IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8882
Summary Calendar

FRED MCKETHAN,

Plaintiff-Appellant,

HAL K. GILLESPIE,

Appellant,

VERSUS

TEXAS FARM BUREAU, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(A-91-CV-345)

(August 23, 1994)

Before SMITH, WIENER, and PARKER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Fred McKethan and Hal Gillespie, his trial counsel, appeal the imposition of sanctions against McKethan for attorneys' fees and of

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

FED. R. CIV. P. 11 sanctions against Gillespie. Concluding that the district court correctly awarded the sanctions, we affirm in part and remand in part.

I.

As the complete facts of this case are reported elsewhere, see McKethan v. Texas Farm Bureau, 996 F.2d 734 (5th Cir. 1993), cert. denied, 114 S. Ct. 694 (1994), we briefly summarize the salient issues only. McKethan sued his former employer, Texas Farm Bureau ("TFB"), alleging age discrimination, slander, and intentional and negligent infliction of emotional distress. The claims stemmed from events surrounding an awards ceremony at TFB's annual meeting at which, McKethan alleged, a TFB employee directed embarrassing and inflammatory remarks at him. Contending that the awards incident had made his work environment intolerable and thus constituted constructive discharge, McKethan filed, nine months later, age discrimination claims with the Equal Employment Opportunity Commission ("EEOC") and the district court. Supplemental claims for slander and intentional and negligent infliction of emotional distress were added later.

After McKethan had presented his case, the court granted TFB's request for judgment as a matter of law on the age discrimination and emotional distress claims. In addition, the court sua sponte reconsidered and granted TFB's prior motion for summary judgment on the slander claim. We affirmed. See id. at 744.

Subsequent to the appeal, the district court responded to

TFB's motion to recover attorneys' fees by determining that TFB was entitled to $32,000 in fees under the bad faith exception to the so-called American Rule. After a show-cause hearing on the issue of Gillespie's liability under rule 11, the court found that he had violated the rule and ordered that he write a letter of apology to the State Bar of Texas and to the judges in the Northern District of Texas. This appeal follows.

II.

McKethan first challenges the award of TFB's attorneys' fees as a violation of the court's inherent powers to sanction.[1] He alleges that the district court concluded improperly that the suit was brought for retaliatory purposes and that the claims were brought in bad faith and without sufficient factual or legal merit. Even assuming the validity of assessing attorneys' fees, McKethan also argues that the court erred in failing to examine the

[1] The district court awarded fees and sanctions on the following grounds:

> [T]he court is persuaded that the bad faith rule is applicable and that Plaintiff Fred McKethan should be responsible for Defendants' attorneys' fees in the amount of $32,000.00. Additionally, the facts are such that the Court is persuaded that Hal Gillespie filed this suit without making a reasonable inquiry into whether it was grounded in fact, and that he participated in filing a suit which was brought for the sole purpose of harassing the Texas Farm Bureau. This is based upon the Court's determination that no rational person could have construed the remarks made at the award's banquet by Don Grantham as slanderous and that there as absolutely no evidence of any age discrimination or intentional infliction of emotional distress. Further, the timing of Plaintiffs' suit persuades the Court that it was initiated in retaliation because Plaintiff became angered at the cross-examination conducted by Defendant's counsel during the deposition taken of Plaintiff in a civil case filed by a friend of his against Defendants. Plaintiff filed his E.E.O.C. charge against Defendants the day after the deposition, although the acts which formed the basis of the suit occurred approximately nine months before.

reasonableness of the fees submitted by TFB.

Gillespie asks this court to reverse the district court's imposition of rule 11 sanctions. According to Gillespie, the court violated the "snapshot rule" by engaging in an ex post examination of the reasonableness of Gillespie's inquiries as to the validity of the suit and the motivation for filing it. Gillespie further argues that the court imposed an unduly harsh punishment by requiring a letter of apology.

A.

