

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-4415  
Summary Calendar

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TRUDY FONTENOT,

Plaintiff-Appellant,

v.

HUEY P. BOURGEOIS,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Western District of Louisiana  
(90 0181 L)

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January 13, 1994

Before DAVIS, JONES, and DUHÉ, Circuit Judges.\*

PER CURIAM:

Appellant Trudy Fontenot was employed by the St. Mary Parish Sheriff as a deputy tax collector from September 1, 1980 until January 27, 1989 when she was terminated. In 1987, Fontenot underwent thyroid surgery for which she received approximately forty two days of paid sick leave. In 1988 and early 1989, as a result of wrist and bladder surgeries performed during this time, Fontenot took approximately eighty days of sick leave for which she

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

was not paid. She returned to work on a part-time basis on January 17, 1989, but left work on the morning of January 27, 1989 without notifying her supervisor, apparently in part because she was distressed that as a part-time employee she would not be paid for the Martin Luther King holiday. Fontenot was terminated by written notice the same afternoon for absenting herself without proper leave in violation of the express employment rules of the Sheriff's office.

Nearly a year later, Fontenot brought a Title VII action alleging discrimination on the basis of sex against St. Mary Parish Sheriff Huey Bourgeois.<sup>1</sup> The case proceeded to trial by consent before the magistrate judge who entered judgment against the plaintiff in April 1993. Having reviewed the judgment of the magistrate judge, we affirm.

As an initial matter, we note that the parties' concern with the shifting burdens of proof at trial outlined in the Title VII jurisprudence of the Supreme Court is misplaced. On appellate review of a fully tried case, our review is limited to the district court's findings on the ultimate question of discrimination vel non and does not concern the shifting burdens of proof that are relevant at the trial court level. See Collins v. Baptist Memorial Geriatric Ctr., 937 F.2d 190, 192-93 (5th Cir. 1991), cert. denied, 112 S. Ct. 968 (1992). Further, whether Sheriff Bourgeois unlawfully discriminated against Fontenot constitutes the ultimate

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<sup>1</sup>Fontenot also alleged a variety of other federal and state law claims not relevant here since she does not appeal from their denial.

issue and we consequently address it de novo. Of course, unless clearly erroneous, the trial court's findings of subsidiary fact bind us. See Hill v. Miss. State Employment Serv., 918 F.2d 1233, 1238 (5th Cir. 1990), cert. denied, 112 S. Ct. 188 (1991).

Fontenot pursued her Title VII claim under both of the well-established models for identifying unlawful discrimination: disparate impact and disparate treatment analysis. See id. In terms of disparate impact analysis, Fontenot contends that the subjective sick leave evaluation procedure used by Sheriff Bourgeois resulted in a substantial disparity between the paid sick leave granted male and female employees.<sup>2</sup> The magistrate judge concluded that Fontenot had failed to establish a prima facie case of disparate impact because the statistics she offered at trial were unreliable.

Once the employment practice has been identified, a plaintiff *must* offer statistical evidence sufficient to show that the practice has caused the discrimination in order to establish a prima facie case of disparate impact. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988). Of course, "courts ... [are not] obliged to assume that the plaintiff's statistical

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<sup>2</sup>Under a written policy implemented by Sheriff Bourgeois, all employees were granted six days per year of paid sick leave. Additional sick leave was granted at the Sheriff's discretion, but some of the considerations used in the exercise of his discretion included: length and nature of employment with the Sheriff's office; prior use of sick leave, particularly whether the extended leave was related to an individual's first major illness; and whether the illness was job-related.

evidence is reliable." Id. at 996. The trial court here found the statistics unreliable for reasons which we find compelling.

Particularly convincing is the trial court's observation that removal of plaintiff Fontenot from the data set would completely alter the implications of the statistical analysis. Including Fontenot in the data set produces results whereby male employees are paid for 75% of their extended sick days versus 62% for female employees; removing the plaintiff yields the inverse: *females* are compensated for 95% of their extended sick days while *males* are paid for 75.7%.<sup>3</sup> This easily verified result should cause serious doubts about the veracity of the statistical proof, especially given that the plaintiff's expert testified that the data set was "too large" to be impacted by the removal of any one employee.

Further reason to be extremely skeptical of the plaintiff's statistics is the inconsistency between the results calculated by the plaintiff's expert in Exhibit No. 1 and the results offered by the plaintiff in Exhibit No. 2 calculated by a legal assistant for plaintiff's counsel. No explanation was offered at trial for the discrepancy in these relatively simple calculations comparing the percentage of extended sick days paid over a four year period for male and female employees. Both

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<sup>3</sup>Extended sick days are days beyond the six paid sick days given to employees as a non-discretionary matter. See infra note 2.

exhibits were based on the same underlying data yet inexplicably yielded two different results.<sup>4</sup>

In short, we agree with the magistrate judge's conclusion that the statistics offered by the plaintiff are unreliable. The reliability of statistical proof in a disparate impact case is critical to establishing the discriminatory effect of an identified employment practice. In the absence of such reliability, we must conclude that Fontenot has failed to establish that Sheriff Bourgeois unlawfully discriminated against Fontenot on the basis of sex.<sup>5</sup>

As to plaintiff's disparate treatment claim, we also agree with the magistrate judge that Fontenot failed to produce any evidence that Sheriff Bourgeois terminated Fontenot because of her gender. While the Sheriff's decision to terminate Fontenot was likely motivated by more than her merely leaving work on January 27 -- namely the plaintiff's intermittent, recurring sick leave taken without ever providing supporting documentation from attending medical personnel, such motivation is not the gender-based animus Title VII seeks in part to ferret out. See Hill, 918 F.2d at 1238.

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<sup>4</sup>Also troubling is the inconsistency in the underlying data and the evidence adduced at trial. For example, for 1988, the underlying data in the plaintiff's exhibits assumed the total number of sick days taken by female employees to be fifty nine, when at trial it was established that Trudy Fontenot took some sixty seven days of sick leave in 1988.

<sup>5</sup>Appellant devotes much of her brief to arguments concerning the "business necessity" of the Sheriff's discriminatory sick leave practice. We need not concern ourselves with the particulars of these arguments here since the absence of reliable statistical proof resolves the ultimate question of discrimination.

Simply put, since the record is completely barren of any evidence of sex-based discriminatory motive on the part of the Sheriff, no Title VII liability exists under the disparate treatment model. See Frazier v. Garrison I.S.D., 980 F.2d 1514, 1526 (5th Cir. 1993).

For the foregoing reasons, we **AFFIRM** the magistrate judge's ruling.