UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-3379

KEITH A. SCOTT,

Plaintiff-Appellant,

versus

AETNA CASUALTY & SURETY CO.,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(C.A 91-3945 G c/w 92-1324 G)

(March 29, 1994)

Before POLITZ, Chief Judge, JONES, Circuit Judge, and FULLAM[*], District Judge.

POLITZ, Chief Judge:[**]

We consider the *pro se* appeal by Keith Scott of an adverse summary judgment in favor of Aetna Casualty and Surety Company in his Title VII and La. R.S. 23:1006 action alleging retaliation and

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[*]District Judge for the Eastern District of Pennsylvania, sitting by designation.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

racial discrimination in his discharge. Finding no error, we affirm.

Background

Scott, a black male hired by Aetna in June 1989 as a claims representative in its Metairie, Louisiana office, was twice placed on probation prior to termination. Unsatisfactory work performance was assigned as the reason for his discharge. Scott alleges that caucasian claim representatives were not disciplined for inadequate performance and that they were allowed to perform supervisory duties. He alleges that his work was subjected to enhanced scrutiny and that he was denied an opportunity to function in a supervisory capacity. Scott invoked Title VII and La. R.S. 23:1006,[1] claiming retaliation[2] and discriminatory discharge based on race.

The parties consented to referral to a magistrate judge.[3] Upon completion of discovery Aetna moved for summary judgment. In his deposition Scott attested that the only evidence he possessed of disparate treatment was contained in the documents produced at his deposition. This documentation included copies of reviews of

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[1]Interpretations of Title VII are used in determining issues under Scott's state law claim. The discussion herein applies to both state and federal discrimination claims. See **Wyerick v. Bayou Steel Corp.**, 887 F.2d 1271 (5th Cir. 1989).

[2]Prior to his termination Scott filed a claim of discrimination with the EEOC. He claims that his discharge was in retaliation for this filing.

[3]28 U.S.C. § 636(c).

the claims files of Scott and the other adjusters, interoffice memoranda, and claim department reports. Scott did not file an opposition to the motion for summary judgment and acknowledged at the hearing thereon that he had no evidence to contradict the evidence presented by Aetna. The magistrate judge granted Aetna's motion upon finding: (1) "no evidence whatsoever to indicate a *prima facie* case of discrimination," and (2) because of knowledge Aetna acquired after Scott's discharge that his job application contained a false statement for which Aetna asserts it would have fired him. Scott timely appealed.

Analysis

We review a ruling on a summary judgment motion under the same standard as that applied by the trial court, affirming only if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. We examine the record *de novo*, reviewing the evidence and any inference to be drawn therefrom in the light most favorable to the nonmoving party.[4] Doing so we conclude that the record fully supports the grant of summary judgment in favor of Aetna.

Summary judgment is appropriate where critical evidence on an essential fact is so weak or tenuous that it could not support a judgment in favor of the nonmovant, or where the evidence is so

[4] **Wilkerson v. Columbus Separate School Dist.**, 985 F.2d 815 (5th Cir. 1993).

overwhelming that it mandates judgment in favor of the movant.[5] Scott maintains that the magistrate judge erred in granting the summary judgment without hearing evidence of disparate treatment, baldly asserting that he did establish a *prima facie* case and, at any rate, at trial he intended to call three witnesses with direct evidence of Aetna's discriminatory intent. Scott misperceives firmly established law for "once a motion for summary judgment has pierced the allegations contained in either the complaint or answer, produce one must or face the potential of an adverse summary judgment."[6] Allegations by Scott at this stage, however sincere, simply do not suffice. After a fair time for discovery, summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to his case and on which he will bear the burden of proof at trial.[7]

A Title VII plaintiff has the initial burden of proving, by a preponderance of the evidence, a *prima facie* case of discrimination.[8] In our recent **Armstrong** opinion we sought to clarify the standard for granting a summary judgment in a retaliation and disparate treatment case. We there stated that when "the plaintiff seeks to enforce rights under a statute, he

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[5]**Armstrong v. City of Dallas**, 997 F.2d 62 (5th Cir. 1993).

[6]**Id.** at 67.

[7]**Celotex Corp. v. Catrett**, 477 U.S. 317 (1986).

[8]**Texas Dep't of Community Affairs v. Burdine**, 450 U.S. 248 (1981).

must 'carry the initial burden under the statute of establishing' facts sufficient to warrant recovery."[9] It is only at this point that a rebuttable presumption arises which requires the defendant to articulate a legitimate, non-discriminatory basis for its action.[10] The failure of a plaintiff to establish initially a *prima facie* case is fatal to the further processing of his claim of discrimination under Title VII.

The magistrate judge found that Scott failed to establish a *prima facie* case of discrimination.[11] A studied review of the summary judgment record persuades of the correctness of this finding; no rational factfinder could find on this record that Aetna discriminated against Scott on the basis of his race or in retaliation for his filing of an EEOC complaint. Because of this conclusion, we need not and do not address the issue of after-acquired information.

AFFIRMED.

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[9]997 F.2d at 65.

[10]**Id.**

[11]See **Smith v. Wal-Mart Stores**, 891 F.2d 1177 (5th Cir. 1990) (to establish a *prima facie* case of discrimination, plaintiff must show that he or she was treated less favorably than a similarly situated employee). See also **Davis v. Delta Air Lines, Inc.**, 678 F.2d 567 (5th Cir. Unit B 1982).