We review for abuse of discretion the imposition of attorneys' fees under the bad faith exception to the American Rule. Chambers v. NASCO, Inc., 501 U.S. 32, 55 (1991). "If possible and within reason, we will construe the district court's actions in a favorable (that is to say permissible) light." Natural Gas Pipeline Co. v. Energy Gathering, Inc., 2 F.3d 1397, 1410 (5th Cir. 1993), cert. denied, 114 S. Ct. 882 (1994).

Although the American Rule typically requires that the parties to a lawsuit shoulder the burden of their own attorneys' fees, federal courts have inherent power to assess attorneys' fees where the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." Batson v. Neal Spelce Assocs., Inc., 805 F.2d 546, 550 (5th Cir. 1986) (quoting F.D. Rich Co. v. United States, 417 U.S. 116, 129 (1974)). "In this class of cases, the underlying rationale of 'fee shifting' is punitive. The essential element in triggering the award of fees is therefore the existence

of 'bad faith' on the part of the unsuccessful litigant." Batson, 805 F.2d at 550 (citing Hall v. Cole, 412 U.S. 1, 6 (1973)).

McKethan first contends that the district court erred in assigning to him a bad faith motivation for the commencement of the suit))that he was angered at TFB after having been deposed by TFB attorneys in an unrelated civil suit brought against TFB by Gordon Beall, a close friend of McKethan's. In support of its assertion, the court noted that McKethan discussed his claims with Gillespie (who was, incidentally, representing Beall in this other suit) immediately following his deposition and then filed his EEOC claim the day after the deposition. The juxtaposition of these events was further highlighted by the fact that the events of the awards banquet had occurred nine months prior. Furthermore, McKethan indicated to one of the regional sales managers, two weeks after the banquet, that he intended to retire thirteen months hence for tax reasons; approximately one month later, McKethan played golf with a state sales manager to whom he expressed no bitterness about the banquet incident.

McKethan responds, however, that he disavowed any bad faith filing in his direct testimony at trial. Although McKethan admitted that he had been upset after being deposed, he testified that his intention in filing the age discrimination claim was to remedy what he perceived to be a recurring problem at TFB. McKethan also testified that he communicated to a regional sales manager that his resignation was in fact linked to the banquet's events. As evidence of his good faith filing, McKethan also points

to the fact that he did not retire immediately after Beall's termination and that he knew nothing of the 300-day statute of limitations on the age discrimination claim prior to his discussions with Gillespie at Beall's deposition.

We are unpersuaded that the district court erred in concluding that the claim was filed in bad faith. Although McKethan's direct testimony at trial may have discredited any such bad faith, the court did not abuse its discretion by looking to other circumstantial evidence introduced by TFB in support of its bad faith determination.

McKethan's other arguments to the contrary))that he did not resign immediately following Beall's termination and that he was unaware that the statute was about to run on his age discrimination claim))are unconvincing. McKethan's decision to postpone his retirement for thirteen months was motivated by tax reasons; any correlation between this delay and Beall's termination is merely spurious. Similarly, McKethan's lack of knowledge regarding the statute of limitations may be interpreted to support, rather than defeat, the bad faith claim. If McKethan was so convinced of the age discriminatory practices of TFB, in particular as they related to his situation, he would have been more likely to have sought legal representation in the nine months following the banquet and preceding his deposition in the Beall case.

McKethan's citation to Guidry v. Int'l Union of Operating Eng'r, Local 496, 882 F.2d 929 (5th Cir. 1989), vacated on other grounds, 494 U.S. 1022 (1990), does not compel reversal of the

district court's imposition of attorneys' fees. Guidry does not restrict the inquiry to the bad faith manner in which the litigation itself is conducted. "That is, the rule is intended to penalize a litigant who brings to court a frivolous suit or defense, or abuses the process so as to create an inquiry separate from the underlying claim." Id. at 944 (emphasis added). Batson, 805 F.2d 546, which the Guidry court cites for this court's reasoning as to the applicability of the bad faith exception, confirms this interpretation of Guidry: "When the request for fees is made by a successful defendant, the bad faith, vexation, wantonness, or oppression often relates to the filing and maintaining the action . . . . Courts may also award fees, however, as a sanction for bad faith in the conduct of the litigation resulting in an abuse of judicial process." Batson, 805 F.2d at 550 (citations omitted) (emphasis added).[2]

