IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10457
(Summary Calendar)

JOHN E. HANNON,

Plaintiff-Appellant,

versus

R.L. POLK & COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(3:93-CV-354-G)

(November 22, 1994)

Before DUHÉ, WIENER and STEWART, Circuit Judges:

PER CURIAM:[*]

John E. Hannon filed a racial discrimination complaint against his employer, R.L. Polk & Company. The district court granted Polk's motion for summary judgment, and Hannon appeals. We affirm.

FACTS

R.L. Polk & Company hired John E. Hannon, an African-American male, on July 25, 1990 as a telemarketer to sell listings in and copies of a directory it produces for cities throughout the United States. In early 1991, Hannon was appointed to the position of

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[*] 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public and burdens on the legal profession."Pursuant to that Rule, the Court has determined that this opinion should not be published.

Office Orders Coordinator, a position which Hannon favored because of the quality of customers and better bonus schedule. Hannon's supervisor was David Royalty, a white male. Royalty's roommate, Roger Fuhrman, was also a telemarketer under Royalty's supervision. In 1991 and 1992, Fuhrman occasionally acted as telemarketing supervisor when Royalty was absent from work. On April 1, 1992, Royalty was replaced by Joe Walker. Polk began expanding its telemarketing operations by hiring additional employees, and additional telemarketing supervisors were needed. Walker promoted seven people in the time period during which Hannon complains of racial discrimination. Walker promoted Fuhrman to a supervisor position in May 1992. Two other persons were promoted to supervisor on July 1, 1992: Sythia Manning (an African-American female), and Rick Brewer (a white male). On September 12, 1992, Walker promoted Jeanette Martin (an African-American female) to the position of supervisor.

When Hannon asked why he had not been promoted, Walker told Hannon that he had less supervisory experience than those who had been promoted. Hannon then revised his resume to show additional telemarketing supervisory experience which had not been shown on his previous resume. On May 11, 1993, three telemarketing supervisor positions were filled with Hannon, Harry Dixon (an African-American male), and Shebrenda Johnson (an African-American female). Thus, during the year in which Hannon claims he was discriminated against, five of the seven who were promoted to the supervisory position were African-American.

Hannon alleged that during mid-1991 until April 1992, Royalty discriminated against him by giving Fuhrman preferential treatment based on race. This preferential treatment included better work assignments. Hannon alleged that, after Walker replaced Royalty in April 1992, he was discriminated against on the basis of race when others were hired before him during the initial expansion of telemarketing personnel. Polk moved for summary judgment. The district court found that Hannon's summary judgment evidence was insufficient to establish an essential element of his claim, and granted summary judgment against Hannon and in favor of R.L. Polk & Company Hannon appeals, pro se, asserting that the district court erred in disregarding his summary judgment evidence[1] and in failing to rule in his favor.

DISCUSSION

Hannon raised two claims of disparate treatment before the district court. The first was that Fuhrman and Brewer were treated more favorably than were similarly situated African-Americans, and the second was that Polk promoted them before Hannon because of Hannon's race. The district court found that (1) Hannon presented no evidence of favoritism toward Brewer, and (2) although the record shows favoritism toward Fuhrman, it does not show that the

[1] Hannon contends that the district court disregarded his summary judgment evidence. He asserts that, if his evidence had been considered, the district court would have ruled in his favor. Our review of the district court determination shows that there was no exclusion or other disregard of evidence. The district court considered the documents and memoranda presented by both parties and rendered judgment. This argument has no merit and is not discussed further herein.

favoritism was based upon race. The record supports these findings.

Summary judgment is proper where there exists no genuine issue as to any material fact. Fed.R.Civ.P. 56(c). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Bodenheimer v. PPG Industries, Inc., 5 F.2d 955, 956 (5th Cir. 1993), citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). We review summary judgments de novo in employment discrimination cases, applying the same standard as the district court. Bodenheimer, Id., citing Waltman v. Int'l Paper Co., 875 F.2d 468, 474 (5th Cir. 1989).

The plaintiff in a Title VII discriminatory treatment case must first establish a prima facie case of racial discrimination. In order to show disparate treatment in promotion, a plaintiff must show (1) membership in a protected group, (2) an application for an open job for which he was qualified, (3) rejection, and (4) action by the employer in promoting or hiring a nonminority for the job or in continuing to seek nonminority applicants for that job. Uviedo v. Steve's Sash & Door Co., 738 F.2d 1425, 1428 (1984), cert. denied, 474 U.S. 1054, 106 S.Ct 791, 88 L.Ed.2d 769 (1986); see also, St. Mary's Honor Center v. Hicks, ___U.S.___, 113 S.Ct. 2742, 2747, 125 L.Ed.2d 407 (1993) and McDonnel Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). If the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, non-

discriminatory reason for the adverse job action. McDonnel Douglas, Id.; Young v. City of Houston, Texas, 906 F.2d 177, 180 (5th Cir. 1990).

