UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-4102
Summary Calendar

BOBBY L. LILLY,

Plaintiff-Appellant,

VERSUS

BROOKSHIRE GROCERY COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Texas

(91-CV-696)

August 17, 1993

Before JOLLY, SMITH, and WIENER, Circuit Judges

PER CURIAM*:

Plaintiff-Appellant Bobby L. Lilly appeals the district court's take-nothing judgement on Lilly's claims of workplace discrimination. Lilly claims that he was improperly denied the right to trial by jury on his Age Discrimination in Employment Act ("ADEA") claim, and that in his bench trial the district court was

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

clearly erroneous in finding that he was not a victim of age and race discrimination. We find that although Lilly's demand for jury trial was sufficient under FED R. CIV. P. 38, he waived this right when he failed to object timely after being notified that his claims were set for a bench trial. Also, a review of the record discloses that there were ample, non-discriminatory grounds for the employment actions by Defendant-Appellee Brookshire Grocery Company ("Brookshire"). Concluding that the district court was not clearly erroneous in rendering a take-nothing judgement, we affirm.

I

FACTS AND PROCEEDINGS

Lilly filed a complaint charging Brookshire with engaging in race and age discrimination in violation of Title VII and the ADEA respectively.[1] The complaint alleged that Brookshire committed two discriminatory acts: refusing to promote Mr. Lilly to manager between March and June of 1990, and terminating his employment on September 7, 1990.

The original complaint, filed on December 20, 1991, contained a request for a jury trial in the last sentence of the prayer for relief. Lilly filed an amended complaint on March 23, 1992 that contained an identical request for a jury trial. On May 20, 1992 Lilly's counsel attended a management conference in which counsel was informed to his surprise that the case was scheduled for a

[1]The appellant Lilly also sought relief under §1981 and §1983. The appellant does not, however, dispute the district court's holding that these two claims had no factual basis.

bench trial. Counsel questioned this docketing and told the magistrate judge that counsel had made a demand for a jury trial. The magistrate judge advised counsel that he would need to file some type of motion to clarify this issue at an early stage. On June 4, counsel received a docket control order reflecting, inter alia, that the case was set for a bench trial on November 9, 1992.

On October 30--more than five months after the management conference and less than two weeks before the scheduled trial--counsel formally filed a motion to request leave to file a motion for a jury trial. On November 3, he actually filed a motion for a jury trial, which motion was denied by the district court on that same day. Counsel filed an appeal of this denial, which we dismissed for lack of jurisdiction.[2]

The district court conducted a bench trial in which it found insufficient evidence to support either the age or race discrimination claim. As to the age claim, the court found that the younger worker who was promoted was more qualified than Lilly. The district court further found no evidence that Brookshire had any age-based economic incentive to refuse to promote or to terminate Lilly. As to the claim of racial discrimination, the court found that Lilly failed to offer sufficient evidence either of discrimination in Brookshire's promotion and discharge decisions, or of pretext in Brookshire's facially age and race neutral reasons for those decisions. Accordingly, the district

[2]Lilly v. Brookshire Grocery Co., No. 92-5157 (5th Cir. Dec. 7, 1992)

court entered judgement for the defendant, Brookshire, and Lilly timely appealed.

II

ANALYSIS

A. Invocation and Waiver of Jury Trial Right

1. Indorsement on Pleading

Rule 38 provides that any party may demand a trial by jury "by serving upon the other parties a demand therefor in writing. . . " and that such demand "may be indorsed upon a pleading of the party."[3] The rule further states that "a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable."[4] Lilly requested a jury trial "on all questions of fact raised by this complaint" in both his original and amended petition. The complaint included a claim under the ADEA, which is triable to a jury under 29 U.S.C. 626 (c)(2).

Brookshire argues that Lilly never made a proper demand under Rule 38 because the demand was placed at the last sentence of the prayer for relief. According to Brookshire, this obscure placement failed to provide clear notice of the request to the clerk and opposing counsel. Brookshire reasons that this failure to notify operates as a failure to "indorse" within the meaning of Rule 38.

We disagree. While Lilly's method of requesting a jury may

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[3] FED. R. CIV. P. 38 (West 1993)

[4] Id. .

not be the optimum method, it suffices to meet Rule 38's requirement that the demand be served on the other party by an indorsement on the pleading. The courts have consistently refused to impose any special formality on the "indorse" requirement,[5] and we refuse to incorporate one here.

2. Waiver

Brookshire argues in the alternative that if Lilly's indorsement is found to be sufficient, he waived this right to a jury by failing to object in a timely fashion once he learned that his case had been set for a bench trial. Although "the right to jury trial is fundamental, and courts indulge every reasonable presumption against waiver,"[6] we held in Wauhop v. Allied Humble Bank, N.A. that this right can be waived by a failure to object timely to a denial of the right.[7] Five months' inaction is hardly timeliness. We agree with Brookshire, therefore, that Lilly, like the plaintiff in Wauhop,[8] waived this right by failing to object in a timely fashion after being notified that the case was set for a

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[5]See e.g., Gargiulo v. Delsole, 769 F.2d 77, 78-79 (2d Cir. 1985) (holding that demand on last page of answer complies with Rule 38); Kahn v Head, 114 F.R.D. 20, (D.Md. 1987) (noting that statement "Jury Trial Demanded" under the docket number complies with Rule 38); see generally 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure §2318 (1971) (collecting cases containing different forms of jury demands).

[6]Wauhop v. Allied Humble Bank, N.A., 926 F.2d 454, 455 (5th Cir. 1991).

[7]Id. at 455-56.

[8]Id. .

bench trial.