We agree with McKethan that the mere filing of an unsuccessful claim is not frivolous as a matter of law and thus is not, absent other factors, sufficient to sustain a bad faith finding. "[A] district court [should] resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." Christiansburg, 434 U.S. at

[2] Although Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), involved a title VII claim and is thus not binding on this action, we note that even under the more rigorous standards for recovering attorneys' fees in a title VII claim, "if a plaintiff is found to have brought or continued such a claim in bad faith, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense." Id. at 422.

421-22 (emphasis in original). The district court in this case, however, did not rest its bad faith filing determination solely on the lack of success of the legal claims; the court was moved by the bad faith filing coupled with the weakness of the claims as alleged.

With respect to the age discrimination claim, both parties agree that the determinative factor in the success or failure of the action was McKethan's ability to prove constructive discharge. The test is whether the trier of fact is satisfied "that the working conditions were so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980). Deposition testimony confirmed at trial reflected that McKethan was never demoted or asked to perform duties inconsistent with his sales position, nor did TFB reduce his compensation. Furthermore, McKethan could not cite a single person whose opinion of him had changed following the incident, nor could he point to any evidence of a general diminution in his reputation. Rather, McKethan confirmed his intention to retire thirteen months after the incident in order to accrue certain tax advantages, and, indeed, he retired at precisely that time. His decision to seek reinstatement after his retirement further evinces his failure to allege sufficient facts to prove constructive discharge.

Bennett v. Corroon & Black Corp., 845 F.2d 104 (5th Cir. 1988), cert. denied, 489 U.S. 1020 (1989), on which McKethan relies, is inapposite. First, the plaintiff in Bennett presented

a valid title VII case, failing only because equitable relief (the only relief available under title VII) was inappropriate based upon the facts. Id. at 106. In all other respects, the plaintiff had alleged sufficient facts to support her title VII claim. This was not so in the case at bar.

Second, Bennett is distinguishable on procedural grounds))the Bennett defendants asked this court to award them attorneys' fees. We were not reviewing under the abuse of discretion standard, as we are in this case, the district court's imposition of costs against the plaintiff. Hence, although our decision not to assess costs against the Bennett plaintiff was predicated on our failure to find the complaint "frivolous, unreasonable, without foundation, or filed in bad faith," id. at 107, we were viewing de novo defendant's request on the cross-appeal.

In contrast, our review of the district court's decision is subject to abuse of discretion, a standard that requires greater deference to the district court's findings.[3] Under this standard, we refuse to reverse the district court's finding as to the non-meritorious nature of the age discrimination claim.

The slander and emotional distress claims are similarly infirm. "The allegedly slanderous statements must be construed as a whole, in light of the surrounding circumstances or context in

[3] McKethan also cites Johnson v. Artim Transp. Sys., Inc., 826 F.2d 538 (7th Cir. 1987), cert. denied, 486 U.S. 1023 (1988). Although we are not bound by this decision, we also note that it is distinguishable on similar grounds as was the Bennett case. The Johnson defendants raised the issue of attorneys' fees for the first time on appeal, and, as such, the court viewed the motion de novo. The district court in Johnson, unlike the court here, had made no finding as to the groundless nature of the plaintiff's claims.

which a person of ordinary intelligence would understand the statements." Shearson Lehman Hutton, Inc. v. Tucker, 806 S.W.2d 914, 920-21 (Tex. App.))Corpus Christi 1991, writ dism'd). Under the abuse of discretion standard of review, we find the district court's conclusion that "those statements, taken in the undisputed context of their making are not slanderous, and no reasonable juror could so find (emphasis in original)," to be dispositive.

