UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10332

RUBEN GLORIA,

Plaintiff-Appellant,

VERSUS

VALLEY GRAIN PRODUCTS, INC., a wholly-owned subsidiary of Archer-Daniels-Midland Company,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas (5:93-CV-113-C)

(March 31, 1995)

Before SMITH and BARKSDALE, Circuit Judges, and FITZWATER, District Judge.[1]

PER CURIAM:[2]

Calling into play Fed. R. Civ. P. 39(c) ("the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right"), the key issue at hand, which drives our standard of review, is whether the jury, which found for Ruben Gloria on his employment discrimination claim (termination due to national

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[1] The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

origin) against Valley Grain Products, Inc., was only advisory. Concluding that it was not, we conclude also that the evidence was sufficient to support the jury's verdict, and that, therefore, the district court erred in granting Valley's motion for judgment as a matter of law. Accordingly, we **REVERSE** and **REMAND**.

I.

Ruben Gloria was employed by Valley from December 1983 until his discharge on July 25, 1991. He had never been reprimanded for misconduct and received good evaluations from his supervisors. On July 25, 1991, a co-employee, Jeremy Combs, reported to his supervisor, Troy Scott, that Gloria had hit him in the nose during an altercation between them. Following a meeting between Scott and Gloria, during which Gloria allegedly admitted hitting Combs, Scott terminated Gloria.[3]

A jury found that Gloria's national origin (Hispanic) was a motivating factor in Valley's decision to terminate him; awarded $33,000 for lost wages and employment benefits; but found Gloria was not entitled to other damages -- compensatory (including future lost wages) or punitive. The district court, however, granted Valley's motion for judgment as a matter of law.

II.

Before reviewing the judgment as a matter of law, we must address first the dispute over the standard of review. At bottom,

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[3] Following his discharge, Gloria notified the Equal Employment Opportunity Commission (EEOC) of his belief that he had been terminated because of his national origin. The EEOC determined that the evidence did not establish employment discrimination. Gloria then filed this action.

it turns on whether the jury verdict was binding, as claimed by Gloria, or advisory, as claimed by Valley.

A.

The district court did not make Rule 52 findings of fact and conclusions of law.[4] Gloria insists that the verdict was binding, and that, because the court found insufficient evidence to support that verdict, it granted Valley's motion for judgment as a matter of law. Consequently, says Gloria, we should apply the verdict-deferential standard of review applicable to such judgments. *See* ***Boeing Co. v. Shipman***, 411 F.2d 365, 374 (5th Cir. 1969) (en banc).

On the other hand, Valley urges that the jury was advisory, and that, therefore, we must review the district court's ruling as if it were pursuant to Rule 52, to include applying the clearly erroneous standard of review to findings of fact. (But, as noted, the court did not make any.) Needless to say, this is a much more favorable standard of review for Valley.

Valley rests its position on the fact that the alleged discrimination took place before the effective date of the 1991 amendments to the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et*

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[4] Rule 52(a) provides in part:

> In all actions tried ... with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58.... Findings of fact ... shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Fed. R. Civ. P. 52(a).

seq (1991 Amendments), which permit jury trials in Title VII actions.[5] In ***Landgraf v. USI Film Prods.***, 114 S. Ct. 1483 (1994), pending during, but decided after, Gloria's trial, the Supreme Court concluded that the 1991 Amendments do not apply retroactively. Consequently, Valley maintains that the jury's verdict was not binding. Gloria urges that Valley waived its retroactivity assertion by stipulating, in the pretrial order, that Valley was "covered by the Civil Rights Act of 1964, as amended, *and the Civil Rights Act of 1991*, at the time of the incidents made the basis of this suit." (Emphasis added.)[6]

Complicating matters all the more is that, after Gloria presented his evidence, counsel for Gloria and Valley, as well as the district judge, appear to have acknowledged that the jury was advisory as to some, or all, of the types of damages, as discussed *infra*. But, in contrast, the conduct of Valley and the court post-trial suggest a binding jury. The day after trial, the court ordered that post-trial motions and supporting briefs be filed within seven days. In response, Valley requested judgment as a matter of law, not Rule 52 findings of fact and conclusions of law, as would be the case had the jury been advisory. Moreover, neither

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[5] The effective date for the 1991 Amendments was November 21, 1991. The alleged discriminatory acts took place that July.

