UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2424
Summary Calendar

CURLEY J. McQUEEN,

Plaintiff-Appellant,

versus

EXXON COMPANY USA,
a/k/a Exxon Company Baytown Refinery,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 91 3028)

(November 30, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Curley J. McQueen appeals the adverse summary judgment on his employment discrimination claim against Exxon Company, U.S.A. We **AFFIRM**.

I.

McQueen filed suit against Exxon in October 1991, alleging sex discrimination in violation of Title VII of the Civil Rights Act of

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 Pursuant to that rule, the court has determined that this opinion should not be published.

1964, 42 U.S.C. § 2000e, *et seq.*[2] After Exxon moved for summary judgment, McQueen did not file a response or opposition. The magistrate judge recommended that judgment be granted. Although McQueen's objections to the magistrate judge's recommendation were untimely, the district court nevertheless considered and overruled them, adopting the recommendation.

II.

McQueen raises three issues: (1) summary judgment was inappropriate because Exxon failed to demonstrate the absence of genuine issues of material fact; (2) the magistrate judge was required to conduct an evidentiary hearing before recommending summary judgment; and (3) the district court failed to conduct *de novo* review before adopting the recommendation.

A.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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). Our review of summary judgment is plenary, and we view all facts and the inferences to be drawn from the facts in the light most favorable to the non-movant. ***LeJeune v. Shell Oil Co.***, 950 F.2d 267, 268 (5th Cir. 1992).

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[2] On joint motion of the parties, McQueen's state law discrimination claims and his Title VII racial discrimination claim were dismissed with prejudice in October 1992.

1.

McQueen asserts that it was unnecessary for him to respond to Exxon's summary judgment motion, because Exxon failed to satisfy its initial burden of informing the district court of the basis for its motion and identifying those portions of the record which it believed demonstrated the absence of material fact issues. *See* ***Celotex Corp. v. Catrett***, 477 U.S. 317, 323 (1986). This contention is specious. In its supporting memorandum, Exxon thoroughly set forth the basis for its motion. It asserted, *inter alia*, with the support of accompanying affidavits, that it did not discriminate against McQueen on the basis of sex, but instead promoted a female rather than McQueen in accordance with an affirmative action plan. With respect to McQueen's retaliation claim, it pointed to the absence of evidence of a nexus between any unfavorable employment action and McQueen's filing of discrimination charges. Exxon's properly supported motion satisfied its initial burden under Rule 56. To avoid the entry of summary judgment, McQueen (who bore the burden of proving discrimination) was required to go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial". Fed. R. Civ. P. 56(e); ***Celotex***, 477 U.S. at 324.[3] He failed to do so.

[3] We note that the Southern District of Texas local rules provide that the failure to respond to a motion for summary judgment "will be taken as a representation of no opposition". S.D. Tex. R. 6E.

2.

Next, McQueen asserts that the district court erred by relying on unauthenticated deposition excerpts and conclusory affidavits which were not based on personal knowledge. As noted, McQueen filed no response or opposition to Exxon's motion. His only submittal was the untimely filing of objections to the magistrate judge's recommendation, in which he stated: "The magistrate relied on the unauthenticated excerpt of the deposition of plaintiff and conclusionary [sic] statement submitted by the Defendant". He did not, however, move to strike the deposition excerpt or the affidavits.

With respect to his contention that the excerpts from his deposition were not properly authenticated, McQueen asserts that Exxon did not attach a certification from either Exxon's attorney or the court reporter. Exxon relied on the excerpts primarily to provide background factual information. McQueen does not assert that there is any disputed issue of fact with respect to any of the information contained in the excerpts, nor does he assert that the excerpts are from a deposition other than his own, or that they are inaccurate. Under these circumstances, the district court did not err in considering them.

We reject McQueen's contention about the affidavits, because he neither properly objected to them on these grounds before the district court, nor moved to strike them. "To reverse the district court's judgment at this stage on grounds unobjected to below would allow a party to `sandbag the [district] court ..., selectively

opposing the points [it] chose, and on appeal claiming that the unopposed points were defectively presented and required no response'". ***Williamson v. United States Dept. of Agriculture***, 815 F.2d 368, 383 (5th Cir. 1987).[4]

3.

We reject McQueen's assertion that summary judgment is inappropriate in employment discrimination cases. "Although summary judgment is not favored in claims of employment discrimination, it is nonetheless proper when `there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law'". ***Waggoner v. City of Garland, Tex.***, 987 F.2d 1160, 1164 (5th Cir. 1993) (quoting Fed. R. Civ. P. 56(c)) (footnotes omitted).

B.

Contrary to McQueen's contention, the magistrate judge was not required to conduct an evidentiary hearing before recommending that judgment be granted. *See* 12 C. Wright & A. Miller, ***Federal Practice & Procedure***, § 3076.7 (Supp. 1993) ("the magistrate [judge] is free to determine the manner and extent of the hearings, as may be required by the nature of the matter referred to him and

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[4] McQueen's objection to the magistrate judge's reliance on the "conclusionary [sic] statement submitted by the Defendant" may have been intended to refer to the affidavits. If so, it is too vague to adequately apprise the district court that it referred to the affidavits. Moreover, the objection does not refer to any alleged lack of personal knowledge. In any event, this contention would fail even if McQueen had preserved it for review. The affidavits either expressly state or clearly reflect that the information contained in them is based on the affiants' personal knowledge. Nor are they conclusory.

the needs of the particular case and parties"). As noted, pursuant to the local rules, McQueen's failure to respond to the motion was a representation of no opposition; accordingly, there was no reason for a hearing.

C.

Finally, McQueen contends that the district court erred by failing to conduct *de novo* review of the recommendation. The district court's order stated: "After reviewing the Magistrate's Memorandum and Recommendation and the Objections filed thereto, this Court finds that the evidence supports the Magistrate's Memorandum and Recommendation". The reference in the order to "the evidence" indicates the requisite review by the district court. In any event, in the absence of any evidence to the contrary, we will assume that this language indicates that the district court performed the requisite *de novo* review. *See* ***Longmire v. Guste***, 921 F.2d 620, 623 (5th Cir. 1991) (order stating "[f]or the reasons set forth in the Magistrate's Report to which an objection was filed; IT IS ORDERED that ... the defendant's motion for summary judgment be granted" does not indicate a failure to conduct *de novo* review).

III.

For the foregoing reasons, the summary judgment is

AFFIRMED.