UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-7375

(Summary Calendar)

ALFRED BARNES,

Plaintiff-Appellant,

versus

ERGON REFINING, INC.,

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Mississippi
(CA 91-0189-B)

(October 4, 1994)

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

PER CURIAM:[*]

Alfred Barnes sued Ergon Refining, Inc. ("Ergon") for refusing to hire him as a pool operator at Ergon's Vicksburg, Mississippi, oil refinery. Barnes claimed that Ergon intentionally discriminated against him because of his race, in violation of 42 U.S.C. § 1981 (1988) and Title VII of the Civil Rights Act of 1964 ("Title VII"). Barnes also claimed under Title VII that Ergon refused to hire him in retaliation for a charge he had previously

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

filed against a former employer. The jury found for Ergon on Barnes' § 1981 claim, and the district court found in favor of Ergon on his Title VII claims. Barnes appeals certain evidentiary rulings and the judgment against him. Finding no reversible error, we affirm.

I

Barnes, an African-American, applied for work at Ergon a few weeks after he was laid off from his job at Petrosource, another oil refinery in Vicksburg, Mississippi. Ergon had no openings at that time, and Steve Reed, an Ergon manager, informed Barnes of that fact.

A few months later, a friend told Barnes that Ergon had openings, including an entry-level position as a pool operator at a pay rate of $6 per hour.[1] Barnes spoke again with Reed, who had been asked by Ricky Allen, the plant superintendent, to conduct the initial screening of candidates. Reed interviewed Barnes, and referred him to Allen for further consideration. Allen interviewed Barnes for the position of pool operator.

Barnes had the requisite qualifications for the pool operator position. He had several years of experience in similar jobs at Petrosource, and he had completed special training during his service in the armed forces. When he was laid off from Petrosource, Barnes held a supervisory position and was making approximately $12 per hour.

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[1] Ergon also had an opening for a laboratory analyst, for which Barnes applied. The district court ruled that Barnes was not qualified for that position, and Barnes does not challenge this finding.

At the time of his interview with Allen, Barnes had also filed an EEOC charge against his former employer, Petrosource, for race discrimination regarding his discharge from that company. Barnes informed a receptionist at Ergon, Ruth Brown, of this claim, and Brown relayed this information to Allen.

When Ergon told Barnes that they did not intend to hire him, he contacted and met with Allen. Allen told Barnes that Barnes was overqualified, and, based on past experience, he believed that Barnes would be dissatisfied with the entry-level pool operator job and would not stay long-term.

Barnes filed a charge of racial discrimination with the EEOC. When the EEOC declined to pursue his claim, Barnes filed suit against Ergon, claiming that Ergon's refusal to hire him constituted racial discrimination, in violation of 42 U.S.C. § 1981 and Title VII. He also claimed that Ergon refused to hire him as retaliation for his charge against Petrosource. The § 1981 claim was tried before a jury, and the district court heard the Title VII claims. Both the jury and the district court found that Barnes had failed to prove discrimination. Accordingly, the district court entered judgment in favor of Ergon on all claims. Barnes now appeals, asserting that the district court erred in 1) excluding evidence Barnes sought to admit from the EEOC file concerning his charge against Ergon; 2) entering judgment against him; and 3) denying him judgment as a matter of law.

II

A

Barnes first contends that the district court erred by excluding documents from his EEOC file.[2] "[W]e will reverse an evidentiary ruling only where the district court has clearly abused its discretion and a substantial right of a party is affected." *Cortes v. Maxus Exploration Co.*, 977 F.2d 195, 202 (5th Cir. 1992); *see also* Fed R. Evid. 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ."); *see also Rock v. Huffco Gas & Oil Co.*, 922 F.2d 272, 277 (5th Cir. 1991) (applying Rule 103(a)).

Section 706(b) of Title VII provides that "[n]othing said or done during and as a part of such informal [EEOC conciliation] endeavors may be . . . used as evidence in a subsequent proceeding without the written consent of the persons concerned." 42 U.S.C. § 2000e-5(b) (1988 & Supp. V 1993). In *Olitsky v. Spencer Gifts, Inc.*,[3] we excluded the entire EEOC file, because "[s]ection 706(b) clearly prohibits any use of EEOC conciliation material in subsequent litigation, even by the parties to the agency proceeding." *Id.* at 706.[4]

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[2] Prior to bringing a civil suit for discrimination, a claimant must file a charge with the EEOC, who investigates the charge. If the EEOC finds no reasonable cause indicating a valid charge, the EEOC dismisses the charge, and the claimant is then free to file suit. *See* 42 U.S.C. § 2000e-5; *see also E.E.O.C. v. Associated Dry Goods Corp.*, 449 U.S. 590, 595, 101 S. Ct. 820-821, 66 L. Ed. 2d 762 (1981) (describing EEOC administrative process).

