

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10909

SURENDRA K. GUPTA,

Plaintiff-Appellant,

versus

TEXAS INSTRUMENTS, INC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(3:91 CV 2522 G)

(June 28, 1995)

Before HIGGINBOTHAM and PARKER, Circuit Judges, and TRIMBLE,
District Judge.*

PER CURIAM:**

Surendra Gupta appeals a judgment entered against him by the district court on his Title VII claim. A jury found that Texas Instruments, Inc., did not discriminate against Gupta on the basis of his national origin, and the jury's verdict controls. Accordingly, we affirm.

* District Judge for the Western District of Louisiana, sitting by designation.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I.

Surendra Gupta, a native of India and a naturalized American citizen, worked at Texas Instruments, Inc., from 1983 until 1991. In December 1990, TI declared Gupta "surplus." Gupta applied for ten different jobs within TI, but was unsuccessful. TI terminated Gupta in February 1991.

Gupta filed this discrimination action, claiming that TI discriminated against him on the basis of his age, race, and national origin. Gupta tried his § 1981 and age discrimination claims to a jury and his Title VII claim to the court. At the close of Gupta's case, TI moved for judgment as a matter of law, which the court denied. The jury returned a verdict in favor of TI on the § 1981 and age discrimination claims, and the court ruled against Gupta on his Title VII claims. The court assumed that Gupta had met his burden of establishing a prima facie case, but ruled that TI had offered a legitimate, non-discriminatory reason for rejecting Gupta for the positions.

Gupta did not appeal the jury's verdict, but did appeal the court's decision on his Title VII claim. Specifically, Gupta alleged that TI discriminated against him by failing to hire him as an auditor and, instead, hiring a less qualified individual. This court held that TI had failed to articulate a legitimate, non-discriminatory reason for its action. It then instructed the district court on remand to determine whether Gupta had established a prima facie case. The district court found in favor of TI,

holding that Gupta had failed to establish a prima facie case or, alternatively, that it was bound by the jury's § 1981 verdict.

II.

A.

TI argues that Gupta may not recover because the jury verdict is binding on the court. While TI did argue this issue to the district court after remand, it did not urge this as an alternative ground of affirmance in Gupta's first appeal. "We will consider an issue raised for the first time on appeal only if the issue is a purely legal issue and if consideration is necessary to avoid a miscarriage of justice." Citizens Nat'l Bank v. Taylor (In re Goff), 812 F.2d 931, 933 (5th Cir. 1987).

In this case, the only evidence of discrimination was that Gupta was qualified for the auditor position, that he was not selected, and that someone who was arguably less qualified was selected. However, the person TI selected to fill the auditor position was also a naturalized American citizen, though he was from Colombia, South American and not India. Given the near absence of evidence of discrimination, it would be a miscarriage of justice to not consider TI's preclusion argument. Cf. Cunningham v. Housing Auth., 764 F.2d 1097, 1100 (5th Cir.) (holding that when a case has been fully tried on the merits, the issue becomes "the propriety of the ultimate finding of discrimination vel non") (citation and internal quotation marks omitted), cert. denied, 474 U.S. 1007 (1985).

B.

In Ward v. Texas Employment Comm'n, 823 F.2d 907, 908-09 (5th Cir. 1987) (per curiam), this court held that a jury's verdict in a § 1981 case controls the outcome of a Title VII case based on the same facts. In this case, the court asked the jury whether "race or national origin [was] a motivating factor in TI's decision not to select Gupta for a vacant job position?" The jury answered "No." Because this is the very fact issue presented to the district court, the jury verdict controls.

III.

For the foregoing reasons, the judgment of the district court is AFFIRMED.