

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-8202  
Summary Calendar

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ELIZABETH A. FELAN,

Plaintiff-Appellant,

VERSUS

MARVIN RUNYON, Postmaster General,  
UNITED STATES POSTAL SERVICE, et al.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Western District of Texas  
(SA-89-CA-1553 c/w SA-90-CA-0417)

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(November 18, 1993)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:\*

Elizabeth Felan appeals a summary judgment entered in her employment discrimination suit. Finding no error, we affirm.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

## I.

The following facts are undisputed. In 1985, Felan was hired by the United States Postal Service ("USPS") as a rural relief carrier, a person who substitutes for the regular carrier whenever he takes leave, becomes ill, or for some other reason cannot work. The job is a part-time, not a full-time, career position.

Felan held this position until April 1988. For much of the time between 1985 and 1988, the position of regular carrier was vacant. As a result, Felan delivered the mail on a regular basis.

While acting as the rural relief carrier, Felan applied to be the regular carrier. To be considered for the permanent position, she was required to pass the rural carrier examination. She failed this standard examination twice.

In March 1988 the vacancy was filled by a black male, Bobby Kea, who was selected on the basis of passing the rural carrier examination and his veteran's points. Shortly after Kea's selection, Felan was fired from her position as rural relief carrier.

## II.

Felan filed two lawsuits asserting claims arising from her employment and termination. In Civil Action No. SA-89-CA-1553, filed in November 1989, she asserted claims against the Postmaster General and several employees of the USPS,<sup>1</sup> contending that she was

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<sup>1</sup> These named defendants are Joseph Schraer, C.R. Griffin, Louis Alonzo, Sam Maskill, Albert Garcia, Bobby Smith, Juan Hinojosa, and Reggie Quintero.

fired because of her race (white) and sex (female) in violation of title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16(a)-(e). She also asserts claims under the Equal Pay Act, 29 U.S.C. § 206(d), the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 et seq., U.S. CONST. AMENDS. V and XIV, and 42 U.S.C. §§ 1981, 1983, and 1985.

In Civil Action No. SA-90-CA-417, filed in April 1990, Felan asserted claims against the Postmaster General and Evan V. Kemp, Jr., Chairman of the Equal Employment Opportunity Commission ("EEOC"), alleging that the USPS wrongfully failed to promote her to the position of regular rural carrier and wrongfully discharged her in violation of the fair employment laws. She also asserted that she was denied her right to due process.

The two lawsuits were consolidated. The district court accepted the magistrate judge's recommendations and granted summary judgment on the title VII claims and dismissed all other claims with prejudice.

### III.

#### A.

When no party specifically objects to a magistrate judge's report and recommendation, we need not conduct a de novo review of it. 28 U.S.C. § 636(b)(1). The district court carefully instructed Felan on how to file written objections to adverse findings. Despite this guidance, her objections amount to unsubstantiated and generalized griping. As she failed to object

specifically to the magistrate's findings, absent plain error or manifest injustice she is barred from appealing those findings, which were accepted by the district court. Tolbert v. United States, 916 F.2d 245, 247 (5th Cir. 1990).

B.

The district court dismissed Felan's claim under the Equal Pay Act. It also held that title VII provides the exclusive remedy for claims arising out of alleged discrimination in federal employment; thus, it dismissed with prejudice Felan's claims under the FTCA, the Fifth and Fourteenth Amendments, and §§ 1981, 1983, and 1985 and dismissed all defendants except the Postmaster General as improper defendants in a title VII action. All of these holdings were correct.

1.

The Equal Pay Act prohibits the payment of unequal wages for equal work on the ground of sex, unless the wage difference is justified by one of four enumerated defenses. See § 206(d). Felan complains that she was not hired as the regular rural carrier, and of her discharge. She does not contend that she was paid differently from the men who did the same work as she. Thus, her claim under the Equal Pay Act properly was dismissed for failure to state a claim. Chance v. Rice Univ., 984 F.2d 151 (5th Cir. 1993).

2.

The district court held that title VII provides the exclusive judicial remedy for claims of employment discrimination by the federal government. Thus, it dismissed with prejudice Felan's other claims for relief.

Except for claims of sex-based wage discrimination, cognizable under the Equal Pay Act, the exclusive remedy for claims of discrimination by federal employees is provided in 42 U.S.C. § 2000e-16(a)-(e). Brown v. General Servs. Admin., 425 U.S. 820, 835 (1976); Henderson v. Veterans Admin., 790 F.2d 436, 439 (5th Cir. 1986). Thus, we affirm the district court's dismissal for failure to state a claim of all claims except for her claim under title VII. Brown, 425 U.S. at 834; Irwin v. Veterans Admin., 874 F.2d 1092, 1095-96 (5th Cir. 1989), aff'd, 498 U.S. 89 (1990).

