

IN THE UNITED STATES OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8178
Summary Calendar

JEFFREY L. ABRAHAM,

Plaintiff-Appellant,

versus

SOUTHWESTERN BELL YELLOW PAGES,
INC. and LEROY ROSAS,

Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Texas
(SA 91 CA 30)

(August 18, 1993)

Before JOLLY, SMITH, and WIENER, Circuit Judges.

PER CURIAM:*

After being terminated from his position as a sales representative with Southwestern Bell Yellow Pages, Inc., Jeffrey L. Abraham filed suit alleging that his termination was based on his age and his nationality and was in retaliation for his filing of a claim with the Equal Employment Opportunity Commission

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

(EEOC). The district court granted summary judgment to Southwestern Bell on all of Abraham's claims. The district court also awarded Southwestern Bell attorneys' fees after determining that most of Abraham's claims were groundless. Abraham appeals. We affirm the district court's granting of summary judgment, but reverse the district court's award of attorneys' fees to Southwestern Bell.

I

Abraham was employed by Southwestern Bell on April 24, 1987, as a sales representative. On December 15, 1989, Abraham, along with three other employees, was placed on probation following an evaluation based upon performance results and management standards; in the evaluation, Abraham ranked 32 out of 32 representatives. Southwestern Bell established a formal developmental probation program for Abraham and the other employees on probation, which was intended to assist them to improve their low sales results. At the end of the probationary program, Abraham's performance was again reviewed. Southwestern Bell at this time terminated Abraham's employment based on Abraham's failure to meet the terms of his probation, i.e., that he achieve an objective or group average in sales. On July 9, 1990, Abraham's employment with Southwestern Bell was terminated. At this time, Abraham was forty-four years old.

Of the four employees Southwestern Bell placed on probation, three were within the age group protected under the ADEA. Only

Abraham and one other employee were eventually terminated from their positions with Southwestern Bell; the other employee was not within the protected age group. Twenty-seven employees were not placed on probation; of these, thirteen were within the protected age group. After Abraham's employment was terminated, he was not replaced with by an employee of a different national origin, an employee of a different race, or a younger employee.

After being placed on probation, Abraham filed a complaint with the EEOC in which he alleged that he was placed on probation because of his national origin ("Anglo") and because of his age. After Abraham's employment was terminated, he amended his EEOC charge to include a charge that his termination from employment was in retaliation for his filing of the initial charge. He did not allege that Southwestern Bell terminated his employment because of his national origin or his age.

On January 20, 1991, Abraham initiated this suit against Southwestern Bell pursuant to section 7(b) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626(b), and section 16(b) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b). Abraham later filed a second complaint against Southwestern Bell pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.; Abraham also included state court pendent claims of negligent infliction of emotional distress and tortious interference with contract. Abraham sought reinstatement

to his position of employment, back pay and benefits, compensatory and punitive damages, attorneys' fees, and injunctive relief.

On March 20, 1992, Southwestern Bell filed its motion to dismiss and/or for summary judgment. On April 20, 1992, Abraham filed his response to Southwestern Bell's motions. On February 12, 1993, the district court granted Southwestern Bell's motion to dismiss and entered a take-nothing judgment in favor of Southwestern Bell. On March 4, 1993, Southwestern Bell moved for attorneys' fees; the district court granted this motion and awarded Southwestern Bell \$59,176.43 in attorneys' fees. Abraham appeals.

II

On appeal, Abraham argues that the district court erred by granting Southwestern Bell's motion for summary judgment. Abraham also argues that the district court should not have granted Southwestern Bell's motion for attorneys' fees under 42 U.S.C. § 2000e-5(k).

On the other hand, Southwestern Bell argues that the district court properly granted summary judgment on all of Abraham's claims. In addition, Southwestern Bell argues that the district court properly awarded attorneys' fees.

III

A

Summary judgment is appropriate if the moving party, Southwestern Bell, established that there is no genuine issue of material fact and that it is entitled to a judgment as a matter of

law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). We review the district court's granting of summary judgment de novo and affirm if the nonmoving party, Abraham, failed to present sufficient evidence to create a genuine issue of material fact. Palmer v. Fayard, 930 F.2d 437, 438 (5th Cir. 1991).