In Wauhop, the plaintiff filed various employment-related claims under Title VII, the Equal Pay Act, and the Fair Labor Standards Act. Her complaint included a demand for "a trial by jury of all claims so triable."[9] The district court concluded that the complaint did not allege any claims entitling plaintiff to a jury, and thus scheduled the trial for the non-jury docket. Recognizing that this issue was not free from doubt, however, the district court gave the plaintiff 45 days in which to object to this ruling. Although the plaintiff agreed to this time limit, she failed to follow it and did not make an objection until the day of trial some nineteen months later.[10] We held in Wauhop that the plaintiff's failure to object timely waived any right to a jury trial. We characterized that agreement as an "oral stipulation in open court," which when breached had the effect of waiving the right under Rule 39 (a)(1).[11]

As Brookshire points out, Lilly's counsel was fully informed at the management conference on May 20, 1992 that the case was set for a bench trial. When Lilly's counsel objected to this docketing, he was told by the magistrate judge that he should file

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[9] Id. at 454.

[10] Id. at 455-56.

[11] Id. at 455. Rule 39 provides that when a trial by jury has been demanded as required by Rule 38, the action shall be docketed as a jury action unless: 1) the parties by written or oral stipulation in open court consent to a bench trial, or 2) the court finds that a right to trial by jury does not exist. FED. R. CIV. P. 39 (a) (West 1993).

a motion for clarification with the district judge so that this matter could be settled at "some early stage." Counsel agreed with the magistrate judge's suggestion by stating "that's what we'll do." Yet, despite this agreement--including the magistrate judge's express admonition that Lilly needed to file such a motion promptly--Lilly failed to file a motion on the jury issue until more than five months after the conference and just nine days before trial. This agreement to file a jury motion at some early stage, like the one in Wauhop, is properly characterized as a stipulation in open court under Rule 39. The facts that the agreement did not specify a finite deadline and that it was confected with the magistrate judge in conference rather than the district judge in the courtroom are insufficient to distinguish this case from Wauhop. We conclude that Lilly's failure to comply with this agreement by filing a jury trial motion promptly constituted a waiver.

B. Review of District Court's Fact-Finding[12]

1. Standard of Review

Our standard of review for fact-finding in bench trials is well established: findings of fact are reviewed only for clear error.[13] A finding of fact is clearly erroneous "only if our review

[12] Lilly's brief only questions whether the district court found the proper facts as to the employment discrimination claims. It does not dispute the legal standard applied by the district court.

[13] E.g. FED. R. CIV. P. 52; Seal v. Knorpp, 957 F.2d 1230, 1234 (5th Cir. 1992).

of the entire record impels the definite and firm conviction that a mistake has been committed."[14]

2. Employment Discrimination Claims

Lilly's complaint distilled to its essence is that Brookshire engaged in two discriminatory acts: promoting a younger white male instead of Lilly to manager in March of 1992, and terminating Lilly in September of 1992. Lilly asserts that these acts constitute age discrimination in violation of the ADEA, and race discrimination in violation of Title VII.

The only issue disputed on appeal is whether the district court was clearly erroneous in failing to find an intent to discriminate on the basis of race or age in the promotion and termination decisions.[15] Our review of the record reveals that Lilly's evidence of discrimination is limited almost entirely to his unsubstantiated assertions. The record and the Memorandum Opinion further reveal that there is ample evidence of non-discriminatory reasons for both of Brookshire's decisions and no substantial evidence of pretext.

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[14]E.g., Sullivan v. Rowan Cos., 952 F.2d 141, 147 (5th Cir. 1992); United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

[15]Neither side disputes that Lilly made out a prima facie case under Title VII and the ADEA. The employer responded to this prima facie case by offering legitimate non-discriminatory reasons for its employment actions. The case thus moved to the ultimate issue of whether the defendant intentionally discriminated on the basis of race or age--an issue on which the plaintiff bears the burden of proof. See Saint Mary's Honor Center v. Hicks, ____U.S._____, 61 U.S.L.W. 4782, 4784-85 (June 25, 1993) (holding that once the defendant rebuts the prima facie case, the fact-finder must find from plaintiff's proof that the defendant intentionally discriminated)

The Promotion Decision. The district court found that the younger white male who, instead of Lilly, was promoted to manager was promoted because he was more qualified. The court also found that there was no age-based economic incentive to prefer the person promoted over Lilly. These findings are amply supported by testimony in the record from Lilly's supervisor.[16] The record also reveals that in the past Lilly's superior had supervised and promoted other African Americans as managers.

The Termination Decision. The district court found that Lilly was dismissed for violation of various company rules relating to integrity and dishonesty. The court concluded, inter alia, that Lilly had recently removed a bag of ribs without checking them out through the registers, as required by company policy. The court also noted that Lilly had admitted to various infractions of company rules such as, on one occasion, exchanging food stamps for cash and, on another, paying for groceries with a deposit slip instead of a check. The record also discloses disputed testimony as to whether Lilly had deliberately underpaid for various purchases from Brookshire by manipulating and violating the rules applicable to "specials." In short, the record provides sufficient evidence to support the district court's determination that

[16]These factual determinations as to the employer's motives for acting, as well as the ones as to whether Lilly engaged in assorted dishonest acts, turn principally on the credibility of the various witnesses. In short, the trial judge had to determine who to believe: Lilly or his accusers. As the Supreme Court has noted, a trial judge's decision to credit one witness over another "can virtually never be clear error." Anderson v. Bessemer City, 470 U.S. 564, 575 (1985).

Brookshire's employment decisions were not the product of intentional age or race discrimination.

III

CONCLUSION

Lilly's failure timely to object formally to the docketing of his case as a bench trial operated to waive his right to a jury trial under Rule 39. We conclude that the district court was not clearly erroneous in finding that Lilly failed to prove intentional race or age discrimination by Brookshire in its promotion and termination decisions. Therefore, the judgement of the district court is AFFIRMED.