Without addressing the non-outrageous nature of the comments made to McKethan, we dismiss the intentional infliction claim on the severity-of-emotional-distress prong. McKethan had the burden to prove that his distress was so severe that "no reasonable man could be expected to endure it." K.B. v. N.B., 811 S.W.2d 634, 640 (Tex. App.))San Antonio 1991, writ denied), cert. denied, 112 S. Ct. 1963 (1992).

With the exception of stomach problems on the evening of and the day after the banquet and his own testimony about "severe depression," McKethan failed to allege significant emotional injuries. McKethan also admitted during his deposition that since his retirement he had been engaged in the investigation of various other business ventures, activities that would have been difficult to continue if he were suffering from serious emotional injuries. McKethan's decision to retire thirteen months following the incident, and his post-retirement attempt at reinstatement, also attest to the lack of severity of his injuries. We therefore find no abuse of discretion in the district court's judging this claim to be meritless.

McKethan next asserts that the district court's decision to deny TFB's motions for summary judgment on each of the claims proves the meritorious nature of the claims. We disagree. First, the standard for summary judgment is whether there exists a "genuine issue as to any material fact." FED. R. CIV. P. 56(c). The district court was required to deny TFB's motions where it had determined that a genuine factual issue remained; the legal merit of the claim is not at issue in the summary judgment motion.[4]

Second, because the decision to award attorneys' fees is within the discretion and inherent powers of the district court, we do not find it inconceivable that a district court, which was wavering as to the legal sufficiency of a claim, could allow the plaintiff to present its case before finding the claim meritless. Indeed, the interests of judicial economy and fairness to the plaintiff support the court's decision to allow a plaintiff who appears initially to have an unfounded case the opportunity to present his case.

The district court's denial of TFB's summary judgment motions should not be construed as a stamp of approval as to the legal sufficiency of McKethan's claims. Indeed, we have previously recognized that "a determination of whether or not a pleading is well grounded in law and fact may not be feasible until after an evidentiary hearing on a motion for summary judgment or even after the parties have presented their cases at trial." Thomas v.

[4] It is not for this court to ask why TFB did not file a FED. R. CIV. P. 12(b)(6) motion challenging the legal sufficiency of McKethan's claim.

Capital Sec. Serv., Inc., 836 F.2d 866, 881 (5th Cir. 1988) (en banc).[5]

B.

McKethan next challenges the court's imposition of $32,000 in legal fees as invalid given the court's failure to attend to the twelve factors articulated in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). We agree with McKethan and remand to the district court for more careful consideration of the Johnson factors. We note, however, that our decision to remand should not be construed to suggest that the failure to incorporate the Johnson factors is a per se abuse of discretion. Rather, we restrict our holding to the facts of this case))where McKethan challenged at the district court level the reasonableness of the calculation of certain fees and where the district court's order assessing fees made absolutely no mention of the Johnson factors. Under such circumstances, we cannot accept TFB's assertion that its discussion of the Johnson factors in its briefing to the district court is sufficient.

We disagree with TFB that our previous holdings compel a different result. Hornbuckle v. ARCO Oil & Gas Co., 732 F.2d 1233 (5th Cir. 1984), cert. denied, 475 U.S. 1016 (1986), is distinguishable on the facts. The Hornbuckle plaintiff did not challenge

[5] Because the district court's decision does not reference its warning to McKethan regarding the possibility of sanctions, we need not address McKethan's argument that the court did not provide him with adequate warning until the trial had begun. It is not the duty of the district court to warn counsel of the possibility of sanctions.

the reasonable hourly rate proffered by the defendant, and the court was not asked to determine the amount of already incurred fees. Id. at 1238. Rather, the court was asked to compute how much time would be spent in the future to prepare for a retrial, a decision that this court found would not have been aided by a closer examination of defense counsel's files.

Bogney v. Jones, 904 F.2d 272 (5th Cir. 1990), is also inapposite. The decision not to remand the sanctions award in Bogney was motivated in part by our determination that the materials supporting the charges were reasonably specific and that there were no allegations of inflating charges. In addition, the Bogney plaintiff failed to respond to the court's motion for sanctions. None of these facts is present in this case.