[6] Counsel made no attempt to retract or correct the stipulation. *See* Fed. R. Civ. P. 36(b). Needless to say, the pretrial order (in which the stipulation was made) "control[s] the subsequent course of the action unless modified by a subsequent order". Fed R. Civ. P. 16(e).

in its motion, nor in its supporting brief, did Valley state -- or in any way indicate -- that the jury was advisory.

Indeed, it was Gloria who appears to have changed horses -- at least as to the types of damages other than lost wages. In his post-trial motion, apparently unhappy because the jury had only awarded damages for lost wages, he distinguished such damages from "future lost wages, compensatory damages, and punitive damages, ... [which] the jury did not award", and then stated:

> Recognizing that the jury verdict declined to award compensatory and punitive damages under the 1991 Civil Rights Act, and that the issues answered in its verdict probably are advisory, Plaintiff would submit to the Court that the verdict is well supported by the evidence, and should be confirmed as the judgment of the Court. Plaintiff requests that the Court render judgment of $33,000.00 for lost wages, plus interest as provided by law. Such judgment is in accordance with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g).

Gloria then requested equitable relief in the form of front pay ($33,000), stating that the evidence showed that reinstatement was not feasible, and reserved the right to seek attorney's fees.

In response to the competing motions, the district court granted Valley's motion for a judgment as a matter of law. As noted, it did not make the findings of fact and conclusions of law required by Rule 52.

We are lead out of, if not spared, this confusion by the Federal Rules of Civil Procedure, and conclude the jury was binding. Rule 39(c) states, in part, that "the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter

of right". The 1991 Amendments provide for a jury trial at the request of either party. Therefore, a stipulation to the application of the 1991 Amendments is, if anything, a consent to the exercise of the rights afforded by those amendments. Accordingly, we conclude that Valley's stipulation in the pretrial order to be bound by the 1991 Amendments operated as a "consent" to jury trial.[7] Furthermore, the pretrial order contemplates a jury trial by referencing proposed jury instructions and noting that the case had been set for trial on the jury docket.[8]

Adding perhaps one final oddity is that, on the day the pretrial order was filed, Valley moved to strike Gloria's demand for a jury trial. Valley's sole contention was, ironically, that the 1991 Amendments should not be applied retroactively to permit a jury trial. The district court denied the motion on the day filed.

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[7] An express consent is not required. As the Third Circuit noted:

> While neither [party] expressly consented to a trial with a nonadvisory jury under Rule 39(c), such express consent is not required. If one party demands a jury, the other parties do not object, and the court orders trial to a jury, this will be regarded as a trial by consent.

Bereda v. Pickering Creek Indus. Park, Inc., 865 F.2d 49, 52 (3d Cir. 1989) (internal quotations and citations omitted). Likewise, we conclude that consent to the application of law granting parties the right to a jury trial amounts, at least in this case, to consent to a jury trial.

[8] Of course, these references to a jury trial would be necessary even if the jury were only advisory. But, as noted, no mention was made of an advisory jury until well after the trial had begun. These references, therefore, suggest further the parties' intent to have a binding jury.

As noted, the first mention of an advisory jury was in the middle of the trial, during Valley's motion for judgment as a matter of law at the close of Gloria's case-in-chief. The ensuing argument on the motion shows confusion by counsel not only for Valley, but also for Gloria, as well as by the court, as to the jury's status for some, or all, of the issues.[9] As stated, the confusion over the jury's status, both during (*see* note 9, *supra*) and after trial, compels us to look elsewhere for help.

Gloria's response to Valley's pretrial motion to strike the jury demand said nothing of an advisory jury. Indeed, that response specifically stated that Gloria had prepared its case " in

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[9] The matter arose during argument on Valley's request to exclude all but back pay damages because the other types were not allowed under the pre-1991 law. When Gloria's counsel noted that Valley's stipulation to the 1991 Amendments was discussed in the response to Valley's motion to strike the jury demand, the court stated: "Of course we are trying to a jury?" The following colloquy ensued:

> [Gloria's Counsel]: We were trying it to a jury for an advisory, in case the Supreme Court says we are correct and don't have to try this thing again.
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> THE COURT: That is true. We are trying it to the jury as an advisory jury, and I am thinking at this point out of an abundance of caution, ... I am going to deny [Valley's] motion as to the damage issue, and we might go ahead and submit issues on ... damages other than back pay, and then I will take another look at it. Whether I will enter judgment if the jury makes a finding on back pay, of course keeping in mind it is an advisory jury, I may or may not enter a judgment on damages other than back pay. But at least we will have the record in such shape that we won't have to retry the case at a later point.