The issue in a disparate treatment case is whether a defendant had a discriminatory intent. Uviedo, 738 at 1429. It is the plaintiff's task to demonstrate that similarly situated employees were not treated equally. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 249, 101 S.Ct. 1089, 1091 (1981). Stray remarks in the workplace cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate concerns. See Young, 906 F.2d at 182, quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 1804, 104 L.Ed.2d 268, 305 (1989).

As stated in Burdine, 450 U.S. at 253-254, 101 S.Ct. at 1094:

> The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination. [Footnote omitted.] . . . As the Court explained in Furnco Construction Corp. v. Waters, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978), the prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case. [Footnote omitted.]

In the instant case, the district court found that Hannon had not established a prima facie case. The record contains conclusory statements by Hannon that both Royalty's alleged acts of favoritism toward Fuhrman, and Walker's reasons for promoting others before promoting Hannon, were because of Hannon's race. We shall examine each of his claims in turn.

ROYALTY'S PREFERENTIAL TREATMENT

The facts, as described by Hannon, are as follows: Royalty occasionally allowed his roommate, Fuhrman, to stand in as supervisor when Royalty was out of the office. Hannon asked to stand in, but Royalty said no because the staff would not listen to Hannon. Hannon did not ask, and Royalty did not say, why Royalty thought the staff would not listen to Hannon. Royalty also gave Fuhrman more work than Hannon and the other workers.

Taken as true, these facts do not give rise to an inference of unlawful discrimination. Fuhrman was not the only white telemarketer, and Hannon was not treated differently than any of the other telemarketers. Even if Royalty gave preferential treatment to Fuhrman by the work assignments, all telemarketers were affected, not just the African-American staff. Likewise, we find no discriminatory intent in the statement that Royalty did not think the staff would listen to Hannon. The district court correctly found that Hannon failed to establish a prima facie case regarding Royalty's preferential treatment of Fuhrman.

WALKER'S PROMOTION DECISIONS

Once Royalty was replaced by Walker, the promotions began. Hannon did not know about the first opening until Fuhrman was promoted.[2] Next, Brewer and Manning were promoted. There was no policy for posting announcements of new or open positions until August 1992. Hannon applied for this position, but Martin was hired instead. Hannon then revised his resume to show telemarketing supervisory experience. When the next promotions were made, Hannon was promoted to telemarketing supervisor. At some point, Walker said he was a "white supremacist." Hannon asserts that this statement either constitutes racial discrimination or shows that Walker had discriminatory intent in his promotion decisions.

Taken as true, these facts do not prove by a preponderance that Hannon applied for an available position for which he was qualified but was rejected under circumstances which give rise to an inference of unlawful discrimination. Although Hannon did not know about the first few available positions, one African-American and two whites were promoted before implementation of the posting system. After the posting system, one African-American was promoted before the date of Hannon's promotion. Walker's racial remark shows that Walker was "race-conscious", but does not alone show that discriminatory intent motivated any of his promotion

[2] Hannon concludes that the reason he did not know was due to discriminatory intent. However he agrees that there was no policy for posting announcements until after both Fuhrman and Brewer had been promoted.

decisions. See and compare, Langley v. Jackson State University, 14 F.2d 1070, 1075 (5th Cir. 1994), cert. denied, ___U.S. ___, 115 S.Ct. 61, ___ L.Ed.2d ___ (1994).

Polk presented evidence of the following: Walker based his decisions on the employees' amount of prior supervisory experience in telemarketing. Hannon's resume did not reflect such experience until it was amended after Martin was promoted. After Hannon made Polk aware of his prior supervisory experience in telemarketing, he was promoted. Thus, Polk presented summary judgment evidence which, *taken as true*, would permit the conclusion that there was a nondiscriminatory reason for the promotion decisions. See and compare, St. Mary's Honor Center, 113 S.Ct. at 2748.

Thus, even if we were to assume that Hannon did present a prima facie case, Polk's evidence shifted the burden back to Hannon to produce evidence which demonstrates that the promotion decisions were based upon race rather than upon the absence of prior telemarketing supervisory experience on his resume. Hannon presented a document which indicated that Fuhrman had less experience than his resume indicated and that Fuhrman had occasional "outbursts" when angry. However, Hannon agrees that the information about his supervisory experience was not on his resume until after Fuhrman and Brewer were promoted.

Hannon did not show that the reasons set forth by Polk were a pretext for racial discrimination. Thus, whether or not Hannon established a prima facie case of racial discrimination, summary judgment was properly granted in favor of Polk.

CONCLUSION

For the foregoing reasons, we agree with the district court. Our review of the entire record reveals that there is no genuine issue of material fact presented under any theory of racial discrimination. Summary judgment is therefore appropriate.

AFFIRMED.