

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 92-8503  
Summary Calendar

---

MILTON D. NOWLIN,

Plaintiff-Appellant,

versus

ANTHONY M. FRANK,  
Postmaster General, ET al.,

Defendants-Appellees.

---

Appeal from the United States District Court for the  
Western District of Texas  
A 89 CV 988

---

( May 12, 1993 )

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:\*

Milton D. Nowlin was, at the time of his discharge, a twenty-four year employee of the United States Postal Service. He had a long record of disciplinary actions taken against him, including a suspension without pay for threatening violence. He was discharged from his employment after he told his supervisor that he would go

---

\*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 Pursuant to that Rule, the court has determined that this opinion should not be published.

home, get a gun, and come back to the post office to take out his frustrations. The Postal Service had a written policy that threats of violence toward another employee could be just cause for termination. Nowlin filed suit against the Postmaster General, alleging that he was terminated in violation of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791 et seq., and Title VII, 42 U.S.C. § 2000e-16. As the bases of his claims, Nowlin indicated age, disability, and reprisal. Following a bench trial, the district court entered judgment in favor of the Postmaster General, and Nowlin appeals. Finding that Nowlin's issues raised on appeal are completely without merit, we affirm the decision of the district court.

I

The facts leading up to Nowlin's discharge are as follows: In October of 1987, Nowlin's supervisor informed him that he had 104 hours of leave that he needed to use before the end of the year. Nowlin requested three weeks leave in December. The National Agreement between postal workers and management prohibits extended periods of leave in December; however, incidental leave for short periods, usually one or two days, is permitted provided the proper form is filed. Nowlin's request for leave was denied. Nowlin learned on Friday, December 18, 1987, that his supervisor had granted incidental leave to an employee with junior status. Nowlin became very angry, but his supervisor explained that the other employee had filed the appropriate form for incidental leave and he

had not. Nowlin then filled out an incidental leave form and took it to his supervisor. He placed the form on the supervisor's desk and twice demanded that he sign it; when the supervisor did not, Nowlin became even more upset, threw the form on the supervisor's desk, and left the building. Nowlin had not received authorization to leave his shift and left the post office shorthanded.

Nowlin did not report to work the following Monday, and his wife called his supervisor to report that he was sick. Nowlin's supervisor told her that he needed to bring a doctor's excuse explaining his absences on Friday and Monday. Nowlin returned to work the next day, December 22, 1987, and brought a medical excuse that stated that he was unable to work on Friday and Monday and that he had seen the doctor on Monday. Nowlin's supervisor accepted the excuse for the Monday absence but not the Friday absence because the excuse did not state that Nowlin had seen a doctor on that date. Nowlin became very angry, and the supervisor instructed him to go back to work and they would reconsider the issue.

The next day, December 23, 1987, Nowlin arrived fifteen minutes late for work and was upset. Soon thereafter, his supervisor informed him that his medical excuse for Friday was unacceptable. Nowlin became very angry and asked to speak with the union steward. Nowlin's supervisor contacted the union office and Nowlin was told the steward would notify him when he was available. To this Nowlin angrily asked if the supervisor wanted him to go

home and get a gun and come back to the office and take out his frustrations. This was not the first time Nowlin had discussed weapons with his supervisor, who knew Nowlin was an accomplished marksman. Several months earlier, following the incident in which a disgruntled postal employee shot several people and which was the subject of a memorandum, Nowlin told his supervisor that if he ever did anything like that, he would not shoot randomly but would make sure he got who he wanted. Nowlin's supervisor therefore took his threat seriously and called her supervisor immediately, who called the acting postmaster. Nowlin was called in for an immediate pre-disciplinary hearing to determine if he had made the statement and to give him an opportunity to explain. Nowlin admitted making the comment, but stated that he meant he was going to come back and shoot himself, not any other employees. Nowlin was placed on emergency suspension, which was thirty days administrative leave without pay.

On December 24, 1987, Nowlin received a letter informing him that he had been placed on an off-duty without pay status for making threats of violence, which was to continue until further notice. On January 7, 1988, Nowlin received a letter informing him that he would be removed from the Postal Service thirty days from receipt of the letter, an act precipitated by Nowlin's threats of violence.

## II

On April 8, 1988, Nowlin filed a formal complaint with the Equal Employment Opportunity Commission (EEOC) alleging that his proposed termination was based on his alleged handicap, sleep apnea.<sup>1</sup> On September 28, 1988, the EEOC found that Nowlin had not been a victim of discrimination and notified him of his right to file a civil action.

