

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 94-11077
Summary Calendar

DAVE GARDNER, Plaintiff-Appellant,

versus

MARVIN T. RUNYON, JR., Defendant-Appellee.
Postmaster General US Postal
Service,

Appeal from the United States District Court for the
Northern District of Texas
(3:93 CV 1009 D)

(August 17, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM*:

This *pro se* appeal arises from a wrongful termination action and employment discrimination action filed by Plaintiff-Appellant Dave Gardner ("Gardner") against Defendant-Appellee Marvin T. Runyon, Jr. ("Runyon"), Postmaster General of the United States Postal Service. The district court found that the Administrative Law Judge's ("ALJ") decision upholding Gardner's discharge was supported by substantial evidence and was not arbitrary or

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Pursuant to that Rule, the Court has determined that this opinion should not be published.

capricious, that Gardner was afforded his due process rights in the administrative review of his discharge and that Gardner failed to meet his burden of production with regard to his race discrimination claim to overcome Runyon's legitimate, nondiscriminatory reasons for discharging Gardner. We affirm.

I.

After his discharge from the U.S. Postal Service on February 4, 1992 for improper conduct and failure to disclose his prior criminal offenses on his employment application, Gardner pursued his administrative remedies through an ALJ and the Merit System Protection Board ("MSPB") on both the wrongful termination issue and the discrimination issue, and through the Equal Employment Opportunity Commission ("EEOC") on the discrimination issue only. The ALJ, the MSPB and the EEOC ruled against Gardner.

Gardner then filed suit in federal court on May 24, 1993, alleging race discrimination. Runyon filed a motion for summary judgment, and the district court granted the motion and dismissed Gardner's complaint with prejudice.

II.

Our limited review of the decision of the MSPB allows reversal only if we find the actions of the MSPB to be:

- (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;
- (2) obtained without procedures required by law, rule, or regulation having been followed; or
- (3) unsupported by substantial evidence; except that in the case of discrimination...the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

5 U.S.C. § 7703(c). See *Oliver v. U.S. Postal Service*, 696 F.2d

1129, 1130-31 (5th Cir. 1983).

With regard to Gardner's Title VII claim of race discrimination, we find that, even assuming that Gardner established a *prima facie* case, the district court correctly concluded that Gardner failed to produce sufficient summary judgment evidence to rebut Runyon's legitimate, nondiscriminatory reasons for terminating his employment with the U.S. Postal Service. Gardner's summary judgment evidence, submitted to the district court in an unsworn pleading, is insufficient and is based on hearsay. See *Nissho-Iwai American Corp. v. Kline*, 845 F.2d 1300, 1306 (5th Cir. 1988). Therefore, the district court was correct to grant summary judgment in favor of Runyon with respect to Gardner's race discrimination claim.

Gardner's remaining arguments challenging the findings of the ALJ and the MSPB are also without merit. Our review of the administrative record reveals an overabundance of evidence to support the decisions of the ALJ and the MSPB. Moreover, we find that the findings are neither arbitrary nor capricious.

III.

For the reasons articulated above, the judgment of the district court is AFFIRMED.