Prior to *Gloria's counsel's* mention of an advisory jury, it appears that the trial judge was of the view that the jury was binding. At oral argument here, counsel for Gloria urged that he simply did not mean what he said.

expectation of a jury trial". Furthermore, the order denying Valley's motion to strike made no mention of an advisory jury. We are also mindful of possible unfairness in changing the role of the jury mid-trial (even though, at that point, Gloria was one source of the confusion).

> Any good trial lawyer will testify that there are significant tactical differences in presenting and arguing a case to a jury as opposed to a judge. To convert a trial from a jury trial to a bench trial (or vice-versa) in the middle of the proceedings is to interfere with counsel's presentation of their case and, quite possibly, to prejudice one side or the other. Further, it is a waste of the additional time and money which is inherent to a jury trial.

Hildebrand v. Board of Trustees, 607 F.2d 705, 710 (6th Cir. 1979).

In ***Thompson v. Parkes***, 963 F.2d 885, 886 (6th Cir. 1992), where the parties stipulated in the pretrial order to a jury trial, but subsequent pretrial discussions between the parties and judge revealed contemplation of an advisory jury. The matter was left unresolved, and the case tried to a jury. ***Id***. at 887. Following the jury's verdict for the plaintiff, the district court ruled that the plaintiff had no right to a jury trial, and that, accordingly, the verdict was advisory. ***Id***. The court then held for the defendant. ***Id***. The Sixth Circuit reversed, concluding, in essence, that by failing to notify the parties otherwise, the pretrial order stipulating to a jury trial controlled. ***Id***. at 889-90.

Guiding the Sixth Circuit was the premise that "[t]he parties are entitled to know prior to trial whether the jury or the court will be the trier of fact". ***Id***. at 889. We could not agree more.

Accord ***Stockton v. Altman***, 432 F.2d 946, 949-50 (5th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971); ***Bereda v. Pickering Creek Indus. Park, Inc.***, 865 F.2d 49, 52-53 (3d Cir. 1989). Given Valley's tacit consent to a jury trial, the denial of its motion to strike the jury demand, and the district court's not alerting the parties, prior to trial, that the jury would be advisory, we conclude that Rule 39(c) operates to create a binding jury.

B.

The jury verdict being binding, we can uphold the Rule 50(b) judgment as a matter of law for Valley only if "there is no legally sufficient evidentiary basis for a reasonable jury to find for [Gloria] ...." Fed. R. Civ. P. 50(a)(1). Along that line, judgment as a matter of law is proper only if, viewing the record in the light most favorable to Gloria, the verdict was not supported by "substantial evidence", defined as "evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions". ***Boeing***, 411 F.2d at 374.

The structure of proof for a Title VII action of this type is most familiar. *See, e.g.*, ***St. Mary's Honor Center v. Hicks***, 113 S. Ct. 2742 (1993); ***Texas Department of Community Affairs v. Burdine***, 450 U.S. 248 (1981); ***McDonnell-Douglas Corp. v. Green***, 411 U.S. 792 (1972). The plaintiff must establish a *prima facie* case by showing that the employer treated a similarly situated individual, who is not in the protected class, different from the plaintiff. The defendant may rebut the resulting presumption of discrimination by

offering a nondiscriminatory reason for the difference in treatment. And, the plaintiff may demonstrate that the employer's proffered justification is a mere pretext for the discriminatory act. As the Supreme Court has reminded, however, "the ultimate question [is] discrimination *vel non*". ***St. Mary's Honor Center***, 113 S. Ct. at 2753 (citation omitted).

The backdrop to the discrimination claim is Gloria's altercation with his co-employee, Combs. The following is Gloria's testimony about the altercation. When he arrived at work for the "graveyard" shift on July 24, 1991, Combs was spraying a fellow employee with a pressure hose. Attempting to stop the horseplay, Gloria turned off the hose several times, but Combs returned each time to turn it back on. During Gloria's last attempt to turn off the hose, Combs attempted to stop Gloria and spray him with the hose. In the ensuing struggle to take the hose, Combs was struck either by the hose or, inadvertently, by Gloria's fist -- Gloria was uncertain. Gloria denied that he admitted to either his supervisor, Scott, or the division manager, James Turnbow, that he intentionally hit Combs.

