

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-8769
Summary Calendar

Eddie R. Aurispa, et al.,

Plaintiffs-Appellants,

VERSUS

Texas Department of Commerce, et al.,

Defendants-Appellees

Appeal from the United States District Court
for the Western District of Texas
(A 92 CV 168)

September 11, 1995

Before HIGGINBOTHAM, DUHÉ, and GARZA, Circuit Judges.

PER CURIAM:¹

Plaintiffs Eddie R. Aurispa, Raymond I. Barnes, Sr., and James Mikus appeal the jury verdict in favor of defendants Texas Department of Commerce, Ann Richards, Alan Kahn, Richard L. Moya, Cathy Bonner, and Margaret Donaldson, in their individual and official capacities. Plaintiffs' sole contention on appeal concerns the propriety of the trial court's exclusion of three pieces of evidence. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

FACTS

In January 1991, Ann Richards, a Democrat, was sworn into office as Governor of Texas. At that time, plaintiffs, who are Republicans, were employees of the Texas Department of Commerce (TDOC). Shortly after her election, Governor Richards appointed and assigned the remaining named defendants, all of whom are Democrats, to high-level positions at TDOC. Subsequently, in the Spring of 1991, plaintiffs were terminated by TDOC allegedly as part of an agency reorganization. Plaintiffs sued under 42 U.S.C. §§ 1983 and 1985² claiming defendants violated their constitutional rights, including their First Amendment right of association, by predicating plaintiffs' terminations on their political affiliation. A jury decided in favor of the defendants. Plaintiffs appealed.

DISCUSSION

Plaintiffs contend the trial judge erred in excluding from evidence certain summaries of the voting records of Travis County, Texas, that purported to reflect the political affiliations of other persons discharged by TDOC simultaneously with plaintiffs and testimony by plaintiff James Mikus that he had personal knowledge of these listed persons' political affiliations. Additionally,

Plaintiffs also raised age discrimination claims in the district court. These claims were dismissed by the district court in an order entered on September 29, 1993 granting the defendants' oral motion for directed verdict. Plaintiffs do not urge error in these dismissals.

plaintiffs assert error in the trial court's refusal to allow plaintiffs to call as witnesses persons listed on the summaries.

1.) The summaries.

Federal Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Thus, the standard for relevance is a liberal one. E.E.O.C. v. Manville Sales Corp., 27 F.3d 1089, 1093 (5th Cir. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 1252, 131 L.Ed.2d 133 (1995). Accordingly, the district court was probably incorrect in holding that the summaries were irrelevant. Nonetheless, assuming the summaries to be relevant, Federal Rule of Evidence 403 allows the exclusion of otherwise relevant evidence "if its probative value is substantially outweighed by the danger of . . . misleading the jury." The summaries purported to establish the political affiliation of the persons listed, when in fact the summarized information only indicated in which political primary these persons had most recently voted. Accordingly, the potential for these summaries to confuse the jury was a sufficient basis for their exclusion. When the judgment of the district court is ultimately correct, it may be affirmed on appeal for reasons other than those relied on by the district court. Terrell v. University of Texas System Police, 792 F.2d 1360 (5th Cir. 1986), cert. denied, 479 U.S. 1064, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987).

2.) James Mikus's testimony.³

After exclusion of the summaries, Plaintiff Mikus attempted to testify that he had personal knowledge of the listed persons political affiliations. On voir dire examination following defendants' objection, Mikus admitted his knowledge resulted from seeing these persons at republican events and fund raisers, working with them on republican campaigns, and having discussions wherein they told him they were republicans.

Federal Rule of Evidence 602 provides that a witness is not competent to testify to a matter about which he does not have personal knowledge. Mikus's statement that these persons declared their affiliation to him is inadmissible hearsay and insufficient to give him personal knowledge of the declarants' political affiliations. See Fed. R. Evid. 801 and 802; United States v. Quezada, 754 F.2d 1190 (5th Cir. 1985); Elizarraras v. Bank of El Paso, 631 F.2d 366 (5th Cir. 1980). "If the testimony on its face purports to be based on observed facts but is actually based on an out-of-court statement, the objection should be lack of personal knowledge." 27 Charles A. Wright & Victor J. Gold, Federal

The relevant testimony was as follows:

Q. Were there a list -- was there a group of people terminated in April from the Department of Commerce?

A. Yes, sir, there was.

Q. All right. Do you know the political affiliation from your own personal knowledge of those people terminated?

A. Yes, sir, I do.

Q. All right. And what was the political affiliation of those people from your personal knowledge?

A. From my personal knowledge -- my personal knowledge, seventeen of the eighteen were republicans.

(Tr. vol. 1, p. 91, lines 19-25 to p. 92, lines 1-3).

Practice and Procedure: Evidence § 6026, p. 225 (1990). Likewise, Mikus's observing the participation of these persons in republican events made him competent to testify about such participation, but he was not thereby competent to testify to the fact of their actual political affiliations. "Rule 602[, as opposed to Rule 701,] applies when the testimony on its face purports to relate facts but there is no showing that those facts are within the personal knowledge of the witness." 27 Wright & Gold, Evidence § 6022, p. 190. Thus, the trial court was correct in sustaining defendants' objection to Mikus's testimony based on his lack of personal knowledge.

3.) Refusal to allow witnesses.

Plaintiffs contend in this Court that the trial court refused to allow them to call as witnesses persons on the excluded summaries to prove those persons' political affiliations. This assertion by plaintiffs is without merit. In fact, the trial judge clearly informed plaintiffs' counsel that he could call the persons on the summaries and have them testify as to their political affiliations. (Tr. vol. 1, p. 102, lines 18-25 to p. 103, lines 1-13).

Plaintiffs, on the other hand, have misinterpreted the portion of the trial transcript upon which they rely in making this assertion of error. On redirect examination of James Mikus,⁴ plaintiffs' counsel inquired into Mikus's associations with the other persons fired from TDOC "to establish an associational

See Tr. vol. 2, pp. 59-69.

pattern under Rutan." (Tr. vol. 2, p. 66, line 23). At the time of defendants' objection to this testimony, Mikus had described his interactions with five persons. When counsel for plaintiffs indicated he had six more persons about whom to inquire, the court properly sustained defendants' objection to continuation of this testimony under Federal Rule of Evidence 403 as repetitious or needlessly cumulative.

Appellate courts show considerable deference to evidentiary rulings of the district court, reviewing them only for abuse of discretion. Johnson v. Ford Motor Co., 988 F.2d 573, 579 (5th Cir. 1993). Accordingly, for the reasons stated above, we conclude the trial court did not abuse its discretion in making any of the evidentiary rulings about which plaintiffs complain.

For the foregoing reasons, the decision of the trial court is
AFFIRMED.