[3] 842 F.2d 123 (5th Cir.), *cert. denied*, 488 U.S. 925, 109 S. Ct. 307, 102 L. Ed. 2d 326 (1988), *modified on other grounds on appeal after remand*, 964 F.2d 1471 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1253, 122 L. Ed. 2d 652 (1993).

[4] Barnes argues that the EEOC never reached the conciliation stage in his case, and consequently section 706(b) does not apply. The stage of the proceeding, however, does not determine whether the information is conciliation material. *See Olitsky*, 842 F.2d at 706-07 (rejecting contention that

Barnes argues, however, that even if the entire file is not admissible, the district court erred in refusing to allow the admission of specific documents from that file.[5] On appeal after remand in *Olitsky*, we held that if the documents are not conciliation material, section 706(b) does not bar their admission. *Olitsky v. Spencer Gifts, Inc.*, 964 F.2d 1471 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1253, 122 L. Ed. 2d 652 (1993) (approving the district court's admission of document which "contained no reference to conciliation efforts"). While "proposals and counter-proposals of compromise" are conciliation material, information that consists solely of "purely factual material related to the merits of [the plaintiff's] charge" is not. *Branch v. Phillips Petroleum Co.*, 638 F.2d 873 (5th Cir. Unit A 1981). We agree with Barnes that Documents P-6, P-8,[6] P-10, and P-11 contain only factual material to which section 706(b)'s bar does not apply.

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investigatory stage can be disclosed because not "conciliation").

Barnes also contends that *E.E.O.C. v. Associated Dry Goods Corp.*, 449 U.S. 590, 101 S. Ct. 817, 66 L. Ed. 2d 762 (1981), supersedes *Olitsky* and renders the entire file admissible. We agree with the district court that *Associated Dry Goods* addresses only whether the EEOC file is discoverable; it does not reach the question of admissibility. *Id.* at 596-97, 101 S. Ct. at 821.

[5] The documents Barnes sought to introduce contained information submitted to the EEOC by Ergon. Document P-6 is a letter from Ergon's attorney to the EEOC detailing Ergon's position regarding Barnes' retaliation claim and setting forth facts surrounding that position. Document P-8 lists the initial and present title and salary of Ergon employees. Documents P-10 and P-11 review the facts surrounding Barnes' application to Ergon and Ergon's decision not to hire Barnes.

[6] Ergon contends that, because P-15 contains substantially the same information as P-8, the admission of P-15 divests the exclusion of P-8 of all error. Because P-15 does not contain the pay history information included in P-8, we disagree.

Exclusion of these documents, however, is reversible only if exclusion affects Barnes' substantial rights. *See* Fed. R. Evid. 103(a). The exclusion of EEOC file information is harmless error if "after weighing the evidence actually admitted, [none of the excluded documents] would have added appreciable weight to the contention that the [action] was discriminatory." *Garcia v. Gloor*, 618 F.2d 264, 271-72 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113, 101 S. Ct. 923, 66 L. Ed. 2d 842 (1981). The district court found that none of the documents constituted direct evidence of discrimination and noted that its decision would not have varied had it considered the excluded information. Although the excluded documents do contain some information not completely duplicative of the testimony offered by Ergon at trial, we do not see that they add any appreciable weight to Barnes' claim of discrimination or retaliation. Accordingly, we hold that the district court's exclusion of Exhibits P-6, P-8, P-10, and P-11 was harmless error.