To establish a *prima facie* case, Gloria presented several instances of similar conduct by white employees which resulted in less severe punishment. *See* ***Davin v. Delta Airlines, Inc.***, 678 F.2d 567, 570 (1982). In one instance, two white employees engaged in an altercation far more serious than Gloria's. Both individuals exchanged several blows and both required medical attention. Only one of the employees -- the one who instigated the fight -- was

terminated. That employee also had three prior reprimands; as noted, Gloria had none. Another incident, occurring after Gloria's discharge, between two white employees allegedly involved hair pulling, the wielding of a knife, and a punch to the groin. Neither employee was fired. Finally, Gloria testified about an incident when a white employee pushed him intentionally while he was carrying a 50-pound sack, causing him to fall and sustain an injury to his back, and requiring several visits to a doctor. Although Gloria's supervisor admitted to being aware of this incident, no action was taken.

At the conclusion of Gloria's case-in-chief, in denying Valley's motion for judgment as a matter of law, the court ruled "as to the discrimination issue", that "a prima facie case [had been] made". Valley sought to rebut that case by insisting that Gloria admitted to Scott and Turnbow that he hit his co-employee, and that the two other fighting incidents were distinguishable from Gloria's. (Valley did not attempt to explain why no action was taken concerning the white employee pushing Gloria to the ground.) For the first instance, where the two employees were injured, Valley emphasized that the employee who threw the first punch was terminated, and that this was similar to the action it took with Gloria. Valley noted also that, although the terminated employee had three prior reprimands, none involved fighting or other related misconduct -- only poor job performance. As to the second incident, Valley's supervisor, Scott, testified that his only knowledge of that event came from the identical reports by the two

employees involved, both of which stated only that one of the men had "lightly tapped [the other] in the groin area". (By contrast, Valley contends that Gloria's incident involved more aggressive behavior, and that Gloria stated as much by admitting that he hit Combs.) Finally, Valley noted that both its total workforce and its supervisory staff are at least 50% minority.[10]

Gloria challenges Valley's version. For instance, Gloria offered testimony from an employee who witnessed the "groin tapping" incident. That witness testified that the altercation involved a full punch to the groin, which was intended to harm the individual. Moreover, that witness testified that he related this version to Scott. (Scott presented a different version -- he had not talked with anyone other than the participants, because their version was the same.)

Finally, Valley places great reliance on the claimed admission by Gloria that he hit Combs intentionally. But, Gloria's testimony was just the opposite; he denied making the admission, and testified that he explained to Scott and Turnbow that if he hit Combs, he did so inadvertently in his struggle to gain control of the hose. Along that line, Gloria testified that he refused to sign the termination notice, which stated that he hit Combs, because "that [was] not the way it happened". Valley does not dispute that it did not conduct an investigation to determine

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[10] Valley's evidence regarding its "bottom-line" minority workforce percentage is legally insufficient as a defense to a *prima facie* case of disparate treatment. ***Connecticut v. Teal***, 457 U.S. 440, 442 (1982).

exactly what did happen -- asserting that Gloria's admission ended the matter. Valley admits also that Gloria's termination papers and final check were prepared before Gloria was given the opportunity to respond to Combs' version.

Viewing the evidence in the light most favorable to Gloria, we conclude that the district court erred in granting judgment as a matter of law to Valley. Because there is a fact dispute at every turn, this was a classic jury issue. Valley claimed that in all prior similarly reported situations, it had discharged the instigating employee; Gloria offered contrary evidence. On the point on which it appears to place greatest reliance, Valley claimed that Gloria admitted hitting Combs; Gloria denied doing so. It was for the jury to resolve these disputed facts, and it could reach the conclusion that it did.

III.

For the foregoing reasons, the judgment is **REVERSED**, and this action is **REMANDED** to the district court.

REVERSED AND REMANDED

FITZWATER, District Judge, concurring:

I join the court's opinion, and add this brief observation. Prior to the Supreme Court's decision in Landgraf v. USI Film Prods., ___ U.S. ___, 114 S.Ct. 1483 (1994), trial judges grappled with the question whether to conduct jury trials in Title VII actions, where a right of jury trial would apply if pertinent portions of the Civil Rights Act of 1991 were held to have

retroactive application. As the panel correctly points out, the Court decided Landgraf after Gloria's trial. See op. at 4. It is apparent from the record that Judge Cummings was attempting to avoid a retrial in the event the Act was held to have retroactive application in this respect. See id. at 7 n. 9. Our reversal should not be seen as a rebuke of the well-intentioned efforts of the trial judge to handle the case efficiently as well as justly.