from the Softec store, in the good-faith belief that he was following the policy that Breit had outlined at a meeting. AT & T counters that no other AE thought it legitimate to claim the type

of commission that Harris did and that Breit testified that she never made the statements upon which Harris claimed he had relied. The district court believed Harris. Our role as a reviewing court compels us to accept the district court's credibility decisions unless they are clearly erroneous. We do not find the district court's decision to reach that level.

Next, the district court found problems with the way AT & T handled its investigation of Harris. The court did not think that AT & T interviewed enough witnesses who might have supported Harris's version. AT & T retorts that the people the court thought should have been interviewed no longer worked for AT & T and that the people actually interviewed knew enough to inform the AT & T investigators. In addition, AT & T claims that these potential witnesses, when they testified for Harris at trial, were biased.

The determination of witnesses' credibility is the province of the trial court, and we shall not disturb such determinations lightly. Kendall v. Black, 821 F.2d 1142, 1146 (5th Cir. 1987). We do not find this an instance where the district court's determination was clearly erroneous.

Finally, the district court based its finding that AT & T's proffered business reason was pretextual upon its understanding that the plan was not uniformly interpreted throughout AT & T. Harris contends that Linda Jacobs, a white female AE from AT & T's Dallas-Fort Worth office, engaged in behavior substantially similar to Harris's, yet she was not terminated. Despite the fact that she did not personally refer all of the customers from whom she

received referrals, she continued to work for AT & T because her branch decided that no written policy existed that would have let her know her behavior was unacceptable. AT & T responds first that Jacobs's activity was not the same as Harris's because Jacobs did actually work closely with the store from which she claimed referrals, and second, she was not similarly situated to Harris because she worked in a different city under a different supervisor.

The district court heard both sides' evidence and concluded that Jacobs behaved similarly to Harris yet was not terminated. The record provides enough evidence to support this finding. Jacobs testified that the 1986 compensation plan that affected Harris was identical to the plan under which she filed her referrals. She additionally testified that while she, like Harris, did not actively participate in about nineteen referrals, and while AT & T investigated her as well, she was not terminated. In fact, she was promoted to sales manager. The district court's conclusion, based upon evidence in the record, was not clearly erroneous.[5]

Based upon our review of the record, we do not believe the

[5] As for AT & T's argument that the two were not similarly situated because they worked in different offices under different supervisors, AT & T cites no case showing that to be situated similarly means both employers must work in the same office. It does cite Jones v. Gerwins, 874 F.2d 1534, 1541 (11th Cir. 1989), where the court held that different supervisors' treating workers differently did not necessarily amount to racial discrimination, absent a showing of selective enforcement within the employ of each supervisor. Jones is inapposite to the instant case because it is limited to group treatment by a supervisor)) here, Harris claims that he, as a black AE, was treated differently from other Houston AE's)) and AT & T does not show that all AE's in Houston were treated equally harshly while all Dallas AE's were treated equally leniently.

district court's finding that AT & T terminated Harris because of his race was clearly erroneous. There is evidence in the record that tends to show that AT & T treated Harris disparately with regard to the rearrangement of sales territories, extension of termination warnings, and his eventual termination. Even if we may feel that two permissible views of the evidence exist, the district court's choice between them was not clearly erroneous.

III.

Harris initiated this appeal claiming that the district court abused its discretion in limiting Harris's award to $4,600 per month for eighteen months, plus benefits. Harris now urges us to award him full back pay, future damages, and, perhaps, reinstatement. We refuse.

The relevant portion of title VII governing awards of back pay and reinstatement is 42 U.S.C. § 2000e-5(g)(1), which reads in relevant part as follows:

> (g) Relief available
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> > (1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the

back pay otherwise allowable.

The plain language indicates, through the use of the word "may," that the court has discretion in fashioning a remedy. Unless the reviewing court finds that the district court abused its discretion, it will uphold the award. Johnson v. Chapel Hill Indep. School Dist., 853 F.2d 375, 382 (5th Cir. 1988). See also Garza v. Brownsville Indep. School Dist., 700 F.2d 253, 255 (5th Cir. 1983).