B

Abraham argues that the district court erred in granting summary judgment to Southwestern Bell. On appeal Abraham details evidence he presented to the district court, apparently in an attempt to demonstrate that a genuine issue of material fact exists. First, Abraham discusses a letter from the president of Southwestern Bell dated June 11, 1990, which showed Abraham and two other employees who were "targeted" for termination; all three employees were over the age of forty. Next, Abraham states that six employees were placed on warning and/or probation, which he alleges "shows a pretextual basis for the termination and/or demotion" because two of the employees were never treated as if they were on probation and they were not terminated.

Third, Abraham allegedly had a conversation with supervisors in which one supervisor stated that he wanted to get rid of older workers and that he favored younger workers. Abraham alleges that this supervisor told him that he was going to get rid of three to

five older representatives and "face the heat later."¹ Abraham also alleges that his supervisor did not tell him that he would get off probation if he successfully completed probation and that this was "insurance to be sure that [he] was going to be terminated." Next, Abraham alleges that a fellow Hispanic employee was placed on probation, but this employee's probation format was different and that other Hispanic employees with low performance were allowed to work without probation.

Regarding his retaliation claim, Abraham alleges that after his supervisor received his EEOC charge the supervisor told him that he could not believe the charges had been filed and that the supervisor was "outraged."

Abraham also argues that his performance was above other representatives who were not put on probation or terminated. Furthermore, he argues that his performance appraisal one month before being placed on probation was satisfactory. Abraham argues that the district court ignores these issues of material fact and concluded that age and national origin were not factors in his termination.

C

On the other hand, Southwestern Bell argues that the district court properly granted its motion for summary judgment as to all of Abraham's claims. Southwestern Bell first addresses Abraham's age

¹The supervisor flatly denies these conversations ever occurred.

discrimination claim pursuant to the ADEA, noting that Abraham did not address the district court's threshold finding that he failed to establish even a prima facie case of age discrimination in that he was not replaced by someone outside of the protected class or by someone younger. Southwestern Bell argues that in a discrimination case, summary judgment for the employer is appropriate where an employee cannot establish a genuine issue of material fact on each element of a prima facie case. Southwestern Bell argues that Abraham was not replaced by someone younger than he, and he failed to present any testimony that would raise a genuine issue of material fact regarding this allegation.

Southwestern Bell further argues that even if Abraham had established a prima facie case of age discrimination, he presented no evidence raising a factual issue that the reasons for his discharge were pretextual. Southwestern Bell states that it terminated Abraham's employment because of his poor performance and failure to meet the terms of his probation. Additionally, Southwestern Bell states that Abraham was defiant and refused to carry out his assigned tasks. Southwestern Bell argues that it articulated a legitimate nondiscriminatory reason for Abraham's discharge and that Abraham has presented no evidence that the proffered reasons were a pretext for discrimination.

D

To establish a prima facie case of age discrimination, Abraham must establish that (1) he was discharged; (2) he was qualified for

the position; (3) he was within the protected class at the time of discharge; (4) he was replaced by someone outside the protected class or someone younger; or (6) he was otherwise discharged because of his age. Crum v. American Air Lines, Inc., 946 F.2d 423, 428 (5th Cir. 1991). The district court determined that Abraham offered nothing to indicate that he was replaced by anyone--much less someone outside the protected class or someone younger. The district court noted that, on the other hand, Southwestern Bell presented an affidavit stating that upon Abraham's termination he was not replaced by someone "of a different national origin or race" or by someone "younger in age." Accordingly, the district court determined that Abraham had failed to present a prima facie case of age discrimination.

The district court further determined that even assuming, arguendo, that Abraham had made out a prima facie case, Abraham presented nothing to reflect that his termination was merely a pretext for discrimination. The district court noted that Abraham's only evidence was that a younger employee whose sister and brother-in-law were in business with Abraham's supervisor had a sale moved to a higher category. Other than this, Abraham's only "evidence" was uncorroborated conversations with his supervisor, all of which his supervisor flatly denied, and Abraham's own unsubstantiated beliefs and conclusions.

