

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5519
Summary Calendar

JOHN KEBIRO,

Plaintiff-Appellant,

VERSUS

DENTON STATE SCHOOL,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
(4:92-CR-193)

(May 27, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

John Kebiro appeals a summary judgment rendered against him on his employment discrimination claims in connection with his termination by the Denton State School. Finding no error, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I.

Kebiro is a black male born in Kenya. In January 1992, he missed ten days of work in a row. He called in only once, saying that he was in South Carolina "on his day off," and that he had been in an automobile accident. He returned to work a week after the phone call. He was told to go home and subsequently was terminated for job abandonment.

Kebiro filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging that he was terminated because of his race, black, his national origin, Kenyan, and his sex, all in violation of title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. He received his right to sue letter and proceeded on claims of discrimination based upon his race and national origin.

The district court granted summary judgment for the school, concluding that Kebiro failed to raise material facts to show that the reasons for terminating him were pretextual and holding that his additional claims were beyond the scope of his EEOC complaint.

II.

This court reviews a grant of summary judgment de novo. Hanks v. Transcontinental Gas Pipe Line Corp., 953 F.2d 996, 997 (5th Cir. 1992). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The

party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). After a proper motion for summary judgment is made, the non-movant must set forth specific facts showing that there is a genuine issue for trial. Hanks, 953 F.2d at 997.

We begin our determination by consulting the applicable substantive law to determine what facts and issues are material. King v. Chide, 974 F.2d 653, 655-56 (5th Cir. 1992). We then review the evidence relating to those issues, viewing the facts and inferences in the light most favorable to the non-movant. Id. If the non-movant sets forth specific facts in support of allegations essential to his claim, a genuine issue is presented. Celotex, 477 U.S. at 327.

Under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), where there is no direct evidence of discrimination the plaintiff must first prove a prima facie case of discrimination. See also Britt v. Grocers Supply Co., 978 F.2d 1441, 1449 (5th Cir. 1992), cert. denied, 113 S. Ct. 2929 (1993). To establish a title VII prima facie case, the plaintiff must show (1) that he belongs to a protected minority, (2) that he was qualified for the job he held, (3) that despite his qualifications, he was terminated, and (4) that his employer discharged him under circumstances that give rise to an inference of unlawful discrimination. Establishing this prima facie case creates a presumption of discrimination. Britt, 978 F.2d at 1450. The burden of production then shifts to the

defendant to rebut the presumption by articulating a legitimate, nondiscriminatory reason for its disparate treatment of the plaintiff. Id. If the defendant presents a nondiscriminatory explanation for its conduct, the presumption vanishes, and the burden shifts back to the plaintiff to prove that the defendant intentionally discriminated against the plaintiff. St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2749 (1993). The ultimate burden of persuasion remains on the plaintiff to persuade the factfinder that intentional discrimination motivated the employment decision.

III.

Kebero belongs to two protected classes, as he is black and Kenyan. He was qualified for the job he held, and he was terminated. But he has not demonstrated that he was treated differently from any non-protected employee. He is also unable to raise a genuine issue of fact establishing that the reason for his termination was pretextual. Britt, 978 F.2d at 1450. Allegations, speculation, and belief do not create a fact issue as to pretext. Id. at 1451. To oppose successfully a motion for summary judgment, a party must demonstrate specific facts that establish a genuine issue for trial. Lechuga v. Southern Pac. Transp. Co., 949 F.2d 790, 798 (5th Cir. 1992).

Where the defendant demonstrates that the plaintiff was discharged for violation of a work rule, the plaintiff must show that (1) he did not violate the rule, or (2) if he did violate the

rule, other employees who engaged in similar acts were not punished similarly. Green v. Armstrong Rubber Co., 612 F.2d 967 (5th Cir. 1980).

Denton terminated Kebiro because he violated its no-call/no-show policy by being absent for three or more consecutive days without permission. Kebiro has not demonstrated that he did not violate this work rule. Kebiro was absent from work from January 27 to February 7, 1992. He asserts that he was scheduled to be off duty on January 28-29. He admits to missing work on January 30, and he says that he did not call because rain prevented him from reaching a pay phone. He called in sick on January 31)) from South Carolina. He proffers no explanation as to why he missed work but did not call from February 1 through February 7. Only February 3 was a scheduled day off. Thus, Kebiro unquestionably violated Denton's work rules.

Kebiro also is unable to demonstrate that he was treated differently from similarly situated employees who violated the same rule. None of the employees he identifies were treated differently. Several of them never violated the no-call/no-show rule. Those who did were terminated for job abandonment, regardless of race or nationality. Thus, Kebiro is unable to demonstrate that he was treated differently from any other employee who violated the rule.

IV.

In response to Denton's motion for summary judgment, Kebiro

added claims of promotion discrimination, hiring discrimination, and general harassment to his original claims associated with his termination. These issues and their factual predicates were not mentioned in the original EEOC charge.

Kebiro's EEOC charge is limited in scope to the issue of his termination. Because the allegations of promotion inequities and harassment were outside the scope of the EEOC's administrative review concerning his allegedly discriminatory discharge, they are barred. "While technical omissions of legal theories from the E.E.O.C. charge do not preclude a plaintiff from including those theories in the Title VII complaint, in such a case the acts upon which those theories are based must be noted in the charge." Matthews v. A-1, Inc., 748 F.2d 975, 977 (5th Cir. 1984) (emphasis in original).

Because Kebiro's EEOC charge is silent with regard to allegations of discrimination in promotion and harassment, the district court was correct in dismissing them.

AFFIRMED.