UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-2620
Summary Calendar

JULES J. WALTER,

Plaintiff-Appellant,

VERSUS

H. B. ZACHRY CO.,

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Texas
(CA-H92-1874)

(September 28, 1994)

Before KING, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:[1]

Jules Walter appeals the district court's grant of summary judgment to H. B. Zachry Co. and its dismissal of Walter's Title VII suit. Because Walter did not meet his burden of making out a prima facie case of discrimination or present sufficient direct evidence of discrimination, we affirm the district court's decision.

I.

Jules J. Walter ("Walter") was hired as a Pipefitter I by 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

defendant, H. B. Zachry Company ("Zachry"), on August 17, 1990. One month later, Walter was discharged as "not qualified for the job" because he was working "too slow."

Walter found out that Zachry would rehire discharged employees after a 30-day waiting period. He applied for a pipefitter position in November, underwent a company physical, and attended a safety orientation as part of the application process. After completing the orientation, Walter was dismissed from the hiring process because employees previously discharged as "not qualified for the job" could not be rehired.

Walter then filed a complaint with the Equal Employment Opportunity Commission ("EEOC") complaining that Zachry had discharged him on account of his race. The EEOC determined that Walter's discharge did not violate Title VII of the Civil Rights Act. Walter then filed an employment discrimination action in the district court. The district court granted Zachry's motion for summary judgment after it determined that Walter failed to establish a prima facie claim for discrimination and did not provide sufficient summary judgment evidence of disparate treatment. Walter timely appealed.

II.

Walter argues that the district court erred in granting summary judgment to Zachry because the court only considered the November refusal to rehire and did not consider the September firing. Walter's EEOC charge states:

> On November 13, 1990, I was discharged from the position of Pipefitter. On November 12, 1990, I had been rehired for the position.

> Mr. McDermond, White, General Foreman, informed me that I was discharged because I had previously worked on the night shift, a shift from which I had been discharged on or about September 30, 1990.
>
> I believe that the respondent has engaged in an unlawful employment discrimination practice . . . when it discharged me because of my race, Black.

The district court found that Walter's EEOC charge was based solely on the November refusal to rehire. It then determined that there was no evidence of disparate impact because no other employees previously discharged as "not qualified for the job" were rehired.

Zachry cites several cases for the proposition that the alleged discrimination in September is beyond the scope of the EEOC charge. However, in all of these cases, the plaintiff wanted to press a type of claim in his suit that wasn't in the charge, rather than seek relief in his suit predicated on another instance of the same type of discrimination. **Steffen v. Meridian Life Ins. Co.**, 859 F.2d 534, 544 (7th Cir. 1988), **cert. denied**, 491 U.S. 907 (1989); (plaintiff cannot raise retaliatory discharge claim in district court when charge submitted to EEOC addressed only age discrimination); **Vinson v. Ford Motor Co.**, 806 F.2d 686 (6th Cir. 1986)(plaintiff cannot raise claim of demotion before district court when charge to EEOC alleged only age discrimination), **cert. denied**, 482 U.S. 906 (1987).

While the EEOC charge is ambiguous, we find that it is broad enough to include allegations of discrimination with regard to both the September and the November discharges. Courts have consistently found that the charges upon which complaints of discrimination are based should be construed liberally. **Steffen**, 859 F.2d at 544; **Danner v. Phillips Petroleum Co.**, 447 F.2d 159,

162 (5th Cir. 1971).

Courts determining the scope of an EEOC charge follow the rule that:

> the complaint in the civil action . . . may properly encompass any . . . discrimination like or reasonably related to the allegations of the charge and growing out of such allegations.

Danner, 447 F.2d at 162. Zachry's discharge of Walter in September is related to the refusal to rehire him in November.

The district court did not consider whether the September discharge was discriminatory; however, an examination of the evidence put forth by Walter reveals that with regard to the September discharge, he also failed to establish a prima facie case of discrimination. In a discharge setting, the plaintiff must establish the following four elements in order to set forth a prima facie case of racial discrimination:

> (1) he belongs to a racial minority, (2) he was qualified for the position, (3) he was discharged from that position, and (4) that position remained open and was ultimately filled by a white person.

St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 2747 (1993). Walter failed to present any evidence that the position remained open and was ultimately filled by a white person.

Moreover, Walter failed to provide sufficient direct evidence to prove discriminatory treatment which, if shown, would overcome the necessity of meeting the four-part test. **Young v. City of House, Texas**, 906 F.2d 177, 180 (5th Cir. 1990). Walter recounted only one incident which could be called "direct" evidence of discrimination. The incident involved a conversation in which

Walter's foreman argued with other non-black employees that the Civil War was not fought to free blacks, but rather, for the North to gain control of southern factories. Walter alleges that this conversation took place the same day that he was discharged. At most, this conversation is weak circumstantial evidence of discrimination, and is insufficient to overcome Walter's failure to set forth a prima facie case.

Since Walter has not satisfied his burden of bringing forth sufficient proof to make out either a prima facie or direct case of discrimination, the district court's decision to grant summary judgment for Zachry was not in error. **See Cheilitis Corp. v. Catrett**, 477 U.S. 325, 106 S.Ct. 2548, 2552 (1986).

AFFIRMED.