As to Abraham's claim of national origin/race discrimination, the district court again determined that Abraham was unable to

establish a prima facie case because he could not identify who replaced him, much less establish that his replacement was of a different race or of different national origin. Again assuming, arguendo, that Abraham had made a prima facie case of age discrimination, the district court determined that Abraham had presented nothing to indicate that Southwestern Bell's reasons for terminating his employment were merely a pretext for discrimination. The district court found that the only "fact" reported by Abraham in support of his claim for national origin/race discrimination was his statement that "some people" knew that his supervisor did not care for white employees; however, the only person he actually identified as having such knowledge was a fellow employee who had also filed suit against Southwestern Bell, and furthermore he failed to present an affidavit or deposition testimony in support of this allegation.

Regarding Abraham's retaliatory discharge claim, the district court first stated that to establish a prima facie case of retaliatory discharge Abraham must show that (1) he engaged in an activity protected under Title VII; (2) he suffered an adverse employment action; and (3) there exists a causal connection between his participation in the protected activity and the adverse employment action. Abraham's only evidence in relation to this claim was his uncorroborated statement that his supervisor was upset to learn that the EEOC claim had been filed and said something to Abraham to the effect of "I can't believe you filed

those charges against me." The district court held that this is insufficient to indicate that Abraham would not have been terminated had he not filed his EEOC claim, particularly in light of the legitimate reasons that existed for his termination. The district court held that the supervisor's alleged comment did not reflect any type of threat, implicit or otherwise, and that Abraham's retaliation claim was without merit.

As to Abraham's pendent state-law claims, the district court first determined that Texas law did not recognize a cause of action for negligent infliction of emotional distress arising out of an employment context. Regarding Abraham's tortious interference with contract claim, the district court determined that all of the actions of which Abraham complained were taken by his supervisor in the capacity of an agent of Southwestern Bell. In order to prevail on a claim of tortious interference, the interference must be by a third party who is unrelated to the contracting parties; therefore, Abraham's claim must fail because his supervisor cannot be considered a third party.

After reviewing the evidence presented by Abraham, we agree with the district court that Abraham has failed to present sufficient evidence to create a genuine issue of material fact. As such, summary judgment was appropriate on all claims.

IV

A

Abraham next challenges the district court's award of attorneys' fees to Southwestern Bell. An award of attorneys' fees is entrusted to the sound discretion of the trial court. Texas Commerce Bank v. Capital Bancshares, Inc., 907 F.2d 1571, 1575 (5th Cir. 1990). While section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) provides that a prevailing party may be allowed reasonable attorneys' fees, a prevailing defendant may only be awarded such fees where the court finds that the plaintiff's claim was frivolous, unreasonable, groundless, or without foundation, or that the plaintiff continued to litigate after it clearly became obvious. Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421-22 (1978); Jackson v. Color Tile, Inc., 803 F.2d 201, (5th Cir. 1986).

B

Abraham argues that the district court abused its discretion in awarding attorneys' fees to Southwestern Bell. Abraham argues that his claims were not frivolous, unreasonable, or groundless. Abraham again points to the evidence set out in his summary judgment argument to argue that his age and national origin were controlling factors in his termination. While Abraham admits that this evidence may not be sufficient to overcome summary judgment, he nevertheless argues that it is enough to show that his claims were not frivolous, unreasonable, or groundless.

C

On the other hand, Southwestern Bell argues that the award of attorneys' fees was appropriate because Abraham failed to present any evidence to support his claims. Southwestern Bell argues that Abraham's failure to establish a prima facie case or present any evidence of improper motive establishes its right to an award of attorneys' fees.

D

In its brief order awarding attorneys' fees, the district court stated simply that the order granting Southwestern Bell's motion for summary judgment fully reflects that the majority of Abraham's claims were groundless and, therefore, Southwestern Bell is entitled to an award of attorneys' fees. We conclude that the district court abused its discretion in granting Southwestern Bell's motion for attorneys' fees. While Abraham did not present sufficient evidence to survive summary judgment, we cannot say that all of his claims were frivolous, groundless, or without foundation. Indeed, even the district court only found that a "majority of Abraham's claims" were groundless. Bearing in mind that attorneys' fees are awarded to a prevailing defendant in a Title VII action only in extreme cases, we conclude that the district court did abuse its discretion. We therefore reverse the district court's award of attorneys' fees to Southwestern Bell.

V

In conclusion, we AFFIRM the district court's granting of summary judgment to Southwestern Bell on all of Abraham's claims. However, we REVERSE the district court's decision to award attorneys' fees to Southwestern Bell. Accordingly, the decision of the district court is

AFFIRMED in part and REVERSED in part.