In deciding to remand for a re-examination of the attorneys' fees, we do not suggest that the $32,000 figure is wrong and thus requires modification. Given the current state of the record, we are unable to make such a determination. We remand, however, so that the district court may consider McKethan's concerns about the reasonableness, his allegations of potentially inflated charges, and the twelve factors delineated in Johnson. Because the decision to award fees is at the discretion of the district court, we do not address at this time McKethan's specific allegations regarding the computation of fees.

III.

We review for abuse of discretion the imposition of rule 11

sanctions. "A district court necessarily would abuse its discretion if it imposed sanctions based upon an erroneous view of the law or a clearly erroneous assessment of the evidence. Smith v. Our Lady of the Lake Hosp., 960 F.2d 439, 444 (5th Cir. 1992).

A.

To comply with the requirements of rule 11, an attorney need not guarantee the correctness of his legal theory; rather, he must engage in a reasonable inquiry into the facts and the law under which the claim is supported. Thomas, 836 F.2d at 875. Sanctions may not be levied where a reasonable inquiry has been conducted and where the legal argument is based upon "a good faith argument for the extension, modification, or reversal of existing law." Smith Int'l, Inc. v. Tex. Commerce Bank, 844 F.2d 1193, 1194 (5th Cir. 1988). "Like a snapshot, Rule 11 review focuses upon the instant when the picture is taken))when the signature is placed on the document." Thomas, 836 F.2d at 874.

Gillespie first contends that the district court erred in sanctioning him under rule 11 by failing to apply the snapshot rule. In support of this contention, Gillespie alleges that the court's decision was predicated on an ex post determination of the merit of the claims. We need not repeat our previous discussion regarding the legal and factual merits of Gillespie's claims, but state only that we find no abuse of discretion in the decision to sanction Gillespie.

Furthermore, the court's decision to deny TFB's motions for

summary judgment is not dispositive as to the reasonableness of Gillespie's inquiry at the time of signing the various legal memoranda submitted to the court. Under Thomas, sometimes the determination of whether a pleading is sufficiently grounded in fact may not be feasible until after the parties have presented their cases. Id. at 881. Hence, we are hesitant to infer any ex post reasoning on the basis of the court's procedural disposition of this case.

We also are hesitant to reverse the district court's rule 11 sanctions where it held a proper show-cause hearing before asserting sanctions. Gillespie has not asserted any due process arguments in connection with this hearing, and our review of the record suggests that the district court provided Gillespie a significant opportunity to be heard. Although Gillespie is correct in his assertion that the court did not delineate its application of the various rule 11 factors we outlined previously in Thomas, we reiterate our previous statements that the consideration of these factors is not mandatory. See Smith, 960 F.2d at 444 ("In determining whether an attorney had made a reasonable factual inquiry, a court may consider factors such as . . . .") (emphasis added).

We disagree with Gillespie that our holdings in National Ass'n of Gov't Employees v. National Fed'n of Fed. Employees, 844 F.2d 216 (5th Cir. 1988), and Smith compel reversal of the rule 11 sanctions. Our decision to reverse in National Ass'n was predi-

in violation of the rule, its statements as to the legal sufficiency of certain claims, and its finding of plaintiff's counsel's filing for the purposes of harassment without a showing of frivolousness. Id. at 222-23. None of these reversible errors is present in this case.

Smith is also distinguishable in that the plaintiff's attorney raised good faith arguments based upon existing law. The legal sufficiency of the claim was supported by circuit precedent, and the facts as alleged, if proven, would have constituted a cognizable claim. Smith, 960 F.2d at 444-45. Furthermore, we found other factors that weighed in favor of the reasonableness of counsel's inquiry, including the fact that he relied reasonably upon the investigations of the prior attorney handling the case and that much of the proof was in the hands of the alleged conspirators. Id. at 446-47.