B

Barnes further contends that the district court erred by failing to render judgment in his favor on either the race discrimination or retaliation claims. In finding that Barnes did not carry his burden of persuasion on the issue of intentional discrimination, the district court acted as trier of fact.[7] We

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[7] This case was decided prior to the 1991 amendments to Title VII, which allow for jury trials. *See Landgraf v. USI Film Prods.*, ___ U.S. ___, 114 S. Ct. 1483, 1508, 128 L. Ed. 2d 229 (1994) (jury trial provision of Title VII 1991 amendments does not apply to pre-1991 cases); *see also West v. Resolution Trust Co.*, 22 F.3d 99, 100 (5th Cir. 1994) (applying *Landgraf*).

review the district court's determination for clear error. *See Williams v. Southwestern Bell Tel. Co.*, 718 F.2d 715, 718 (5th Cir. 1983). Findings of fact are "clearly erroneous" when the appellate court, upon a review of the entire record, is "left with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City, N.C.,* 470 U.S. 564, 573, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985) (quoting *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746 (1948)); *see also United States v. Menesses,* 962 F.2d 420, 428 (5th Cir. 1992) (applying *Anderson*).

1

Under Title VII, it is unlawful for any employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to . . . compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (1988). A Title VII plaintiff carries "the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358, 97 S. Ct. 1843, 1866, 52 L. Ed. 2d 396 (1977). A prima facie case includes the following elements: 1) that the plaintiff was a member of a protected class; 2) that the plaintiff was qualified for the position at issue; 3) that the defendant refused to hire the plaintiff despite the plaintiff's qualifications; and 4) that the

defendant continued to seek other applicants. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973). If the plaintiff demonstrates a prima facie case of discrimination, the burden of production shifts to the defendant to show a legitimate and nondiscriminatory basis for the adverse employment decision. *Id.* If the defendant does rebut the prima facie case, the plaintiff then must show that the defendant's offered reason is pretext. *See id.*[8]

Where, as in this situation, the case has been fully tried, we do not review the entire *McDonnell Douglas* presentation; instead, we focus solely on the district court's finding that Ergon did not intentionally discriminate against Barnes. *See Williams*, 718 F.2d at 717 ("The three-fold analysis contemplated by *McDonnell Douglas* and *Burdine*, however, is not the proper vehicle for evaluating a case that has been fully tried on the merits."). Primarily, we decide whether the district court committed clear error when it "decide[d] which party's explanation of the employer's motivation it believe[d]." *United States Postal Svc. Bd. of Governors v. Aikens,* 460 U.S. 711, 716, 103 S. Ct. 1478, 1482, 75 L. Ed. 2d 403

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[8] *See also Texas Dep't of Community Aff. v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981):

> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

450 U.S. at 255, 101 S. Ct. at 1095; *Davis v. Chevron U.S.A., Inc.,* 14 F.3d 1082, 1087 (5th Cir. 1994) (applying *McDonnell Douglas* test); *Vaughn v. Edel,* 918 F.2d 517, 521 (5th Cir. 1990) (same).

(1983); *see also Olitsky v. Spencer Gifts, Inc.*, 964 F.2d 1471, 1478 (5th Cir. 1992) ("When the defendant has produced evidence of a nondiscriminatory reason for plaintiff's discharge and plaintiff has had an opportunity to challenge that reason as pretextual, the trier of fact should proceed directly to the ultimate issue of whether the defendant intentionally discriminated against plaintiff. The initial prima facie case is no longer relevant."),[9] *cert. denied*, ___ U.S. ___, 113 S. Ct. 1253, 122 L. Ed. 2d 652 (1993); *Elliott v. Group Medical & Surgical Svc.*, 714 F.2d 556, 565 (5th Cir. 1983) ("[O]ur concern is not with the state of the evidence at any of its stages, but rather with the evidence in the case at large."), *cert. denied*, 467 U.S. 1215, 104 S. Ct. 2658, 81 L. Ed. 2d 364 (1984). Accordingly, "[t]he extent to which we assess the proceedings below according to the *McDonnell Douglas* order of proof is directed only by the format in which the parties' arguments are presented." *Williams*, 718 F.2d at 718; *see also Merwine v. Board of Trustees for State Institutions of Higher Learning*, 754 F.2d 631, 636 (5th Cir.) (applying *Elliott* and *Williams*), *cert. denied*, 474 U.S. 823, 106 S. Ct. 76, 88 L. Ed. 2d 62 (1985).

