

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2887

Summary Calendar

FREDDY E. VAN DEN ABEELE,

Plaintiff-Appellant,

versus

SGS CONTROL SERVICES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-92-2445)

(June 17, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:*

I.

SGS Control Services hired Freddy Van Den Abeele, a Belgian national, as a chemical and gas inspector. Abeele, who has advanced knowledge of chemicals and liquefied gases, made highly technical evaluations and, like all such field inspectors, had to work highly irregular hours. After Abeele exhibited insubordinate

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

conduct, SGS terminated him. Abeele sued SGS claiming Civil Rights Act and Fair Labor Standards Act violations, fraud, and intentional and negligent infliction of emotional distress. The district court granted summary judgment. Abeele appealed. We affirm.

II.

Abeele argues that SGS discriminated against him on the basis of national origin in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq. The district court found that Abeele had failed to prove that he had to work longer and more unfavorable hours than non-Belgians with professional status and higher pay, but had instead compared himself to non-professional employees who received an hourly wage. Abeele has not demonstrated that he received unfavorable treatment compared to other technical professionals.

III.

SGS hired Abeele under the professional exemption to the Fair Labor Standards Act, 29 U.S.C. § 201 et seq., which meant that Abeele, as a highly skilled professional, would not qualify for overtime pay but would receive a more substantial salary. 29 U.S.C. § 213(a)(1). Although Abeele claims that SGS placed him in exempt status to circumvent his rights, his level of expertise and his job functions indicate that SGS properly placed him in the technical professional exemption.

IV.

Abeele asserts that SGS committed fraud when it promised to place him in a supervisory and managerial position. Abeele had to

provide evidence that SGS made this promise not intending to follow through on it. Walker v. Comdata Network, Inc., 730 S.W.2d 769, 772 (Tex. App. - Dallas 1987, writ dismiss'd). As well, failure to perform, standing alone, does not prove an intent not to perform. Spoljaric v. Percival Tours, Inc., 708 S.W.2d 432, 435 (Tex. 1986). SGS told Abeele only that it had a vacancy for a man of his experience and hired him for that position. Abeele has not provided sufficient evidence of fraud.

AFFIRMED.