UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-2173

INNOCENT C. DURU,

Plaintiff-Appellant,
Cross-Appellee,

VERSUS

CITY OF HOUSTON, ET AL,

Defendants-Appellees,

E.R. CHOVANEC, ETC.,

Defendant-Appellee,
Cross-Appellant.

Appeals from the United States District Court
for the Southern District of Texas
(CA H 85-6182)

(July 22, 1994)

Before ALDISERT,[1] REYNALDO G. GARZA, and DUHÉ, Circuit Judges.

DUHÉ, Circuit Judge:[2]

Innocent Duru, alleging numerous civil rights violations, sued his employer, the City of Houston Fire Department, and various City officials and employees. The district court entered judgment against Edward Chovanec, Duru's supervisor, on Duru's racially hostile work environment claim brought under Title VII of the Civil

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[1] Circuit Judge of the Third Circuit, sitting by designation.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Rights Act of 1964 and 42 U.S.C. § 1983. Both Duru and Chovanec appeal. Finding no reversible error, we affirm.

BACKGROUND

Innocent Duru, a Nigerian national, sued the City of Houston Fire Department (the "City") (his employer), and various City officials and employees, including Edward Chovanec (his supervisor) and Robert Bell (his co-worker), claiming race or national origin discrimination under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §§ 1981 and 1983. Specifically, Duru claimed that the defendants discriminated against him in the following ways: forced him to work in a hostile environment; denied him a promotion; retaliated against him for filing an EEOC complaint; and subjected him to disparate treatment in training, work assignments, evaluations, and promotions. Additionally, he claimed conspiracy to interfere with his civil rights under 42 U.S.C. §§ 1985 and 1986 and intentional infliction of emotional distress under state law. Duru sought injunctive relief, backpay, lost benefits, compensatory damages for emotional distress and mental anguish, and punitive damages.

Duru's Title VII claims were tried to the court and his other claims were tried to a jury. The court found Chovanec and Bell liable under Title VII, but made no finding as to damages or injunctive relief. The jury found Chovanec and Bell liable on Duru's hostile work environment claim and directed them to pay $500 each. After the entry of judgment in accordance with the Court's

findings and the jury verdict, Duru applied for attorney's fees under 42 U.S.C. § 1988, which the court denied.

On appeal, Duru challenges the court's (1) refusal to find the City vicariously liable for Chovanec's Title VII violations and (2) denial of his application for attorney's fees, under 42 U.S.C. § 1988, from Chovanec.[3] Chovanec cross-appeals contending that (1) he is entitled to qualified immunity and (2) there was insufficient evidence to support the judgment against him.

DISCUSSION

I. Section 1983

A. Qualified Immunity

Chovanec's first contention is that the district court should have granted his motion for judgment as a matter of law because he is qualifiedly immune from Duru's hostile work environment claim.[4] A public official is immune from § 1983 liability unless it is shown that, at the time of the incident, he violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Anderson v. Creighton, 483 U.S. 635, 639 (1987). To be clearly established "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. at 640. "The term 'clearly established' does not necessarily refer

[3] Duru has settled his claim against Bell.

[4] Although the qualified immunity defense should be resolved at the earliest possible stage in the litigation, Chovanec has not waived his affirmative defense by failing to seek dismissal on the defense prior to trial. See Spann v. Rainey, 987 F.2d 1110, 1114 (5th Cir. 1993).

to 'commanding precedent' that is 'factually on all-fours with the case at bar,' or that holds the 'very action in question' unlawful." Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443 (5th Cir. 1994)(quoting Jefferson v. Ysleta Indep. Sch. Dist., 817 F.2d 303, 305 (5th Cir. 1987) and Anderson, 483 U.S. at 640), petition for cert filed, 62 U.S.L.W. 3827 (June 1, 1994) (No. 93-1918). Rather, a right is clearly established if "in light of pre-existing law the unlawfulness [is] apparent." Anderson, 483 U.S. at 640.

Duru's racially hostile work environment claim covers the period from 1983 to 1985. In 1983 it was clear that a racially hostile work environment could in itself constitute a Title VII violation. Vaughn v. Pool Offshore Co., etc., 683 F.2d 922, 924 (5th Cir. 1982) (citing Rogers v. EEOC, 454 F.2d 234, 238-39 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972)). This infers that employers, or their agents like Chovanec, could be held liable under Title VII for creating, condoning, or tolerating such an environment. Although this Circuit had not by 1983 had occasion to explicitly state that employers could violate Title VII by condoning or tolerating a racially hostile work environment, other circuits had. See, e.g., Walker v. Ford Motor Co., 684 F.2d 1355, 1358 (11th Cir. 1982) (stating that an employer violates Title VII by creating or condoning a racially hostile work environment); DeGrace v. Rumsfield, 614 F.2d 796, 803 (1st Cir. 1980) (recognizing that "an employer may not stand by and allow an employee to be subjected to a course of racial harassment by co-workers"). Based on our broad holding regarding a racially hostile

work environment and the holdings of other circuits, we conclude that by 1983 it was sufficiently clear that an employer could violate Title VII by creating, condoning, or tolerating a racially hostile work environment. But Chovanec contends that his possible Title VII liability is not relevant to the question of qualified immunity under § 1983. He argues that he cannot lose his qualified immunity unless he violates a clearly established § 1983 right.

