UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-3682

(Summary Calendar)

LINDA LOU BRADLEY,

Plaintiff-Appellant,

versus

KEYMARKET OF NEW ORLEANS, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-92-2023-E)

(June 22, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:*

After a non-jury trial, Linda Bradley received an unfavorable judgment in her Title VII action against her employer, Keymarket of New Orleans, Inc. ("Keymarket"). She contends that the district court erred in granting Keymarket's motion to quash subpoenas and in failing to find that the legitimate reasons offered by Keymarket were a pretext for discrimination. Finding no error, we affirm.

Linda Bradley, an African-American female, worked as a radio announcer for a radio station in the New Orleans area. After she

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

was fired, Bradley filed suit against the station's owner, Keymarket, claiming that she had been discriminated against on the basis of her race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). Before trial, the district court granted Keymarket's motion to quash the subpoenas of several of its employees, on the ground that those employees had neither been personally served nor given the requisite witness and mileage fees. *See* Fed. R. Civ. P. 45(b)(1). After hearing two days of testimony at the non-jury trial, the district court issued its findings of facts and conclusions of law. The court found that Bradley failed to demonstrate that the legitimate reasons offered by Keymarket))i.e., Bradley's frequent tardiness and inadequate on-the-air performance))were but a pretext for discrimination. Based on this finding, the court entered judgment for Keymarket, from which Bradley filed a timely notice of appeal.

Bradley first contends that the district court erred in quashing the subpoenas of several of its employees.[1] The record shows that the employees whose subpoenas were quashed were neither personally served nor given the requisite witness and mileage

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[1] To the extent Bradley argues that the district court erred in excluding the testimony of certain Keymarket employees, we note that Bradley failed to make an offer of proof regarding the anticipated testimony of those employees. Consequently, she waived the right to claim that the court's ruling was erroneous. *See* Fed. R. Evid. 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidences unless a substantial right of the party is affected, and . . . (2) . . . the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.").

fees.[2] *See* Fed. R. Civ. P. 45(b)(1) ("Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law."); *see also* 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2461, at 447 (1971) ("Unlike service of a summons and complaint, it is not sufficient to leave a copy of the subpoena at the dwelling place of the witness."). We therefore uphold the district court's decision to quash the subpoenas.

Bradley also contends that the district court erred in failing to find that the legitimate reasons offered by Keymarket were a pretext for discrimination.[3] A federal appellate court may set

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[2] The subpoenas were apparently left on a receptionist's desk at the radio station.

[3] The district court properly applied the Title VII framework set forth in *Texas Dep't of Community Affairs v. Burdine,* 101 S. Ct. 1089 (1981):

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate reasons for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Id. at 1093 (citing *McDonnell Douglas Corp. v. Green,* 93 S. Ct. 1817 (1973). The court also properly recognized that "[p]roof by the plaintiff that the employer's reason is not legitimate will *permit* the factfinder to draw the inference that discrimination was the basis for the action, but will not *compel* the factfinder to do so." *See St. Mary's Honor Center v. Hicks,* 113 S. Ct. 2742 (1993).

aside a district court's factual finding only if it is "clearly erroneous." Fed R. Civ. P. 52(a); *Amadeo v. Zant,* 108 S. Ct. 1771, 1777 (1988). "If the district court's finding is plausible in light of the record viewed in its entirety, [this court] may not reverse it even though convinced that had [we] been sitting as the trier of fact, [we] would have weighed the evidence differently." *Zant,* 108 S. Ct. at 1777 (attribution omitted).

Keymarket offered the following legitimate, non-discriminatory reasons for firing Bradley: (1) her excessive tardiness;[4] and (2) her poor on-the-air performance on June 4, 1991.[5] In arguing that those reasons were a pretext for discrimination, Bradley offered evidence showing that certain non-minority employees were also habitually late, but were not terminated. She did not offer, however, any evidence showing that those employees had *also* performed poorly while on-the-air. In fact, the evidence showed that after Bradley was fired, Keymarket terminated a white male employee because of his poor on-the-air performance. Thus, viewing the record in its entirety, the district court's account of the evidence is plausible. *See Anderson v. City of Bessemer City, N.C.,* 105 S. Ct. 1504, 1511 ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be

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[4] Bradley conceded on cross-examination that she had been late a total of twenty-seven times from October 5, 1990 to June 4, 1991, for an aggregate amount of 970 minutes or 35.9 minutes per tardy.

[5] One of Bradley's fellow employees testified that she showed up more than two and one-half hours late on June 4, 1991. Once on the air, Bradley allowed long periods of "dead air" between songs and gave out the wrong call letters for the radio station.

clearly erroneous."). We therefore cannot conclude that the district court clearly erred in failing to find that Keymarket's reasons for firing Bradley were a pretext for discrimination.

Accordingly, we AFFIRM the judgment of the district court.