

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20259
Conference Calendar

HOA VAN MA,

Plaintiff-Appellant,

versus

GENERAL TELEPHONE COMPANY
OF THE SOUTHWEST,

Defendant-Appellee.

- - - - -
Appeal from the United States District Court
for the Southern District of Texas
USDC No. 94-20259
- - - - -

(January 24, 1995)

Before POLITZ, Chief Judge, and HIGGINBOTHAM and DeMOSS,
Circuit Judges.

PER CURIAM:*

Appellant, Hoa Van Ma ("Ma"), presents in this appeal an entirely new basis for denying the defendant's motion for summary judgment. Ma apparently now concedes that he was a member of the collective bargaining unit, but he argues, for the first time, that he falls within an exception to the general rule that an employee must exhaust his administrative remedies.

Ordinarily, we do not review issues raised for the first time on appeal unless they involve purely legal questions and

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

failure to consider them would result in manifest injustice. Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991). See also Topalian v. Ehrman, 954 F.2d 1125, 1131-32 & n.10 (5th Cir.), cert. denied, 113 S. Ct. 82 (1992) (party challenging the grant of summary judgment may not advance new theories or raise new issues on appeal). Because Ma's latest argument necessitates the resolution of factual issues, we cannot review it.

Appellee requests attorney's fees and costs as sanctions against Ma for prosecuting this appeal. This Court may sanction an appellant who files a frivolous appeal. Fed. R. App. P. 38. A frivolous appeal is one "in which the result is obvious or the arguments of error are wholly without merit." Carmon v. Lubrizol Corp., 17 F.3d 791, 795 (5th Cir. 1994).

The appeal is frivolous. Ma presents an argument that necessarily fails because it was raised for the first time on appeal and rests, at least in part, on facts not in the record. Even if not procedurally foreclosed, the argument, essentially two pages, offers little legal reasoning upon which to discern the basis of the appeal or to gauge the appropriateness of the two cases cited. Such a brief is inexcusable and serves only to waste the time and resources of this Court and opposing counsel. Although we decline to impose monetary sanctions, Ma and his counsel are warned that future such frivolous appeals will invite sanctions.

The appeal is DISMISSED as frivolous. See Fifth Cir. R.