"A successful title VII plaintiff is entitled to back pay, subject to a statutory duty to minimize his damages." Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1598 (5th Cir. 1989), cert. denied, 493 U.S. 1019 (1990). The language of section 2000e-5(g)(1) requires that a plaintiff must use reasonable diligence to find other employment. The district court determined that Harris was entitled to eighteen months of back pay, but no more, because of a failure to offset past the eighteen-month point.

Harris argues that he searched diligently for a new job. He sought assistance from the Texas Employment Commission, engaged a "headhunter," used a professional resume service, attended an employment fair, and contacted numerous friends and acquaintances about job openings. He seems to have submitted his resume to fifty-six firms in the three years after his termination. At one point, Harris found employment as a pocket pager salesman; he quit this job to pursue a better one. These efforts, Harris contends, constitute reasonable diligence such that the district court erred in finding that Harris should have obtained employment within

eighteen months of his termination.

AT & T responds that Harris did not adequately seek new employment. It provided testimony at trial in the form of an expert witness in the area of job searches. This witness testified that Harris could have found a job paying $40,000 to $50,000 per year in two to four months. He concluded that Harris's job search was far from diligent.

We do not find that the district court abused its discretion in limiting Harris's award to eighteen months. Even if back pay is a favored remedy under our caselaw, the trial court did not violate this principle by cutting off the award after a year and a half. Sufficient evidence in the record supports the district court's determination of Harris's award.

Additionally, Harris contests the district court's refusal to reinstate him. The district court refused because it found that a likelihood exists of continuing antagonism or hostility between Harris and AT & T. Harris points out that reinstatement is the preferred remedy to avoid lost future earnings.

In Deloach v. Delchamps, Inc., 897 F.2d 815, 822 (5th Cir. 1990), we did state that "[r]einstatement is generally the preferred remedy for a discriminatory discharge." We went on, however, to note that when reinstatement is not a realistic alternative, it is not required. Id. The language of 42 U.S.C. § 2000e-5(g)(1) also merely suggests reinstatement as a possible remedy; it does not require it.

Harris contends that the district court erred in finding

potential hostility to exist, because new managers are in place at AT & T's Houston office. AT & T responds that the potential for continuing hostility at AT & T remains high because of this suit and another charge of retaliatory discrimination that Harris has filed with the EEOC against AT & T for refusing to re-hire him when he applied for a position in 1991. In any event, since neither title VII nor our caselaw mandates reinstatement, we do not find that the district court abused its discretion in refusing to order reinstatement.

As a final matter, AT & T asks us to determine that it is not liable for the district court's award of $25,000 to Harris if AT & T unsuccessfully appeals to us. The district court's final judgment reads, "Should AT & T unsuccessfully appeal the judgment to the United States Court of Appeals for the Fifth Circuit, Harris shall recover from AT & T additional attorneys' fees and costs in the amount of $25,000." AT & T argues that because it did not instigate this appeal, it should not be liable for this amount.

We agree, in part. Harris did initiate this appeal, although he limited his appeal to the issue of the district court's award of damages. AT & T cross-appeals the judgment of liability. We find that the district court erred in awarding Harris $25,000 in potential attorneys' fees. This amount is excessive because Harris commenced this appeal. We therefore reduce the award and hold that Harris shall recover only $12,500 from AT & T for attorneys' fees for this appeal. Each party shall bear its own costs on appeal.

IV.

In summary, we find that the district court's determination that AT & T terminated Harris because of his race was not clearly erroneous. We further find that the district court did not abuse its discretion in awarding $87,464.01 to Harris in damages. We do, however, reduce the district court's award of attorneys' fees to Harris from $25,000 to $12,500. The judgment of the district court accordingly is AFFIRMED as so modified.