Section 1983 broadly remedies violations of federal statutory and constitutional laws. Maine v. Thiboutot, 448 U.S. 1, 4-5 (1980). Our review of the record indicates that Title VII and equal protection were the basis of Duru's § 1983 suit. Because Title VII provided a basis for Duru's § 1983 suit, the violation of Duru's Title VII rights can defeat Chovanec's claim of qualified immunity. See Davis v. Scherer, 468 U.S. 183, 194 n.12 (1984) (stating that officials do not "lose their immunity by violating the clear command of a statute or regulation ... unless that statute or regulation provides the basis for the cause of action sued upon"). See also Whiting v. Jackson State Univ., 616 F.2d 116, 121 (5th Cir. 1980) (stating that when 42 U.S.C. §§ 1981 and 1983 are used as parallel actions with Title VII, successfully establishing a claim under Title VII would also establish a claim under §§ 1981 and 1983).

Alternatively, Chovanec contends that what constituted a racially hostile work environment was not sufficiently defined in 1983. We disagree. In Rogers, this Court set forth the parameters of a hostile work environment claim: the "mere utterance of an

ethnic or racial epithet which engenders offensive feelings in an employee [does not fall] within the proscription" of Title VII but "working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers" are proscribed. Rogers, F.2d at 238. Moreover, in Vaughn, we noted that derogatory remarks would constitute a Title VII violation "'upon attaining an excessive or opprobrious level'" Vaughn, 683 F.2d at 924-25 (citing the district court). Duru proffered substantial evidence that several white co-workers frequently used racial slurs, told racial jokes, and harassed and intimidated him because of his race. Such an atmosphere clearly falls within the parameters of an actionable hostile work environment.

B. Sufficiency of the Evidence

Chovanec contends that the court erred in denying his motion for judgment as a matter of law because the evidence was insufficient to support a verdict against him. In reviewing the court's decision, we must consider all of the evidence, drawing all reasonable inferences in favor of the non-moving party. Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc). We cannot disturb its decision if the record contains substantial evidence tending to fairly support the verdict. Id.

Chovanec argues that there was insufficient evidence to support the jury finding that he knew that Duru's work environment was polluted with racial discrimination and failed to take reasonable remedial action. Contrary to Chovanec's assertions,

there was substantial evidence that Duru was frequently subjected to racial harassment, that Duru complained to Chovanec about the racial harassment on several occasions, that Chovanec himself sometimes told racial jokes, and that Chovanec failed to take prompt and appropriate remedial action.

Additionally, Chovanec argues that the jury's factual findings were insufficient to support a judgment against him. Specifically, the jury found that Chovanec took steps to prevent racial harassment against Duru, but these steps were not reasonable.[5] According to Chovanec, the finding that he took steps, even unreasonable steps, to remedy the racial harassment negates § 1983 liability.

Although Chovanec refers to this argument as a challenge to the sufficiency of the evidence, it is actually a challenge to the jury instructions and interrogatories. Our review of the record reveals that Chovanec did not timely object to the charge or interrogatories. Failure to make such an objection precludes review on appeal unless the error is so fundamental as to result in a miscarriage of justice. Farrar v. Cain, 756 F.2d 1148 (5th Cir. 1985). Chovanec has not even attempted to argue such circumstances permitting our review.

II. Title VII

[5] When asked whether Chovanec took steps to prevent a racially hostile work environment, the jury answered yes. When asked whether Chovanec knew that Duru's work environment was heavily polluted with racial harassment and failed to take reasonable steps to prevent acts of racial harassment against the Duru, the jury answered yes.

Duru contends that because Chovanec, an agent of the City, was found liable under Title VII, the City is vicariously liable for Chovanec's improper acts. He further argues that because the City is vicariously liable, he should receive injunctive relief and attorney's fees from the City. Regardless of whether the City may be vicariously liable for Chovanec's Title VII violations, Duru is not entitled to Title VII remedies.

On the question of liability, the court found Chovanec liable under Title VII. But on the question of damages and injunctive relief, neither the court nor the jury awarded Title VII remedies. The only awards entered by the court were the awards of $500 from Chovanec and $500 from Bell. Our review of the record indicates that these awards were for the emotional and mental distress Duru endured as a result of his hostile work environment. Such damages are recoverable under § 1983, but not Title VII. See Carroll v. Gen. Accident Ins. Co., 891 F.2d 1174, 1177 (5th Cir. 1990). The City cannot be held vicariously liable for attorney's fees and injunctive relief when such relief was never awarded against the agent of the City.

III. Attorney's Fees

Duru claims that because he prevailed on his § 1983 claim against Chovanec, the court must award him attorney's fees under 42 U.S.C. § 1988. Prevailing on a § 1983 claim does not in itself entitle Duru to attorney's fees. Section 1988 provides that the court may award reasonable attorney's fees to a prevailing party. Kichberg v. Feenstra, 708 F.2d 991, 995 (5th. Cir. 1983). We

review the district court's determination of reasonable attorney's fees for abuse of discretion. Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1581 (5th Cir. 1989), cert. denied, 493 U.S. 1019 (1990).

In determining the amount of a reasonable fee award, the most critical factor is the degree of success obtained by the prevailing party. Farrar v. Hobby, 113 S.Ct. 566 (1992). In this case, Duru obtained minimal success. Duru sued Chovanec alleging claims under Title VII, 42 U.S.C. § 1981, 1983, 1985, 1986, and state law and seeking back pay ($19,000 to $36,000), compensatory damages ($50,000), punitive damages ($20,000), and injunctive relief. All that Duru received was a judgment for $500. In light of Duru's minimal success, we conclude that the district court did not abuse its discretion in denying attorney's fees.

CONCLUSION

For the foregoing reasons, the district court's decision is AFFIRMED.