UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10867
Summary Calendar

VERNON SCHNEIDER,

Plaintiff-Appellant,

versus

NICHOLAS BRADY, Secretary, Department of Treasury,

Defendant-Appellee.

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VERNON SCHNEIDER,

Plaintiff-Appellant,

versus

LLOYD M. BENTSEN, Secretary, Department of Treasury,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CV-246-G cons.w/93-CV-373 & 94-940)

October 4, 1995

Before JOLLY, JONES and STEWART, Circuit Judges.

PER CURIAM:[*]

Vernon L. Schneider appeals the district court's grant of summary judgment in favor of the government, his former employer,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

in three now-consolidated discrimination lawsuits. Finding no reversible error, we affirm.

BACKGROUND

Schneider was an agent for the Internal Revenue Service (IRS) on June 21, 1988. On that day, Schneider did not report to his regular place of employment, but reported to the Dallas Regional Office of the IRS. When contacted by his supervisor and told to report to his regular assignment, Schneider refused, stating that he could not unless he received direct orders from the regional commissioner or the district director. The supervisor, Clifton Anderson took the matter to his branch chief, the regional personnel department, and the outside employee counseling service, Human Affairs International. Schneider would not return the telephone calls of Human Affairs. Anderson contacted Schneider's family and informed them of his erratic behavior. For two more days, Schneider refused to report to his regular place of work, giving the reason that he was on a secret special assignment for the President of the United States looking for infiltrators in the IRS. At the behest of Schneider's wife, he was committed to CPC Millwood Hospital. On August 4, 1988, Schneider was released.

Schneider returned to work on August 15, 1988, but was temporarily reassigned to the planning and special programs branch of the IRS because it was a less stressful position. Schneider had been diagnosed with paranoid disorder, and with having an obsessive-compulsive personality style. The psychiatrist examining Schneider found that the paranoid disorder had resolved itself

because of decreased stress. On June 2, 1989, Schneider was rated as having performed his new assignment "fully successfully," which was one level below his previous rating of "outstanding." He, however, filed a complaint asserting that his performance rating had been lowered because of his hospitalization. The Equal Employment Opportunity Commission (EEOC) found that Schneider presented no evidence of discrimination because of his handicap.

On June 7, 1991, Schneider met with Lynn Weldon, a case worker with Dallas County Mental Health. He attempted to have a warrant of mental illness issued for his supervisor at the IRS. Following an investigation, Schneider was terminated from his employment effective December 6, 1991, for unauthorized disclosures of taxpayer information, using Government time for other than official purposes, and for misusing his Government identification. In February 1992, Schneider completed retirement forms, and his retirement was authorized effective December 6, 1991, the date of his termination. At the time, Schneider was 61 years old and had nearly 33 years of service credit.

This case is a consolidation of three separate pro se actions filed by Schneider. Schneider v. Brady, No. 3:92-CV-0246-G (Case One) was filed on February 6, 1992. Schneider alleged that he had been discriminated against by the Internal Revenue Service (IRS), his employer, because of his age, mental handicap, and national origin. Schneider also asserted that he had been retaliated against for seeking redress of his grievances through the EEOC process. Schneider alleged that he had been transferred to

a different job within the IRS and that his performance appraisal had been lowered because management perceived that he had a mental handicap.

In Schneider v. Brady, Civil Action No. 3:93-CV-0373-P (Case Two), filed February 23, 1993, Schneider alleged that he had been wrongly terminated by the IRS effective December 6, 1991, because of his age, national origin, and in retaliation for his EEOC activities. Although Schneider mentioned age and national origin as reasons for his termination, the complaint is essentially based on retaliation for his EEOC activities.

Schneider v. Bentsen, Civil Action No. 3-94-CV-0940-P (Case Three), was filed on May 12, 1994, and also alleged adverse employment action caused by discrimination based on age and national origin, as well as retaliation for his EEOC activities.

The district court consolidated the cases and, at appellees' behest, granted summary judgment in their favor. Schneider's motion for reconsideration and to vacate the judgment under Fed. R. Civ. P. 59(e) was denied, and he has appealed.

DISCUSSION

Schneider asserts that the district court erred in granting summary judgment in favor of the defendants on his claims. Summary judgment is appropriate if "viewing all the evidence in the light most favorable to the non-movant, 'there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.'" *Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 809 (5th Cir. 1991), *quoting Williamson v.*

United States Dep't of Agric., 815 F.2d 363, 373 (5th Cir. 1987). If a movant carries his burden, the non-movant must set forth specific facts showing that there is a genuine issue for trial. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc).[1]

ELEMENTS OF AGE AND NATIONAL ORIGIN CLAIMS

To establish a prima facie case of age discrimination, Schneider must show that he "(1) was discharged; (2) was qualified for the position; (3) was within the protected class at the time of the discharge; (4) was replaced by someone outside the protected class, or (5) by someone younger, or (6) show otherwise that his discharge was because of age." *Crum v. American Airlines Inc.*, 946 F.2d 423, 428 (5th Cir. 1991), *quoting Bienkowski v. American Airlines Inc.*, 851 F.2d 1503, 1504-05 (5th Cir. 1988). Similarly, to make a prima facie case of discrimination under Title VII

