

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-10507
Summary Calendar

ERNEST MORRISON and KEATS MORRISON,

Plaintiffs-Counter
Defendants-Appellants,

VERSUS

PRO-LINE CORPORATION, ETHNIC GOLD CORPORATION,
COMER J. COTTRELL, JR., and ISABELL COTTRELL,

Defendants-Counter
Plaintiffs-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CV-1397-P)

(February 24, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:¹

Keats and Ernest Morrison, pro se plaintiffs, appeal the district court's grant of summary judgment in favor of Pro-Line Corporation, Ethnic Gold Corporation, Comer J. Cottrell, Jr., and Isabell Cottrell. Plaintiffs assert claims under Title VII of the 1964 Civil Rights Act. Keats Morrison's claim is based on sexual discrimination, and Ernest Morrison's claim is based on retaliation for speaking out against his son's dismissal. We affirm.

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

BACKGROUND

Comer Cottrell is president of Pro-Line. His wife Isabell served as vice-president of Pro-Line until 1990, at which point she left Pro-Line to organize Ethnic Gold. Pro-Line employed Keats Morrison until November 1990, and Ernest Morrison until October 1991. After Pro-Line fired Keats Morrison, he allegedly worked for Isabell Cottrell at Ethnic Gold. He allegedly resigned from Ethnic Gold in mid-1991 because of sexual harassment by Isabell Cottrell. When Ernest Morrison complained to Comer Cottrell about his son's dismissal, Morrison was allegedly fired by Pro-Line.

After filing Charges of Discrimination in November 1991 with the Equal Employment Opportunity Commission, the Morrisons sued Defendants in district court. Their attorney, Keith Franklin, withdrew representation in January 1993 because he was not licensed to practice in the Northern District of Texas. The district court continued the April trial date until November 1993, but it did not rule on Plaintiffs' motion to extend discovery beyond the January 1993 cutoff. When the court finally ruled on the discovery motion in September, it denied the motion.

In its summary judgment decision, the district court determined that Ethnic Gold and the Cottrells could not be liable under Title VII because they were not employers. The court dismissed Keats Morrison's claim against Pro-Line because he offered no admissible evidence showing that Isabell Cottrell was still an employee of Pro-Line during 1991. Finally, with regard to Ernest Morrison's claim against Pro-Line, the district court

dismissed it because he did not rebut Pro-Line's evidence showing that he had resigned from his position.²

DISCUSSION

We review a district court's grant of summary judgment de novo. Weyant v. Acceptance Ins. Co., 917 F.2d 209, 212 (5th Cir. 1990). We consider all the facts contained in the record and the inferences to be drawn therefrom in the light most favorable to the non-moving party. Id. Plaintiffs complain that their attorney's withdrawal, combined with the actions taken by the district court, amount to a violation of their due process. Plaintiff's also seek review of the district court's dismissal of their Title VII claims.

The Morrisons first contend that their attorney's withdrawal and subsequent acts by the district court denied them due process. Essentially, Plaintiffs argue that the court improperly denied their motion to extend discovery. "We review a district court's decision to preclude further discovery prior to granting summary judgment for abuse of discretion." Krim v. BancTexas Group, 989 F.2d 1435, 1441 (5th Cir. 1993). Plaintiffs emphasize that the discovery cutoff occurred within a week of their attorney's withdrawal and that their attorney did not engage in any discovery during his representation. On the basis that the court has inherent authority to control the administration of justice, Plaintiffs contend that the court should have extended the discovery period.

² Plaintiffs also brought pendent state law claims, over which the district court declined to exercise jurisdiction after granting summary judgment. Plaintiffs do not appeal this ruling.

