

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20289
Summary Calendar

SHARON K. TALLEY,

Plaintiff-Appellant,

versus

SOUTHWESTERN BELL, YELLOW PAGES, INC.
and LOCAL 6222 COMMUNICATION WORKERS
OF AMERICA,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-91-0350)

(December 2, 1994)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:¹

Sharon K. Talley asserts that the evidence is insufficient to sustain the jury's verdict that her former employer, Southwestern Bell, Yellow Pages, Inc., did not breach the collective bargaining agreement, and that her union, Local 6222 Communication Workers of America, did not breach its duty of fair representation. We

AFFIRM.

¹ Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.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.

In August 1988, Talley was employed by Bell as an account specialist, to sell Yellow Pages advertising. While so employed, Talley was a member of the union. During Talley's employment, the collective bargaining agreement between Bell and the union provided, *inter alia*, that Bell would "assign accounts on a fair and equitable basis".

In May 1989, Bell discharged Talley for inadequate sales performance. She presented a grievance through the union, complaining that Bell had unfairly and inequitably assigned an excessive amount of bad debt accounts to her, and had improperly included those accounts in its evaluation of her performance. Although the exact terms of the settlement are disputed, the grievance was resolved when Bell agreed to re-hire Talley when a position became available. As of the time of trial, Talley had not been reinstated, however, because Bell filled openings for account specialists by transferring employees rather than by hiring new employees.

Talley filed suit against Bell for breach of the collective bargaining agreement, and against the union for breach of its duty of fair representation.² The parties consented to proceed before a magistrate judge. The case was tried to a jury, which rendered a verdict in favor of Bell and the union. Talley's motions for

² The district court granted summary judgment for Bell and the union on Talley's state law claims for fraudulent inducement, intentional infliction of emotional distress, and negligent infliction of emotional distress. Talley has not appealed the dismissal of those claims.

judgment as a matter of law or, in the alternative, for a new trial was denied.

II.

Talley contends that the evidence is insufficient to support the jury's verdict, and that the magistrate judge erred in denying her judgment as a matter of law.

Our review of a denial of judgment as a matter of law is governed by the familiar standard set forth in *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc):

On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence--not just that evidence which supports the non-mover's case--but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury.... However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

Id. at 374-75.

A.

Talley contends that there was overwhelming evidence that Bell breached the collective bargaining agreement because its assignment of an excessive number of bad debt accounts to her was not fair and equitable. She asserts that there was undisputed evidence at trial

that she was assigned an excessive amount of such accounts. The record reveals otherwise. For example, Bell introduced evidence that the total amount of bad debt accounts assigned to Talley was within \$1,000 of the amount of bad debt accounts assigned to other account specialists in her division; that all account specialists were evaluated on the same basis; that other account specialists were successful in collecting bad debts; that Talley's performance was below the average of her peers; and that other account specialists were discharged for the same reason that Talley was discharged. The jury considered this evidence and found that Bell did not act unfairly or inequitably in assigning accounts to Talley. Because there was "evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions," *Boeing*, 411 F.2d at 374, the district court correctly submitted the issue to the jury. And, the evidence is more than adequate to support the jury's conclusion.

B.

Talley contends that the union breached its duty to represent her fairly by not insisting that Bell comply with the terms of her grievance settlement. A union has a duty to "serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct". *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

As stated, the terms of the grievance settlement were disputed at trial. Talley testified that the union communicated to her that her grievance had been settled by Bell's agreement to re-hire her as soon as an opening became available, and that she was led to believe that she would be reinstated within two months. She contends that Bell failed to honor the settlement when it transferred employees from within the company to fill openings, rather than reinstating her; and that the union breached its duty to represent her by ignoring her telephone calls and doing nothing to enforce the settlement.³ The union introduced evidence, however, that the terms of the settlement were that Talley would be reinstated when and if Bell hired employees from outside the company for her former position. The union maintains that the settlement agreement has not been breached because Bell has not hired employees from outside the company for the job covered by the grievance settlement; and that it will make every effort to enforce the grievance settlement when and if Bell hires new employees from outside the company for Talley's former position.

Needless to say, resolution of the factual dispute regarding the terms of the grievance settlement was within the sole province of the jury. See *Boeing*, 411 F.2d at 375 ("it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses").

³ Talley testified that she telephoned the union approximately 50 times between October 1989 and August 1990.

III.

For the foregoing reasons, the judgment is

AFFIRMED.