

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-10275
Summary Calendar

DAVID O. SANDERS,
Plaintiff-Appellant,

VERSUS

LTV AEROSPACE, CO.,
Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Texas
(3:93-CV-506-H)

(January 24, 1995)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge:*

David O. Sanders ("Sanders") appeals from a district court's order granting summary judgment to LTV Aerospace Company ("LTV"). Sanders brought a civil rights action against his employer LTV, alleging discrimination based on race. The district court held that Sanders failed to raise a fact issue concerning LTV's alleged

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

pretextual reasons for suspending him. We affirm the judgment.

On March 15, 1993, Sanders filed this suit, alleging that he had been wrongfully discriminated against on the basis of race under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and the Civil Rights Act of 1870, 42 U.S.C. § 1981. As an African-American, Sanders is a member of a protected group. To support his claim, Sanders alleges that two other LTV employees, who are not African-Americans, received less severe discipline for similar misconduct, specifically relying on the disciplinary action taken against LTV employees Steve Whymark and Ted Barrera.

Summary Judgment Proof Relating to Sanders

The following facts were not disputed by Sanders in his response to the LTV's Motion for Summary Judgment. In June 1956, Sanders began working for LTV as a janitor. In 1959, he was laid off. In 1974, he returned to LTV, continuing to work as a janitor. In 1976, Sanders was again laid off. In 1979, Sanders was rehired as an Assembly B person. In 1980, Sanders became a fabricator at LTV's Grand Prairie, Texas facility. Throughout his entire tenure with LTV, Sanders was a member of a collective-bargaining unit represented by the United Auto Workers Union ("UAW").

On December 20, 1990, Sanders was terminated for physically fighting with a fellow employee, Ted Barrera. By agreement between LTV and the UAW, Sanders' termination was converted into a suspension without pay, and he was reinstated on January 7, 1991. Mr. Barrera was likewise terminated and reinstated; however, his

suspension was for a longer period than Sanders'. Sanders conceded at his deposition that Mr. Barrera received a harsher suspension because he had been involved in several prior incidents.

On November 26, 1991, Sanders engaged in a verbal altercation with another fellow employee, Ernie Guerra. Sanders shouted racially offensive comments at Guerra. This time, Sanders picked up a lead hammer and hit a table with it, breaking a coffee cup which was resting on the table. Sanders then threw the hammer into a corner of the room. LTV terminated Sanders. However, by agreement with LTV and the UAW, Sanders was reinstated on March 16, 1992, placed on probation for three years, and required to see a psychologist at LTV's expense.

Summary Judgment Proof Relating to Co-Employees

The undisputed summary judgment evidence shows that, on February 16, 1992, Whymark was involved in an altercation with LTV employee David Deninger. Deninger made a series of "rude and harassing comments to Whymark." At some point, Whymark threw a scrapper on the floor and told Deninger that he was "tired of this crap." No blows were exchanged. The supervisor separated the two and sent them to a Labor Relations Representative who determined that they should both be suspended without pay for four days. This was the first time that Whymark was disciplined for misconduct.

On October 23, 1987, Barrera was involved in an incident with two other LTV employees, Anthony Esparza and Henry Talton. Esparza made a harassing remark to Barrera, who grabbed a Stanley knife from a nearby table and threw it at a wall, near Esparza and

Talton. The knife ricocheted off the wall, struck Talton, and cut him on his leg. LTV terminated Barrera. Barrera filed a grievance protesting his termination, which was sent to arbitration. Over LTV's objection, the arbitrator ordered that Barrera be reinstated with three weeks' suspension.

Analysis

In disparate treatment cases, the inquiry is whether the employer treated some people less favorably than others because of their race, color, religion, sex, or national origin. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978). When there is no direct evidence of discriminatory intent, an employee must first establish a prima facie case of discrimination, then the employer must articulate a legitimate nondiscriminatory rationale for its actions. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the employer produces evidence which would permit the conclusion that there was a non-discriminatory reason for its actions, then the employer has satisfied its burden. See St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993). At this point, the employee must demonstrate that the employer's articulated reason is a pretext for discrimination. Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 (5th Cir. 1993).

Here, the undisputed summary judgment evidence shows that LTV employee Whymark received less severe disciplinary action because it was his first and only offense. This is not the case with Sanders, as he was involved in another fight less than a year before the altercation at issue. Whymark is not similarly-situated

to Sanders.

With respect to LTV employee Barrera, he was discharged for throwing the Stanley knife at the wall. By terminating Barrera, LTV disciplined him similarly to Sanders. In Barrera's case, however, he brought a grievance which was sent to arbitration. Over LTV's objection, the arbitrator was more lenient toward Barrera. These undisputed facts do not support Sanders' position that LTV treated Barrera more favorably.

Sanders has failed to establish the existence of elements essential to his case, those for which he would bear the burden of proof at trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). First, Sanders has not shown that other non-African-American employees who engaged in similar acts were not punished to the same degree. He has not demonstrated disparity of treatment. See Green v. Armstrong Rubber Co., 612 F.2d 967, 968 (5th Cir. 1980) (per curiam), cert. denied, 449 U.S. 879 (1980). Second, Sanders has not provided any summary judgment evidence creating an issue of fact that LTV's reasons for its actions were a pretext for race discrimination. See Britt v. The Grocers Supply Co., Inc., 978 F.2d 1441, 1451 (5th Cir. 1992), cert. denied, 113 S.Ct. 2929 (1993)(age discrimination). In fact, the undisputed summary judgment evidence shows that LTV based its disciplinary action against Sanders upon his November, 1991, violation of company rules in combination with his prior December, 1990, violation of company rules. Accordingly, we **AFFIRM** the district court's judgment.

