UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-3854
No. 93-3855

(Summary Calendar)

HERBERT JACKSON MCCOY,

Plaintiff-Appellant,

versus

WESTERN ATLAS INTERNATIONAL,
LITTON/DRESSER COMPANY,

Defendant,

WESTERN ATLAS INTERNATIONAL, INC.,

Defendant-Appellee.

Appeals from the United States District Court
For the Eastern District of Louisiana
(CA-90-2828-LLM)

(May 25, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Herbert McCoy, proceeding *pro se*, appeals from the district court's dismissal of his discrimination claim under 42 U.S.C. § 1981 (1988) and the court's final judgment on his discrimination claim under Title VII, 42 U.S.C. § 2000e-2 (1988). Finding no

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

reversible error, we affirm.

I

Herbert McCoy, an African American, sued his former employer, Western Atlas International ("Western Atlas"), alleging that Western Atlas had discriminated against him because of his race. He alleged that Western Atlas' job assignment policy was racially discriminatory and that Western Atlas had retaliated against him for having filed a complaint with the Equal Employment Opportunity Commission ("EEOC"). McCoy claimed that Western Atlas' conduct violated the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1988), Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1988), and Louisiana's employment discrimination statute, La. Stat. Ann. § 23:1006 (West 1985). The district court dismissed McCoy's § 1981 claims, and McCoy proceeded to trial on his Title VII and pendent state-law claims.[1]

After a jury trial, at which McCoy represented himself, the jury found that Western Atlas had not treated McCoy differently from other employees in his position and that Western Atlas had not terminated McCoy because of his EEOC charge. Based on the jury's verdict, the district court entered final judgment against McCoy. McCoy now appeals from the district court's dismissal of his § 1981 claims and its final judgment.

II

McCoy contends that the district court erroneously dismissed

[1] At the conclusion of the evidence at trial, McCoy consented to the dismissal of his state-law claims.

his § 1981 claims for failure to state a claim. We review a dismissal for failure to state a claim de novo. *McGrew v. Texas Bd. of Pardons & Paroles*, 47 F.3d 158, 160 (5th Cir. 1995). At the time McCoy commenced his suit, § 1981 provided in pertinent part: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ."[2]

The district court dismissed McCoy's first § 1981 claim, in which he alleged that Western Atlas had a racially discriminatory job assignment policy, based on the Supreme Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989). In *Patterson*, the Court held that § 1981 extends only to claims arising from the formation or enforcement of contracts, and not to the conditions of employment. *Id*. at 179-80, 109 S. Ct. at 2374. The district court dismissed McCoy's second § 1981 claim, in which he alleged that Western Atlas had retaliated against him for filing an EEOC charge, on similar grounds. *See Carter v. South Central Bell*, 912 F.2d 832, 840-41 (5th Cir. 1990) (holding that § 1981 no longer extends to retaliatory termination after the Supreme Court's decision in *Patterson*), *cert. denied*, 501 U.S. 1260, 111 S. Ct. 2916, 115 L. Ed. 2d 1079 (1991). The court noted that Congress had "overturned" *Patterson* in the Civil Rights Act of 1991, but it held that the Civil Rights Act of 1991 did not

[2] Congress later amended § 1981 in the Civil Rights Act of 1991, Pub. L. No. 102-166 § 101, 105 Stat. 1071 (1991).

apply retroactively.[3]

McCoy argues that the Civil Rights Act of 1991 should apply retroactively to his claim. However, the Supreme Court has squarely rejected this argument. *See Rivers v. Roadway Express, Inc.*, ___ U.S. ___, ___, 114 S. Ct. 1510, 1519-20, 128 L. Ed. 2d 274 (1994) (holding that Civil Rights Act of 1991 amendments to § 1981 do not apply retroactively to claims filed before the effective date of the Act); *accord National Ass'n of Gov't Employees v. City Public Service Bd.*, 40 F.3d 698, 713 (5th Cir. 1994); *Valdez v. San Antonio Chamber of Commerce*, 974 F.2d 592, 594-95 (5th Cir. 1992); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1372-74 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1641, 128 L. Ed. 2d 362 (1994).

III

McCoy also appeals from the district court's judgment on his Title VII claims, raising three procedural objections relating to his trial.[4] He contends first that the district judge erroneously refused to admit into evidence a decision by a state administrative law judge ("ALJ") regarding McCoy's eligibility for unemployment insurance benefits. The district court excluded the decision, along with the transcript of the underlying administrative hearing,

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[3] The Civil Rights Act of 1991 became effective over a year after McCoy filed his § 1981 claim against Western Atlas.