We agree with the district court that Barnes demonstrated a

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[9] *St. Mary's Honor Ctr. v. Hicks*, ___ U.S. ___, 113 S. Ct. 2742 (1993), clarifies that it is only the presumption created by the prima facie case that is no longer relevant. *See id.* at ___, 113 S. Ct. at 2749 ("If, on the other hand, the defendant has succeeded in carrying its burden of production, the *McDonnell Douglas* framework))with its presumptions and burdens))is no longer relevant."). The plaintiff's prima facie case still retains its relevance for the ultimate issue of intentional discrimination. *See id.* ("The factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination.").

prima facie case. As an African-American, he is a member of a protected class. He was qualified for the position of pool operator. Finally, Ergon did not hire Barnes and continued to interview other applicants. Consequently, the burden shifted to Ergon to provide a legitimate, nondiscriminatory reason for its decision not to hire Barnes.

In order to satisfy the burden of production, a defendant must "rebut the presumption of discrimination by producing evidence that the plaintiff was rejected . . . for a legitimate, nondiscriminatory reason. . . . To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant." *Burdine*, 450 U.S. at 254-55, 101 S. Ct. at 1094; *see also Aikens,* 460 U.S. at 714, 103 S. Ct. at 1481 (requiring defendant to rebut with legally sufficient evidence). "[The] defendant has failed to meet its burden of production [if it] has failed to introduce evidence which, *taken as true,* would *permit* the conclusion that there was a nondiscriminatory reason for the adverse action." *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S. Ct. 2742, 2748, 125 L. Ed. 407 (1993).

Barnes asserts that Ergon's stated reason for refusing to hire him was legally insufficient. In Title VII cases, this Court has found a defendant's reason legally insufficient when the defendant fails to prove a logical relationship between the requirements of the position and the stated reason. *See, e.g., Walsdorf v. Board*

of Comm'rs for E. Jefferson Levee Dist., 857 F.2d 1047, 1051 (5th Cir. 1988) (holding defendant's reason insufficient because no connection to job requirements); *Bunch v. Bullard*, 795 F.2d 384, 393-94 (5th Cir. 1986) (rejecting district court's finding of legitimate basis as improper because defendant failed to show relationship between allegedly discriminatory tests and job requirements). We have also rejected reasons that are completely subjective. *See Boykin v. Georgia-Pacific Corp.*, 706 F.2d 1384, 1390 (5th Cir. 1983), *cert. denied*, 465 U.S. 1006, 104 S. Ct. 999, 79 L. Ed. 2d 231 (1984) (rejecting "subjective, standardless decision-making by company officials," where the employer had no provisions for notifying employees of promotion openings and no objective bases for evaluating applicants); *Davis v. Jackson County Port Auth.*, 611 F.2d 577, 578 (1980) (rejecting as a legitimate nondiscriminatory reason plaintiff's desire, as stated on her application, to be paid more than job offered, because defendant never considered interviewing the plaintiff and no black person had ever been employed in that office and function).

Ergon's proffered reason was that Barnes was overqualified for the position of pool operator, and Ergon believed that he would not be satisfied with an entry-level position and would leave. Moreover, Ergon stated that it had difficulty retraining experienced persons to perform their duties according to Ergon's procedures, rather than those procedures they had learned and used in their prior positions. With virtually no legal argument, Barnes challenges the legal sufficiency of Ergon's reason, arguing that it

was "inevitably" standardless and subjective. We disagree. The district court found that other workers had left Ergon because they were accustomed to higher pay and more responsibility, and that prior familiarity with other methods hampered Ergon's ability to retrain workers in its own preferred operating procedures. Ergon's experience with other "overqualified" applicants provided the objective basis lacking in *Boykin*. Moreover, unlike the plaintiff in *Davis*, Ergon did interview Barnes and did not reject him at the initial screening level.[10] Consequently, we hold that Ergon's stated reason for rejecting Barnes was not legally insufficient, and the district court did not commit clear error in accepting Ergon's proffered reason as a legitimate and nondiscriminatory basis for refusing to hire Barnes.[11]

Having found Ergon's stated reason not legally insufficient, entry of judgment for Ergon was improper only if the evidence was insufficient for the trier of fact to conclude that Ergon had not

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[10] Barnes argues that Ergon's failure to interview him prior to hiring Marvin Ashley, a white person, constituted racial discrimination. The district court held that, because Barnes was working for his former employer at the time of this opening, and because Barnes did not reapply until after the position was filled, Barnes did not apply for the position Ashley filled. The evidence supports the district court's finding; we hold that it was not clearly erroneous.

