UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4997
Summary Calendar

COYCE D. VINES and CLYDE WILSON,

Plaintiffs-Appellants,

versus

RILEY BEAIRD, A DIVISION OF
UNITED STATES RILEY CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(CA-88-3131)

(December 8, 1993)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:*

Appellants Vines and Wilson contended that their former employer's re-hire policy following a period of significant lay-offs, in which they were caught up, illegally discriminated against older employees. At trial, they alleged both disparate impact and disparate treatment discrimination in violation of the Age Discrimination in Employment Act. The district court ruled against

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

them and refused to grant IFP status on appeal. In this court, they contend that the 1991 amendments to the Civil Rights Act should be applied to their case; that the trial court erroneously interpreted their expert's statistical proof of adverse impact; and the court misapplied the burden of proof for an employer to show a legitimate business reason for disparate treatment. All but the first of appellants' points founder on their unwillingness to secure a transcript of the entire trial. We find no error and affirm.

Beaird Industries has complained that the appellants' brief in this court raises issues that they did not identify to the district court as grounds for an *in forma pauperis* appeal. This complaint is not so significant as the fact that appellants chose not to request a transcript of the entire trial for appeal, confining themselves only to a request for the testimony of their expert witness Dr. Flicker. Appellees requested other specific portions of the trial transcript, but the entire evidentiary record is still not before us. Without a complete transcript, this court is unable to review evidentiary issues on appeal. The ultimate issue in cases of alleged disparate treatment and disparate impact of employer practices is whether illegal discrimination has occurred. Findings of discrimination are findings of fact. Consequently, we cannot review ultimate findings in discrimination cases without a complete trial transcript. F.R.A.P. 10(b)(2). See also Richardson v. Henry, 902 F.2d 414, 415-16 (5th Cir. 1990) ("Rule 10(b)(2) requires an appellant who contends that a finding

or conclusion is unsupported by the evidence to include in the appellate record a transcript of all evidence relevant to that finding or conclusion.")

Applying this principle, we note that appellants' brief discusses at length why they disagree with the district court's finding that they were not subjected to discriminatory treatment by Beaird. We cannot evaluate their complaint without the full evidentiary record and must overrule this point of error.

Second, on the issue of disparate impact, appellants have furnished the testimony of Dr. Richard Flicker, who offered various statistical comparisons that allegedly proved that Beaird's layoff and re-hire policy discriminated against employees over 40. If proof of disparate impact were all that is required for a finding of discrimination, we might be able to perform our appellate function utilizing only Dr. Flicker's testimony.[1] That is not the case, however, because the district court found that Beaird furnished a legitimate, non-discriminatory reason for implementing its policy against rehiring former Beaird employees. Consequently, even if a disparate impact had been shown, the court's additional finding of business justification would shield it from the stigma

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[1] Considering Dr. Flicker's testimony alone, it is hard to disagree with the district court's criticism that he unduly narrowed the scope of his crucial analysis. The court did not err in concluding that the overall company layoff policy was non-age-discriminatory, and the impact of the policy against rehiring former employees, which applied to all who had been laid off, was therefore also not discriminatory. The Sixth Circuit's decision in Abbott v. Federal Forge, Inc., 912 F.2d 867 (6th Cir. 1990), strengthens our conclusion. As the court there noted, the evidence did not show that the company unduly limited the potential pool of applicants over age 40 by enforcing a moratorium on rehires. 912 F.2d at 873-74. So it is here. The Sixth Circuit also held that it is inapt to compare the group of employees hired by the company with the age mix of those laid off. We agree.

of illegality. But, we are precluded from considering the sufficiency of evidence on the court's ultimate finding of no disparate impact discrimination, as we lack a full transcript.

We may, however, review the district court's purely legal conclusion that the Civil Rights Restoration Act of 1991 did not apply retroactively to change the criteria for an ADEA violation in this case. This court has already held that the 1991 Civil Rights Act amendments do not apply retroactively to conduct occurring before the statute passed. Johnson v. Uncle Ben's Inc., 965 F.2d 1363 (5th Cir. 1992), petition for certiorari filed 61 U.S.L.W. 3356 (1992). Appellants' final contention is meritless under the law of this circuit.

For all these reasons, the judgment of the district court is AFFIRMED.