

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-7474  
Summary Calendar

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STEVE B. GRAY,

Plaintiff-Appellant,

v.

CONTINENTAL CONSTRUCTION COMPANY, INC.,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Southern District of Mississippi  
(3:91 CV 207)

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(April 25, 1994)

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

EDITH H. JONES, Circuit Judge:

Appellant Steve Gray sued Continental Construction Company, Inc. ("Continental"), a general contractor specializing in industrial projects, under Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e et seq., alleging that Continental had fired Gray from a construction job due to racial discrimination. Following a bench trial, the district court

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

entered judgment in favor of Continental. Gray now appeals. Finding no error in the district court's judgment, we affirm.

#### **BACKGROUND**

The first time that Gray, an experienced carpenter, worked for Continental, he was hired to work on a job site in Vicksburg, Mississippi. While employed on the Vicksburg job, Gray worked under one of Continental's regular carpenter foremen, Larry Johnson. Johnson, Gray, and a fellow carpenter and son-in-law to Johnson, Bud Meadows, developed a good working relationship.

When Continental asked Johnson to put together a crew of carpenters for a new project in Columbus, Mississippi, Johnson recruited both Gray and Meadows. The Columbus job, known as the HPC Project, involved the construction of a hydrogen peroxide manufacturing facility owned by Eka Nobel, Inc., a new and potentially large customer for Continental.

The HPC Project was a particular challenge for Continental since the construction plans for the facility were being drafted contemporaneously with work on the project. The contract with Eka Nobel, Inc. included a \$100,000 penalty provision in the event that certain portions of the project were not completed by Continental by January 31, 1991. Conversely, the contract also provided for the payment to Continental of a \$50,000 performance bonus if those portions of the project were completed by January 31, 1991.

When the work on the HPC Project began, Gray, Johnson, and Meadows jointly rented a mobile home and shared living

expenses. At some point, the HPC Project began to lag behind schedule due to inclement weather and problems with workers' attendance. Seeking to address this latter concern, Continental's job site management informed all employees at a meeting held on November 12, 1990 that future unexcused absences from work would result in discharge. Gray attended this meeting. Employees were told that they were expected to work ten hours a day, seven days a week, and any employee with concerns relating to this new policy should bring it to management's attention immediately.

Sometime following that meeting, Gray went to Johnson and requested time off for December 1 and 2. Johnson told him to take his request to Ronnie Max as Johnson did not have authority to grant permission for time off. When Gray went to Max, Max told him that the decision was up to Johnson. The parties dispute whether Gray returned to Johnson again to request the time off. In any event, Gray, who had stated to Meadows that he intended to take those days off regardless of what management said, did not report to work that weekend. Instead, he went to visit his children in Vicksburg.<sup>1</sup> Gray did not visit Vicksburg that weekend on account of any emergency, and no one gave him permission to take those days off -- although no one told him he could not go.

Gray was discharged by Continental two days later. Two white employees were also fired pursuant to the new policy for unexcused absences. Gray claims that Continental -- and

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<sup>1</sup> Estranged from the mother of his children, Gray has limited visitation rights.

specifically Johnson -- fired him because of his race. At trial, Meadows, who is white, testified that in his opinion, his father-in-law, Johnson, is a racist. Meadows stated that upon Gray's discharge, he quit his job at Continental to protest its unfair treatment of Gray. According to Meadows, other white employees were absent from work that same weekend, but they were not fired.

Continental maintained that Gray was discharged solely in response to his contempt for authority, asserting that Gray neglected to show up for work without permission during a crucial time of the project after all employees -- including Gray -- had been warned about unexcused absences. Continental maintained that the decision to terminate Gray was made by Morgan, Max, and Neill. All three deny that their decision was racially motivated in any way.

#### **DISCUSSION**

This court reviews a district court's findings of fact for clear error and conclusions of law for legal error. See Shirley v. Chrysler First, Inc., 970 F.2d 39, 41-42 (5th Cir. 1992). This court is to accept the district court's findings of fact if they are plausible in light of the record when viewed as a whole and determinations regarding the credibility of witnesses are afforded even greater deference. See Anderson v. City of Bessemer City, 470 U.S. 564, 575-76, 105 S. Ct. 1504, 1511-12 (1985).

At trial, Gray had the burden of proving a prima facie case of discrimination by a preponderance of the evidence. See Kendall v. Block, 821 F.2d 1142, 1145 (5th Cir. 1987). To

establish a prima facie case based on a violation of Title VII, Gray had to establish (1) that he belongs to a group protected by the statute; (2) that he was qualified for the job from which he was terminated; (3) that, despite his qualifications, he was terminated; and (4) that after his termination, the position remained open and Continental continued to seek or hire a person not in Gray's protected class or retained those having comparable or lesser qualifications not in Gray's protected class. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03, 93 S. Ct. 1817, 1824 (1973) and Whiting v. Jackson State Univ., 616 F.2d 116, 121 (5th Cir. 1980). After that, the burden shifted to the defendant to articulate "some legitimate, nondiscriminatory reason" for the termination. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1089, 1093 (1981); Kendall, 821 F.2d at 1145. At this point, the plaintiff had to prove that the articulated legitimate reason was but a pretext for the discriminatory decision. See Kendall, 921 F.2d at 1145. On appeal, we review the ultimate question whether appellant was discriminated against on account of his race.

The district court, after hearing all of the evidence, concluded that Gray did not carry his burden of proof, finding that (1) the decision to discharge Gray was not made by Johnson alone (with Johnson being the only one charged with racial discrimination), and (2) Gray failed to present evidence, aside from Meadows' testimony which the district found not to be credible, indicating that Johnson was sensitive to Gray's race.

After a thorough review of the record, this court finds that the findings by the district court are well supported in the record and not, therefore, clearly erroneous. The record illustrates that not only did Johnson think highly enough of Gray to offer him a position on the HPC Project, but Gray thought well enough of Johnson to live and share living expenses with Johnson while working on that project. The court did not require Gray to produce direct discriminatory statements from Johnson. The court viewed their relationship as a whole.

Additionally, the only testimony that Gray presented at trial, aside from his own, was that of Meadows. The district judge found Meadows' testimony not to be credible because of his conflict-filled relationship with Johnson and other ill-feelings for Johnson that the district court could not quite understand. This is a credibility call that we may not second-guess on appeal.

Finally, at least two white employees were terminated within the same time frame and for the very same conduct for which Gray was dismissed. Continental's evidence supported its position that Gray was fired because he was absent from work without permission. Gray was present at the meeting when all employees were told that they would be terminated for unexcused absences. The record does not indicate that Gray offered plausible evidence supporting the notion that Continental's legitimate reason for firing Gray was merely a pretext for a racially discriminatory decision. The district court did not err in concluding that Gray

was not fired due to racial discrimination. Other alleged discrepancies in the court's findings of fact are immaterial.

**CONCLUSION**

For these reasons, we **AFFIRM** the judgment of the district court.