In contrast, Gillespie handled the case on his own from the beginning and could have obtained sufficient facts from McKethan alone in order to make a reasonable inquiry as to the legal and factual basis of the claim. Furthermore, Gillespie's expertise in labor law cuts against his claim of having conducted a reasonable inquiry under the Thomas factors.

B.

Gillespie next asserts that the sanction is invalid under rule 11 because the court failed to impose the least severe sanction adequate to deter future misbehavior. "[T]his court has

previously held that the basic principle governing the choice of sanctions is that the least severe sanction adequate to serve the purpose should be imposed." Thomas, 836 F.2d at 878 (citing Boazman v. Economics Lab., 537 F.2d 210, 212-13 (5th Cir. 1976). We do not depart from this statement, but we note that the determination of the appropriate sanction is better placed within the sound discretion of the district court. "What is appropriate may be a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to the circumstances." Id. Here, we find no abuse of discretion in the court's decision to require Gillespie to write a letter of apology.

Gillespie, however, marshals, in support of his claim that the sanction is too harsh, our reference in Thomas to "an innovative approach" taken by a California district court. Id. (citing Huettig & Schromm, Inc. v. Landscape Contractors Council, 582 F. Supp. 1519 (N.D. Cal. 1984), aff'd, 790 F.2d 1421 (9th Cir. 1986). In Huettig & Schromm, the district court required the attorney to circulate throughout his law firm the court's opinion criticizing his conduct. Our citation to this sanction does not, as Gillespie suggests, compel reversal in this case; the sanction was noted merely as "an innovative approach," not as a benchmark against which all other sanctions should be measured. The district court in Huetigg & Schromm determined that an internal letter was sufficient to meet the objectives of rule 11, while the district court in this case determined otherwise. We are not convinced that

this amounts to an abuse of discretion; to the contrary, the district court's approach is a valid exercise of discretion.

We also reject Gillespie's assertion that the court's failure to discuss the four factors outlined in Topalian v. Ehrman, 3 F.3d 931 (5th Cir. 1993), is reversible error. The sanctions at issue in Topalian totaled over $300,000 in attorneys' fees, an amount that "clearly belongs near the upper end of the 'sliding scale' described in Thomas, and therefore our scrutiny of it requires very specific factual bases from which we may conduct our duty of 'rigorous' review." Id. at 936. Without discounting the severity of the sanctions imposed in this case, we do not believe that they are substantial enough in amount, type, or effect to warrant the rigorous scrutiny applied in Topalian. Gillespie's contention that the sanctions are "akin to making him wear a 'Scarlet S' (Sanctioned) and will smear his reputation for years to come" does not convince us otherwise.

Topalian is further distinguishable by its direct reference to monetary sanctions. The second and third factors))the expenses caused by the violation and the reasonableness of the assessed costs))are not implicated where the sanctions are non-monetary. The first and fourth factors))what conduct is being punished and whether the sanction was the least severe))are, however, both relevant and adequately dealt with by the district court. The court's order describes the conduct for which Gillespie was being sanctioned and mentions that the sanctions are the least severe necessary to accomplish the goals of rule 11. Where the sanctions

are non-monetary and not of disproportionate severity to the actions for which the attorney is being punished, as we believe the case to be here, we find no abuse of discretion.[6]

III.

For the foregoing reasons, we find no abuse of discretion in the court's decision to sanction McKethan for attorneys' fees and Gillespie for rule 11 violations and thus AFFIRM the decision of the district court. We do, however, REMAND for more careful consideration, consistent with our previous holdings of the court's sanction of $32,000 in attorneys' fees against McKethan. The court's imposition of sanctions on Gillespie in the form of a letter of apology does not amount to an abuse of discretion and is therefore AFFIRMED.

[6] Because both parties have stipulated that in this case the only applicable difference between the revised (December 1, 1993) and the previous rule 11 is the question of mandatory versus optional sanctions, we need not reach the issue of which version controls. On the face of the district court's opinion, we find no evidence to suggest that the court felt constrained by the old rule 11 to impose mandatory sanctions. Hence, we will not anticipate a legal question that appears not to be implicated in this appeal.