UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-5693
Summary Calendar

John H. Smith, Jr.,

Plaintiff-Appellant,

VERSUS

H. E. Butt Grocery Company,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
SA 91 CV 5

April 27, 1993

Before JOLLY, DUHÉ, AND BARKSDALE, Circuit Judges

PER CURIAM:[1]

Following his resignation, appellant, John H. Smith, Jr., sued Appellee, H. E. Butt Grocery Company ("HEB") his former employer, alleging race and age discrimination and negligent infliction of emotional distress. Smith appeals a summary judgment entered in favor of HEB. We affirm.

Background

Smith worked for HEB as a forklift operator for more than twenty years. Smith worked at a non-standard time job in the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

cigarette section of the grocery warehouse.[2] In 1988, the cigarette operations were relocated and all of the remaining jobs at the grocery warehouse were standard. Because of a prior injury to one of Smith's eyes, he believed that he would be unable to perform a standard time job.

In October 1988, HEB sent Smith to an ophthalmologist who recommended that he not work as a forklift operator. A cataract was detected in one of Smith's eyes and had to be removed. Smith went on disability leave. Smith's doctor ultimately concluded that he should not operate a forklift because of reduced vision and the possibility of further damage to his eye. Smith remained on disability leave from October 1988 until his resignation in July 1990. Apparently, during this time no positions became available for which Smith was qualified, nor did Smith seek any type of retraining to compensate for his injury.

Smith filed a discrimination charge with the Equal Employment Opportunity Commission ("EEOC"). The EEOC determined that no probable cause existed to believe that race or age discrimination had occurred. Smith then filed suit in federal district court alleging unlawful race and age discrimination and negligent infliction of emotional distress. In June 1991, HEB filed a motion for summary judgment on all claims. At a pretrial conference, in October 1991, the district court dismissed the claim for negligent infliction of emotional distress and denied

[2] A non-standard time job had no requirement that the job be completed within a certain time period, whereas a standard time job had to be completed in a specified period of time.

Defendant's Motion for Summary Judgment as to the discrimination claims.

The case was set for trial several times but was continued each time. After an attempt at court ordered mediation, HEB filed a motion requesting reconsideration of its prior motion for summary judgment. Smith responded to HEB's motion, and HEB submitted a short letter reply to the court on September 9, 1992. A copy of that letter was served by mail on Smith's counsel. In October, HEB sent another letter to the court again urging it to consider the pending Motion for Reconsideration. This letter was also served on Smith's counsel.

On October 5, the court reconsidered HEB's Motion for Summary Judgment, granted it and dismissed the case. The basis for the court's decision was that no genuine issue of material fact existed concerning whether Smith had demonstrated a prima facie case of unlawful race or age discrimination. Judgment was entered for HEB that same day.

Discussion

Smith first argues that the court erred by reconsidering HEB's Motion for Summary Judgment. Next, he argues that the court erred in granting summary judgment in HEB's favor. We disagree.

I. Motion for Reconsideration.

Smith complains that the trial court erred in reconsidering the Motion for Summary Judgment because there was no new law or facts that would warrant changing the previous ruling. He also

contends that granting the Motion for Reconsideration was particularly abusive in light of two "ex parte" communications the court received from HEB's counsel. These arguments are meritless.

The two letters sent to the court by HEB's counsel did not constitute ex parte communications. Smith cites no authority for his argument. Both letters were sent to Smith's counsel at the same time they were sent to the court. Smith's counsel concedes he received both letters. Because all parties received copies of the communications with the court, the letters are not considered ex parte.

Smith argues that the court may not reconsider a prior ruling on a motion for summary judgment unless there is a change in the law or additional facts. The law in this Circuit, however, states that because the denial of a motion for summary judgment is an interlocutory order, the court is free to reconsider and reverse its decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the law. Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 184-85 (5th Cir. 1990); Bon Air Hotel v. Time, Inc., 426 F.2d 858, 862 (5th Cir. 1970); Fed. R. Civ. P. 54(b). Therefore, we conclude that the district court did not abuse its discretion in granting the Motion for Reconsideration.

II. Motion for Summary Judgment.

Summary judgment is appropriate if the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In reviewing the summary judgment, we apply the same standard of review as did the district court. Waltman v. International Paper Co., 875 F.2d 468, 474 (5th Cir. 1989); Moore v. Mississippi Valley State Univ., 871 F.2d 545, 548 (5th Cir. 1989). The pleadings, depositions, admissions, and answers to interrogatories, together with affidavits, must demonstrate that no genuine issue of material fact remains. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). To that end we must "review the facts drawing all inferences most favorable to the party opposing the motion." Reid v. State Farm Mut. Auto. Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986). If the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); see Boeing Co. v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc).

Smith argues that the court failed to apply the summary judgment burden properly, and that the court failed to consider "any and all" of Smith's summary judgment proof. He contends that he established, for summary judgment purposes, age and race discrimination as required by McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Aside from these vague allegations of error, Smith points to no evidence in the record to support this claim. Based on our review of the record, we found no evidence creating a genuine issue as to any material fact and conclude that HEB is entitled to a judgment as a matter of law.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.