On November 6, 1989, Nowlin filed an action pro se claiming that his discharge from the Postal Service was in violation of Title VII, 42 U.S.C. § 2000e-16, and the Rehabilitation Act of 1973, 29 U.S.C. § 791 et seq., as amended. He also alleged that similarly situated employees were not fired. Nowlin filed a second pro se action on January 24, 1990, in which he alleged that postal supervisors made discriminatory remarks on his disability retirement application. The two cases were consolidated and tried before the district court on May 29, 1992. The district court entered judgment in favor of the Postmaster General on July 21, 1992. Nowlin appeals.

## III

Nowlin's pro se brief fails to state succinctly the issues he is raising on appeal. From Nowlin's four-page narrative statement of the issues, it appears that the following points are being

---

<sup>1</sup>Nowlin had previously been reprimanded for sleeping on the job, which he blamed on a sleeping disorder, sleep apnea. He had also asserted this malady as the basis for his application for disability retirement, which earlier had been denied.

argued by him: (1) the district court erred by denying his request for appointment of counsel; (2) the district court erred by concluding that it lacked jurisdiction over his disability retirement claims; and (3) he was unaware of his option for a jury trial and would not have knowingly waived his right to a jury trial.

The Postmaster General addresses two of these issues: (1) whether the district court abused its discretion by denying Nowlin's request for appointment of counsel and (2) whether the district court properly concluded that it lacked jurisdiction over Nowlin's disability claims. To these the Postmaster General adds yet another issue: Whether the district court erred in finding that the legitimate, nondiscriminatory reason given by the Postal Service for discharging Nowlin was credible. Because we read pro se briefs liberally, we will address each of these issues seriatim. We hold as follows.

#### IV

##### A

The district court did not abuse its discretion in denying Nowlin's request for appointment of counsel. Before denying Nowlin's request for counsel, the district court had considered the Postmaster General's motion to dismiss or alternatively for summary judgment and the supporting memorandum; therefore, the district court was familiar with the merits of Nowlin's case. The district court also had before it evidence of Nowlin's financial ability to

retain counsel: His total monthly income was \$7,066.67, and his estimated monthly expenses were \$6,343.40. Even if the district court failed to consider Nowlin's efforts to obtain counsel, these two factors weigh against the appointment of counsel.

B

The district court correctly determined that it lacked jurisdiction over Nowlin's claim for disability retirement. Applications for civil service disability retirement are determined by the Office of Personnel Management (OPM). 5 U.S.C. § 8347. Determinations by the OPM are appealable only to the Merit Systems Protection Board (MSPB). 5 U.S.C. § 8347(d)(1). Review of an MSPB order involving a disability retirement claim is "explicitly encompassed in the Federal Circuit's jurisdiction." Lindahl v. OPM, 470 U.S. 768, 797, 105 S.Ct. 1620, 1636, 84 L.Ed.2d 674 (1985).

C

Nowlin knowingly waived his right to a jury trial. Nowlin argues that he was unaware of his right to a jury trial and that he would not have waived such a right. The right of jury trial is fundamental, and courts indulge every reasonable presumption against waiver. Wauhop v. Allied Humble Bank, N.A., 926 F.2d 454, 455 (5th Cir. 1991). We have nothing before us to indicate that Nowlin was not apprised of his right to a jury trial, and he apparently proceeded with the bench trial without objection. "Failure to object to the submission of a case to the judge instead

of a jury usually waives the right to a jury trial." Allen v. Barnes Hosp., 721 F.2d 643, 644 (8th Cir. 1983); see also Southland Reship, Inc. v. Flegel, 534 F.2d 639, 644 (5th Cir. 1976) (presenting evidence to court and submitting findings of fact and conclusions of law represent acquiescence to trial without jury). Nowlin has failed to provide us any information that would lead to any conclusion other than that he knowingly waived his right to a jury.

D

The district court correctly found that Nowlin was discharged because he made an intolerable threat of violence. Nowlin has failed to include in the record on appeal a transcript of the trial before the district court; nevertheless, we have no trouble concluding from the facts presented in Nowlin's own brief that the district court's findings are clearly supported. Nowlin admits that he made a threat to his supervisor on December 23, 1987, that he would go home, get a gun, and come back to the post office to take out his frustrations. Nowlin had previously indicated that if he were to begin shooting people, he would not shoot randomly but would seek out specific people. The Postal Service had a clearly defined policy that threats of violence directed toward postal employees could be just cause for removal.



V

In conclusion, we find that the arguments raised by Nowlin on appeal are completely without merit. Accordingly, the decision of the district court is

A F F I R M E D.