3.

The district court also dismissed all of the defendants, with the exception of the Postmaster General, as not proper defendants under title VII. This was correct. Section 2000e-16(c) provides that in any title VII action against the federal government, "the head of the department, agency, or unit, as appropriate, shall be the defendant." Montgomery v. USPS, 867 F.2d 900, 902 (5th Cir. 1989).

C.

The district court granted summary judgment on Felan's claim

against the Postmaster General under title VII. We review 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). If the moving party succeeds, the non-moving party must "establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. If the non-moving party fails to "offer some proof assuring the Court that he may prevail at trial on a challenged issue that is an essential element of her case," summary judgment is mandated. Montgomery, 867 F.2d at 904.

The evidence and all reasonable inferences to be drawn from it are viewed in the light most favorable to the non-moving party. But the non-moving party may not rest on mere allegations where that party bears the burden on the dispositive issues at trial. Id. Felan claims that she suffered discrimination first when Kea was hired as the regular carrier instead of promoting her, and second when she was terminated from her position as relief carrier. Both claims are meritless.

1.

Felan contends that she was subjected to disparate treatment when the USPS selected a black male instead of her to fill the position of regular rural carrier. She has not submitted proof sufficient to create a genuine issue of material fact regarding the defendant's motives in terminating her.

Under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), the plaintiff in a title VII action is required to establish a prima facie case of discrimination. In a case alleging a discriminatory failure to promote or hire, the plaintiff is required to show that (1) he belonged to a protected class; (2) he was qualified for the particular position; (3) despite his qualifications, he was rejected; and (4) he was replaced by a non-minority. Chaline v. KCOH, Inc., 693 F.2d 477, 480 (5th Cir. 1982).

In support of its summary judgment motion, the government tendered the declaration of Violet Horne, a personnel specialist with the USPS. Horne's declaration established that one qualification to be a regular carrier was passing the rural carrier examination. Although Felan took the test twice, she failed both times. In contrast, Horne's declaration established that Kea passed the exam and placed "high" on the register because of the combination of his test score and his veteran's points.

Felan submitted no evidence to controvert the facts established by Horne's declaration. Because she failed to show that she

was qualified for the position she sought, she cannot sustain a prima facie case of disparate treatment. Thus, the defendant is entitled to judgment as a matter of law on the failure-to-promote claim.

2.

Felan also claims that defendant violated title VII by wrongfully terminating her. She contends that her discharge was prompted by discriminatory motives on the basis of race, national origin, and sex.

An employee discharged for violation of work rules can establish a prima facie case of unlawful discrimination by showing that he was discharged and that a person or persons who did not belong to a minority were retained "under apparently similar circumstances." EEOC v. Brown & Root, Inc., 688 F.2d 338, 340 (5th Cir. 1982). In support of its motion for summary judgment, the government tendered as evidence the declarations of Sam Maskill and Luis Alonzo, USPS employees who were Felan's supervisors. Maskill and Alonzo assert that Felan was fired for leaving the post office without permission, thereby abandoning the mail, and for refusing to train the newly hired regular carrier. Felan does not dispute that she violated work rules as charged.

These declarations are sufficient to establish that there is no genuine issue of material fact regarding the propriety of Felan's termination. Therefore, the burden shifts to Felan to demonstrate that summary judgment is inappropriate. Under FED. R.

Civ. P. 56(e), she cannot counter this finding by mere allegations in her pleadings but must set forth "specific facts showing that there is a genuine issue for trial." Id.; accord Lodge Hall Music Inc. v. Waco Wrangler Club, Inc., 831 F.2d 77, 79 (5th Cir. 1987).

The plaintiff bore the burden of proving that she was discriminated against because of her race or sex. Valdez v. San Antonio Chamber of Commerce, 974 F.2d 592, 596 (5th Cir. 1992). Defendant established a legitimate, non-discriminatory reason for plaintiff's termination: She left her workplace without authorization, abandoned the mail, and refused to follow her supervisor's instruction to train a newly hired regular rural carrier.

In the face of defendant's showing, Felan must submit specific facts demonstrating that employees of a different race or sex who behaved similarly had not been fired. She has not done so. As the district court noted, "her bald, global assertions that other part-time rural relief carriers were treated 'differently' from her is insufficient to withstand summary judgment."

The party opposing summary judgment "cannot establish a genuine issue of material fact by resting on the mere allegations of its pleadings." Russell v. Harrison, 736 F.2d 283, 287 (5th Cir. 1984). Absent specific facts sufficient to rebut defendant's showing that there is no genuine issue of material fact, defendant is entitled to judgment as a matter of law.

The judgment is AFFIRMED.