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[1] The government argues that the claims contained in Case One should be dismissed due to Schneider's failure to timely file in federal court. Construing Schneider's *pro se* brief liberally, Case One contains claims arising under Title VII, the Age Discrimination in Employment Act (ADEA) and the Rehabilitation Act. If Schneider's claims implicated only Title VII and the Rehabilitation Act, the claims would be barred by the limitations period contained in Title VII and the Rehabilitation Act, which at that time barred suits filed 30 days after receipt of a decision by the EEOC. 42 U.S.C. § 2000e-16(c)(1983); 29 U.S.C.A. § 794a(a)(1)(West 1985); *see Johnston v. Horne*, 875 F.2d 1415, 1418-19 (9th Cir. 1989). The government fails, however, to discuss or even mention the split of authority regarding the applicability of the 30 day limitations period in regard to ADEA suits that have first been addressed by the EEOC. *See Jones v. Runyon*, 32 F.3d 1454, 1456-57 (10th Cir. 1994); *Long v. Frank*, 22 F.3d 54, 56-57 (2d Cir. 1994); *Lavery v. Marsh*, 918 F.2d 1022, 1027 (1st Cir. 1990); *Lubniewski v. Lehman*, 891 F.2d 216, 220-21 (9th Cir. 1989). Because this is a vexing issue, and the district court disposed of this case on the merits, this court will do likewise.

Similarly, Case Two presented, according to the government, a question of failure to exhaust administrative remedies. The district court rejected the contention, and we see no need to consider it here.

Schneider must show that he (1) was discharged; (2) was qualified for the position; (3) was a member of a protected group; and (4) that his position was filled by a "person who is not a member of a protected group." *Valdez v. San Antonio Chamber of Commerce*, 974 F.2d 592, 596 (5th Cir. 1992). If Schneider establishes a prima facie case, the burden shifts to the IRS to show a legitimate nondiscriminatory basis for the termination. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-54, 101 S. Ct. 1089, 1093 (1981); *Valdez*, 974 F.2d at 596. If the IRS makes this showing, then the burden shifts back to Schneider to show that the nondiscriminatory basis was merely a pretext for a discriminatory termination. *See McDaniel v. Temple Indep. School Dist.*, 770 F.2d 1340, 1346 (5th Cir. 1985); *Valdez*, 974 F.2d at 596.

ELEMENTS OF A RETALIATION CLAIM

To establish a prima facie case of retaliation the plaintiff must show that (1) he engaged in activity protected by the Age Discrimination in Employment Act or Title VII; (2) an adverse employment action occurred; and (3) there was a causal connection between the participation in the protected activity and the adverse employment action. *Barrow v. New Orleans Steamship Ass'n*, 10 F.3d 292, 298 (5th Cir. 1994). Once the prima facie case is established, the defendant has the burden of producing some nondiscriminatory reason for the action. *Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 42 (5th Cir. 1992). If the defendant makes this showing, the plaintiff has the burden of establishing that the proffered reasons were a pretext for retaliation. *Id*.

With respect to these categories of claims brought in all three suits, Schneider has not produced evidence that creates a question of material fact that any of the personnel actions taken against him were a pretext for discrimination. Other than his basic allegation, Schneider has not even suggested that either his transfer or his termination was based on his age or his teutonic origins.[2] As for retaliation, Schneider's argument on appeal is that his EEOC complaints are proof that he was continually harassed and retaliated against by the IRS. Schneider asserts that the IRS did not establish the alleged rules infractions that were given as the motivation for his termination. Contrary to Schneider's argument, the IRS bears the burden of producing a legitimate reason for the termination, not of proving that there was no discriminatory reason for the termination. Schneider bears the burden of showing that the reason given was merely a pretext for a discriminatory action. Schneider has not presented any evidence to carry this burden. The district court did not err in granting summary judgment on these claims.

REHABILITATION ACT CLAIM

The Rehabilitation Act, 29 U.S.C. § 701-796 (West 1985)(the Act), prohibits discrimination against otherwise qualified disabled individuals in programs that receive federal financial assistance, in this case the IRS. The Act is intended to ensure that individuals with disabilities receive the same

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[2] The district court noted that it was not certain that Schneider had made a prima facie showing of discrimination, but assumed for purposes of the summary judgment motion that he had done so.

treatment as those without disabilities. *Chiari v. City of League City*, 920 F.2d 311, 315 (5th Cir. 1991). To qualify under the Act, Schneider must show that he (1) was disabled; (2) was otherwise qualified; (3) worked for a program that received federal funding; and (4) was transferred or fired solely because of his disability. *Id.*; *see* 29 U.S.C.A. § 794. The Supreme Court has defined a person as "otherwise qualified" if he "is able to meet all of a program's requirements in spite of his handicap." *Southeastern Community College v. Davis*, 442 U.S. 397, 406, 99 S. Ct. 2361, 2367 (1979). Schneider bears the burden of showing that he is "otherwise qualified." *Chiari*, 920 F.2d at 315.

Although the district court did not specifically address Schneider's claims in terms of the Act, the court's conclusion that there was no genuine issue of material fact that the reasons for the transfer and subsequent termination were merely pretextual forecloses this claim as well. As Schneider has not shown that he was terminated or transferred[3] for other than valid reasons, he has not shown that he was otherwise qualified for the position.

CONCLUSION

As seen from the discussion there is no basis to grant Schneider's motion for appointed counsel on appeal. For the

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[3] Schneider has not clearly defined his complaint with respect to his transfer to a different position following his hospitalization. Schneider has not produced any evidence to show that the reassignment was for any purpose other than to accommodate his need for a less stressful work environment with close supervision. It is not logical to argue that an attempt to accommodate the needs of a disabled worker is a violation of the Act.

foregoing reasons, the judgment of the district court is **AFFIRMED**; Motion to Appoint Appellate Counsel is **DENIED**.