[11] Other courts have accepted overqualification as a legitimate basis for rejecting an applicant. *See Woody v. St. Clair County Comm'n*, 885 F.2d 1557, 1561 (11th Cir. 1989) ("[I]t was not error to find that Wyatt validly rejected Woody because she was over-qualified for the position of general office worker. . . . [P]eople are often turned away from employment because they are `over-qualified.'"); *see also Taggart v. Time, Inc.*, 924 F.2d 43, 47-48 (2d Cir. 1991) (acknowledging that, in other contexts, overqualification can be a legitimate reason, but rejecting it in age discrimination context, because although "[a]n employer might reasonably believe that an overqualified candidate))where that term is applied to a younger person))will continue to seek employment more in keeping with his or her background and training, an older applicant that is hired is quite unlikely to continue to seek other . . . opportunities"). Here, we have no reason to believe that a person's race would make him any more or less likely to seek other opportunities more equivalent to his prior positions.

discriminated against Barnes. *See Elliott*, 714 F.2d at 564 ("We are simply to determine whether the record contains evidence upon the basis of which a reasonable trier of fact could have concluded as the [trier of fact actually] did."). As we have already discussed, Ergon introduced evidence of its unsatisfactory experience with other overqualified applicants. Moreover, Ergon produced evidence regarding its difficulty in retraining persons who had established other ways of performing certain tasks. We hold that this evidence allows a reasonable trier of fact to find in favor of Ergon.

2

To prevail on a Title VII retaliation claim, a plaintiff must show 1) that he engaged in protected activity; 2) that the defendant acted adversely against the plaintiff subsequent to that activity; and 3) a causal link between these two events. *See Jack v. Texaco Research Center*, 743 F.2d 1129, 1131 (5th Cir. 1984). Barnes' protected activity (filing a charge against Petrosource) and Ergon's adverse decision not to hire him are not at issue. The only question is whether Barnes proved a connection between the two events. Because the district court found for Ergon, we review Barnes' challenge for sufficiency of the evidence. Accordingly, we will reverse only if the evidence so overwhelmingly favored Barnes that a reasonable trier of fact could not have found against him. *See Elliott*, 714 F.2d at 564. Barnes demonstrated only that Allen knew about the charge against Petrosource at or about the time he interviewed Barnes. In response, Ergon demonstrated that Allen had

a policy of hiring and promoting African-Americans, and Allen testified that the Petrosource charge did not influence his decision. Ultimately, the resolution of this issue rests on the credibility of Barnes and Allen. "[W]hen a trial judge[] . . . credit[s] the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Anderson*, 470 U.S. at 575, 105 S. Ct. at 1512. The district court, as trier of fact, found that the charge against Petrosource did not factor in Allen's decision not to hire Barnes. The evidence is sufficient to support this conclusion.

C

Barnes also challenges the district court's refusal to grant him judgment as a matter of law. "In reviewing a district court's disposition of a motion for judgment [as a matter of law], we apply the same test as did the district court, without any deference to its decision." *Little v. Republic Ref. Co.*, 924 F.2d 93, 95 (5th Cir. 1991). "To reverse the district court's denial of [judgment as a matter of law], we must find after reviewing the entire record in the light most favorable to the [nonmovant] that the evidence so overwhelmingly favors [the movant] `that no reasonable jury could have arrived at the disputed verdict.'" *Patterson v. F.D.I.C.*, 918 F.2d 540, 547 (5th Cir. 1990) (quoting *Long v. Shultz Cattle Co.*, 881 F.2d 129, 132 (5th Cir. 1989)).

Barnes contends that the district court should have granted

his motion for judgment as a matter of law on the § 1981 race discrimination claim.[12] The § 1981 claim presented to the jury was based on the same issue of race discrimination as the Title VII claim discussed previously in this opinion. Barnes introduced a prima facie case of race discrimination. Because Ergon's explanation for its decision was not legally insufficient, Ergon did not "stand silent in the face of the presumption." *See Burdine*, 450 U.S. at 254, 101 S. Ct. at 1094. As we have already held that the evidence supported the district court's decision in the Title VII context, Ergon's evidence clearly sufficed to raise a genuine issue of material fact for the jury. Therefore, we will not disturb the jury verdict.

III

For the foregoing reasons, we AFFIRM the judgment of the district court.

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[12] Barnes actually generally contests the denial of judgment as a matter of law. Our holding that the evidence sufficiently supports the trier of fact's decision on the Title VII claims renders the question of judgment as a matter of law moot on those claims, leaving only the § 1981 race discrimination claim.