IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-7482
Summary Calendar

ALFRED BARNES and ELBERT O'NEAL,

Plaintiffs-Appellants,

versus

BARRETT REFINING, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Mississippi
(CA-3:92-0144(W)(N))

(March 22, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

I

In March of 1991, Barrett Refining Corporation ("Barrett") purchased a small oil refinery in Vicksburg, Mississippi, from Petro Source, Inc. ("Petro"). Both of the plaintiffs, Elbert O'Neal and Alfred Barnes, had been employed by Petro, and each had

---

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

previously filed a charge against Petro with the Equal Employment Opportunity Commission ("EEOC").

In late March, the president of Barrett, John Barrett, Jr., visited the Vicksburg refinery, interviewed the regular employees of Petro who were on location, and made the bulk of Barrett's initial hiring decisions. The plaintiffs' summary judgment evidence alleges that Mr. Barrett interviewed plaintiff O'Neal but did not hire him. Mr. O'Neal alleges that he had greater experience than some of the "B" operators who were employed by Barrett and that there was no legitimate reason why he was not hired by Barrett. Plaintiff Barnes was not among those interviewed by Mr. Barrett at the Vicksburg facility.[1]

After Mr. Barrett left the Vicksburg facility on May 16, 1991, Barrett's newly-hired plant manager, Bobby Clark, took charge of the hiring process. Plaintiff O'Neal made an oral request for employment with Mr. Clark on or about May 31, 1991. Specifically, Mr. O'Neal asked Mr. Clark for a job as a "B" Operator. Mr. Clark states that he declined to hire Mr. O'Neal because there were no open positions--Mr. Clark had filled the fourth and last "B" Operator position for the refinery when he hired Rick Christensen

[1]Mr. O'Neal states that he was the only person interviewed by Mr. Barrett who was not offered a position with Barrett Refining Corporation, and that he was the only interviewee who had filed EEOC charges and a lawsuit against Petro.

on or about May 27, 1991. Again, the summary judgment evidence shows that plaintiff Barnes never applied for a job with Barrett.[2]

II

On March 9, 1992, Mr. Barnes and Mr. O'Neal filed this action in the district court against Barrett alleging that Barrett's refusal to employ them had discriminated against them on the basis of their race, and that Barrett had retaliated against them for their having previously filed discrimination charges against Barrett's predecessor, Petro.

On April 2, 1992, Barrett filed its answer and defenses, and on September 25, 1992, Barrett filed its motion for summary judgment. Barrett's summary judgment motion asserts that Mr. Barnes and Mr. O'Neal failed to raise a genuine issue of material fact that would entitle them to present their claims to a jury. Particularly, Barrett alleges (1) that Mr. Barnes and Mr. O'Neal cannot assert an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, because they failed to first exhaust their administrative remedies, (2) that retaliation against individuals who had filed EEOC charges is not actionable under § 1981, (3) that Mr. Barnes had never applied for employment with Barrett, and (4)

[2]Mr. Barnes admitted this fact by failing to respond to Barrett's specific request for admission served on April 17, 1992. Fed. R. Civ. P. 36(a); see Dukes v. South Carolina Ins. Co., 770 F.2d 545 (5th Cir. 1985). Moreover, the affidavits filed by Barnes and O'Neal in opposition to Barrett's motion for summary judgment do not dispute this fact.

that Mr. O'Neal was not hired because there were no vacancies at the time he expressed interest in employment with Barrett.

On October 28, 1992, Mr. O'Neal submitted an affidavit in opposition to Barrett's motion for summary judgment, and on November 3, Mr. Barnes did the same. On February 26, 1993, the district court entered an order granting summary judgment in favor of Barrett.

III

We review the grant of summary judgment de novo, applying the same standard as the district court. United States v. Arron, 954 F.2d 249, 251 (5th Cir. 1992). "Summary judgment is appropriate where critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant, or where it is so overwhelming that it mandates judgment in favor of the movant." Armstrong v. City of Dallas, 997 F.2d 62, 67 (5th Cir. 1993).

In the present case, the plaintiffs' complaint asserts that Barrett discriminated against the plaintiffs on the basis of their race and that Barrett retaliated against them for their having filed discrimination charges against Barrett's predecessor, Petro. Plaintiffs contend that they have causes of action under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. In such a discrimination case, the burden of producing evidence from which a rational trier of fact could find

discrimination always remains with the plaintiff. Armstrong v. City of Dallas, 997 F.2d 62, 65 (5th Cir. 1993).

The party that moves for summary judgment bears the burden to establish that its opponent has failed to raise a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct 2548, 2553 (1986). Once the movant has met this burden, they are entitled to summary judgment unless the nonmovant can then demonstrate that summary judgment is inappropriate. Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 178 (5th Cir. 1990). In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, the nonmoving party must go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. 324, 106 S.Ct at 2553 (quoting Fed. R. Civ. P. 56(e)).