[4] In his statement of the issues on appeal, McCoy lists a fourth argument, that the magistrate judge who presided over the voir dire erroneously stated that he could discharge a juror for cause over either party's objection, but he does not argue this issue in the body of his brief. We therefore need not consider it. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993). McCoy briefly addresses the issue in his reply brief, but a party may not argue an issue for the first time in a reply brief. *Id.* at 225.

as "improper."[5]

Normally, we would review a district court's evidentiary ruling for abuse of discretion. *Johnson v. Ford Motor Co.*, 988 F.2d 573, 578 (5th Cir. 1993). However, we do not reach the admissibility of the ALJ's decision or the underlying transcript because McCoy failed to make the necessary offer of proof. *See* Fed. R. Evid. 103(a)(2) ("Error may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected, and . . . the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked."). "This Circuit `will not even consider the propriety of the decision to exclude the evidence at issue, if no offer of proof was made at trial.'" *United States v. Ballis*, 28 F.3d 1399, 1406 (5th Cir. 1994) (quoting *United States v. Winkle*, 587 F.2d 705, 710 (5th Cir.), *cert. denied*, 444 U.S. 827, 100 S. Ct. 51, 62 L. Ed. 2d 34 (1979)). "However, neither the Rules nor this Circuit require a *formal* offer to preserve error." *Id.* "Generally, . . . excluded evidence is sufficiently preserved for review when the trial court has been informed as to what counsel intends to show by the evidence and why it should be admitted, and this court has a record upon which we may adequately examine the propriety and harmfulness of the ruling." *Id.* The "adequacy of a given informal proffer will necessarily depend upon its particular circumstances." *Id.*

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[5] The district court did not state under which rule of evidence it excluded the decision and transcript. Western Atlas had objected on the grounds that the decision was irrelevant and a "collateral finding."

In this case, the only reference McCoy made to the content and relevancy of the evidence he sought to introduce was the following question in response to the district court's ruling: "Even though the statements are there that the discrimination was the only reason for my termination, the decision based on this information?" This question, without more, does not suffice as a record on which we can determine whether the district court abused its discretion in excluding the evidence. *See James v. Bell Helicopter Co.*, 715 F.2d 166, 175 (5th Cir. 1983) ("Given the state of the record, we decline to speculate on the complicated questions presented without sufficient knowledge of the true character of the evidence excluded.").[6]

Second, McCoy contends that the court erroneously allowed the defense to play a tape recording that McCoy had made of his termination. McCoy prepared a transcript of the tape and submitted it as evidence, and at the beginning of the trial he agreed to the submission of the tape as well. When the defense sought to play

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[6] *Compare James*, 715 F.2d at 175 & n.8 (holding offers of proof insufficient because excluded documents were "not described with any particularity") *and United States v. Davis*, 571 F.2d 1354, 1356-57 (5th Cir. 1978) (holding that proffer was insufficient because it failed to address conditions of admissibility under public records exception to hearsay rule) *with Ballis*, 28 F.3d at 1407 (holding proffer stated in general terms sufficient because district court "expressed an intimate familiarity with the testimony offered and in fact accepted the offer as a sufficient proffer") *and McQuaig v. McCoy*, 806 F.2d 1298, 1301-02 (5th Cir. 1987) (holding informal proffer sufficient where "party [went] into . . . detail (six pages in the record) as to the substance of the evidence and why it should be admitted" and where a document regarding the proffered evidence was later filed as part of the record).

We note that McCoy has inserted the ALJ's decision in his Record Excerpts on appeal. However, our review is limited to the record before the district court. *See Abbott v. Equity Group, Inc.*, 2 F.3d 613, 629 n. 57 (5th Cir. 1993) (holding that court of appeals' review is limited to record before the district court, and refusing to consider evidence appearing in record excerpts that were not part of district court record), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1219, 127 L. Ed. 2d 565 (1994).

the tape to impeach McCoy's testimony, McCoy objected to the admission of the tape in audible form. On appeal, McCoy concedes that he introduced the transcript of the tape but argues that the court should not have allowed the defense to play the tape audibly. We have found no authority to support McCoy's argument, and he has not demonstrated how playing the tape audibly prejudiced him, especially in light of the fact that he himself had submitted the transcript of the tape.

Lastly, McCoy challenges the way in which the district court polled the jury. The court clerk read the jury's verdict aloud, reading the jury's answer to each of three interrogatories. The clerk then asked the jury, "Is this your verdict?" The jurors answered in the affirmative. The court then asked the clerk to poll the jury, and the clerk asked each juror, addressing them by name, "Is this your verdict?" Each juror responded, "Yes."

McCoy argues that the court should have asked the jurors to respond to each of the interrogatories rather than ask them to confirm the verdict as a whole. McCoy cites no authority for this argument, and we have found none. We therefore decline to reverse the court's judgment on these grounds.

III

For the foregoing reasons, we **AFFIRM** the district court's final judgment and its order dismissing McCoy's § 1981 claims.