Nevertheless, between January and September 1993, when the court ultimately denied an extension of discovery, Plaintiffs were able to engage in limited discovery. In fact, the court compelled the production of interrogatories served by Plaintiffs on May 19, 1993, in an order dated September 22, 1993. Furthermore, Plaintiffs neglected to inform the court, both in their January motion to extend discovery and their April motion asking the court to rule on the discovery motion, that their attorney had not engaged in any discovery during his representation. Although the court's rulings may not seem precise, we find no abuse of discretion.³

On the liability of Ethnic Gold and the Cottrells under Title VII, the district court held them not liable because they did not constitute an "employer" under Title VII. We agree. Only an employer can be held liable under Title VII. See 42 U.S.C. §§ 2000e-2 to -3 (1988). An employer is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such person." Id. § 2000e(b). Thus, Ethnic Gold, with less than fifteen employees, cannot be sued under Title VII. The Cottrells cannot be sued in their individual capacities under Title VII. See Harvey v. Blake, 913 F.2d 226, 227-28 (5th Cir. 1990). The

³ Plaintiffs also asked Judge Solis to recuse himself because of bias and prejudice. The district court denied the motion. Because we see no grounds to support the motion, we reject the notion that the district court was biased.

Cottrells could be liable in their official capacities only if they are agents of Pro-Line and Pro-Line itself is liable.

Keats Morrison's claim against Pro-Line fails because he cannot prove that Isabell Cottrell was an agent of Pro-Line during the time she allegedly fired Keats Morrison from Ethnic Gold. Although she admits that she was a director of Pro-Line during 1991, the only evidence showing that she was an employee of Pro-Line comes from the affidavits of Keats and Ernest Morrison. The district court ruled that the portions of the affidavits linking Isabell Cottrell to Pro-Line were inadmissible at summary judgment because of lack of personal knowledge. At a motion for summary judgment, the court should disregard the inadmissible portions of a challenged affidavit. Williamson v. United States Dep't of Agric., 815 F.2d 368, 383 (5th Cir. 1987); see also Union Ins. Soc'y v. William Gluckin & Co., 353 F.2d 946, 952 (2d Cir. 1965) (ruling that statements in affidavits not based on personal knowledge will not be considered by the court). The defendants challenged the affidavits in their reply brief at summary judgment. Without the stricken portions of the affidavits, no evidence showed that Isabell Cottrell was an employee of Pro-Line during 1991. The district court properly granted summary judgment to Pro-Line on Keats Morrison's Title VII claim.⁴

⁴ In their briefs, Plaintiffs allege that Isabell Cottrell harassed Keats Morrison when they worked at Pro-Line. In the Complaint, however, Plaintiffs allege Keats Morrison's dismissal from Ethnic Gold, not his dismissal from Pro-Line, to be the adverse employment action. What occurred at Pro-Line is not relevant to his dismissal from Ethnic Gold.

The district court granted summary judgment on Ernest Morrison's claim against Pro-Line because Plaintiffs failed to offer evidence of pretext. At summary judgment, Plaintiffs did not respond to Defendants' document showing that Ernest Morrison had resigned from Pro-Line to relocate to a new city. On appeal, Plaintiffs point to Ernest Morrison's response to Defendants' Interrogatory No. 19. In his response, Ernest Morrison described how Pro-Line fired him after he entered into the agreement to resign and relocate. Plaintiffs should have brought this interrogatory response to the attention of the district court. When a moving party at summary judgment demonstrates the absence of a material issue of fact, the non-moving party must identify specific evidence in the summary judgment record that demonstrates the existence of a material issue of fact. Forsyth v. Barr, 19 F.3d 1527, 1533 (5th Cir.), cert. denied, 115 S. Ct. 195 (1994). If the non-moving party fails to point the district court to specific portions of the record, it cannot correct its mistake on appeal. Id. at 1537. Because Plaintiffs failed to direct the district court to this evidence, we will not review it on appeal. Because Plaintiffs failed to show at the summary judgment stage that Ernest Morrison's termination was for a reason other than resignation, the district court properly granted summary judgment on his Title VII claim.

CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment is

AFFIRMED.