A

First, we hold that the plaintiffs cannot maintain their Title VII case against Barrett because they failed to properly exhaust their administrative remedies before bringing this suit. It is well-settled that before a party can pursue a civil action under Title VII, the party must first file a charge with the EEOC, within 180 days of the alleged discriminatory act. 42 U.S.C. § 2000e-5(e)(1); Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 102 S.Ct. 1127, 1132 (1982); Pruet Production Co. v. Ayles, 784 F.2d 1275 (5th Cir. 1986).

It is undisputed in the present case that neither Mr. O'Neal nor Mr. Barnes filed a charge with the EEOC against Barrett. After Barrett made this point in its motion for summary judgment, the burden then shifted to the plaintiffs to go beyond the pleadings and, in response to the summary judgment motion, demonstrate that summary judgment is inappropriate. Celotex, 477 U.S. 324, 106 S.Ct at 2553; Lavespere, 910 at 178. The plaintiffs failed to carry this burden.

The plaintiffs argue on appeal that they were not required to file a charge with the EEOC against Barrett before bringing this suit in the district court. They argue that they are exempted from the normal filing requirement because they had previously filed a EEOC claim against Petro and because they are now asserting a claim of retaliation. See Gupta v. East Texas State University, 654 F.2d 411, 414 (5th Cir. 1981); Carter v. South Central Bell, 912 F.2d 832 (5th Cir. 1990); Gottlieb v. Tulane University of Louisiana, 809 F.2d 278, 284 (5th Cir. 1987). Further, they argue that their previous EEOC charge against Petro suffices for them to bring suit against Barrett under the doctrine of successor liability. See EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086 (6th Cir. 1974). The plaintiffs, however, not only failed to offer the evidence for the purpose of establishing this claim, but failed to even raise the successor argument in the district court. We will not consider for the first time on appeal an argument not presented to the district court. U.S. v. Cates, 952 F.2d 149 (5th Cir.

1992); Atlantic Mutual Ins. Co. v. Truck Ins. Exchange, 797 F.2d 1288 (5th Cir. 1986).

B

In addition to the plaintiffs' Title VII claim, the complaint asserted a claim of retaliatory and racial discrimination under 42 U.S.C. § 1981. Again, we hold that the plaintiffs failed to demonstrate that summary judgment was inappropriate.

First, it is clear that plaintiff Barnes can maintain no discrimination suit against Barrett because the conclusive summary judgment evidence showed that he never even applied for a job with Barrett. In order to make out a prima facie case of discrimination, the plaintiff must allege, inter alia, that he applied for an available position. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 1094 n.6 (1981) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824 (1973)). In the light of the conclusive summary judgment evidence, it is clear that the district court properly granted summary judgment against Mr. Barnes.

Further, we hold that plaintiff O'Neal also failed to allege facts to support his claims of discrimination in a manner sufficient to survive summary judgment. Mr. O'Neal alleged facts to show that, "[a]s a result of racially discriminatory employment practices at Petro," he had filed charges with the EEOC against Petro. He argued that Barrett refused to hire him in retaliation for his having filed these charges against Petro. As we have

previously held, a claim of retaliatory discrimination that occurred before November 21, 1991, is not actionable under § 1981. Johnson v. Uncle Ben's, Inc., 965 F.2d 1363 (5th Cir. 1992); Carter v. South Central Bell, 912 F.2d 832, 840 (5th Cir. 1990); see Patterson v. McLean Credit Union, 491 U.S. 164, 109 S.Ct. 2363 (1989).

Other than Mr. O'Neal's argument of retaliation, his affidavit in opposition to Barrett's motion for summary judgment alleged no other facts to support a claim of discrimination. In fact, Mr. O'Neal states in his affidavit that there was no other reason why he was not hired by Barrett "[o]ther than the fact that [he] had filed a lawsuit against Petro." Mr. O'Neal, therefore, has presented absolutely no evidence to support the bare claim of racial discrimination found in his complaint. See Armstrong, 997 F.2d at 67; Howard v. City of Greenwood, 783 F.2d 1311, 1315 (5th Cir. 1986). Accordingly, we hold that summary judgment with respect to plaintiffs' § 1981 claim was also appropriate.

IV

We hold that the plaintiffs cannot pursue their Title VII claim because they failed to exhaust their administrative remedies by filing first with the EEOC; that plaintiff Barnes failed to make a prima facie case of discrimination to maintain his suit in the district court; and, finally, that plaintiff O'Neal failed to produce any evidence from which a rational trier of fact could find

discrimination under § 1981. The judgment of the district court is therefore

A F F I R M E D.