UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-20317
Summary Calendar

ABBA BAROOMAND,

Plaintiff-Appellant,

versus

CITY OF HOUSTON, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Texas
(CA H-93-2434)

(December 1, 1994)

Before POLITZ, Chief Judge, JOLLY and BENAVIDES, Circuit Judges.

POLITZ, Chief Judge:[*]

Abba Baroomand, an employee of the City of Houston, appeals the adverse summary judgment rejecting his Title VII discrimination and retaliation claims against the City and his 42 U.S.C. § 1983 and state law claims against Houston Police Officer Leonard Bucharski. Finding no error, we affirm.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Background

Baroomand, a naturalized citizen and native of Iran, was employed by the City of Houston as an Operations and Safety Officer at Intercontinental Airport. In 1989 he applied for a promotion to the position of Operations Supervisor and, along with a number of applicants, was recommended for promotion. No one was actually promoted at that time as the job posting was rescinded. When the promotions were awarded Baroomand was not selected. Baroomand complained internally and, not satisfied with the City's reaction, filed a complaint with the EEOC.

Four months later, during the EEOC investigation, Baroomand was on duty at the airport while airport police officers conducted a mock hijacking exercise. During that exercise, Airport Manager John Ferguson ordered Baroomand to leave his work area and move a truck near one of the loading gates. Although Baroomand knew of the exercise, he did not know that he was entering an area declared by the drill authorities to be a zone where non-law enforcement personnel would be taken into custody. Upon entry into the area, Baroomand was placed into custody by Officer Bucharski. When Bucharski took Baroomand in cuffs to his supervisor, Baroomand was identified as being uninvolved with the exercise and was released.

Baroomand allegedly began to suffer psychological problems due to this incident and, on the advice of treating specialists, eventually declined to return to work at the airport. Instead, he requested a job with the City outside of the aviation department but was refused. He filed suit against the City, alleging that the

refusal to promote him was due to unlawful discrimination on the basis of his national origin[1] and that his arrest during the drill was in retaliation for filing the complaint with the EEOC.[2] He also alleged civil rights deprivations[3] and state law tort claims against Bucharski and the City.

Defendants sought and were granted summary judgment dismissing all claims. Baroomand timely appealed all but dismissal of the state law claims against the City.

Analysis

A summary judgment is reviewed *de novo*, applying the same standard as the district court.[4] Fed.R.Civ.P. 56(c) requires summary judgment when the evidence, viewed in the light most favorable to the nonmoving party, presents no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[5]

In an employment discrimination case a plaintiff may establish a claim by first making a *prima facie* case of discrimination, after which the defendant is allowed an opportunity to articulate a legitimate, non-discriminatory reason for the employment decision.[6] If the defendant articulates such a reason, the plaintiff must show

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[1]42 U.S.C. §§ 1981 *et seq.*, § 2000(e).

[2]42 U.S.C. § 2000e-3.

[3]42 U.S.C. § 1983.

[4]**Lindsey v. Prive Corp.**, 987 F.2d 324 (5th Cir. 1993).

[5]**Id.**

[6]**McDonnell Douglas Corp. v. Green**, 411 U.S. 792 (1973).

that reason to be pretextual, with the ultimate burden of persuasion of discrimination remaining with the plaintiff.[7]

Baroomand claims that he made his *prima facie* case of unlawful discrimination by showing the City's failure to promote him and, as the City allegedly failed to assert a legitimate reason for that decision in its motion, Baroomand maintains that the summary judgment motion should have been denied. Baroomand overlooks that "the essential fact question in any employment discrimination case in which the plaintiff alleges disparate treatment is not whether the plaintiff has established a *prima facie* case or demonstrated pretext, but whether the defendant has discriminated against the plaintiff."[8]

The ultimate issue in the summary judgment motion is whether the evidence of lack of discrimination was so compelling that defendants should prevail as a matter of law.[9] Thus, if "critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the monmovant,"[10] summary judgment is appropriate.

The record in this case shows that the City had a legitimate, non-discriminatory reason for its refusal to promote Baroomand -- a botched assignment resulting in the City's aviation department

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[7]**McDonnell Douglas**.

[8]**Armstrong v. City of Dallas**, 997 F.2d 62, 66 (5th Cir. 1993).

[9]**Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242 (1986).

[10]**Armstrong**, 997 F.2d at 67.

director forming an intense dislike for Baroomand.[11] Although the director may have refused to promote Baroomand because he disliked him, there is no evidence that this action stemmed from a discriminatory animus due to Baroomand's national origin.

Baroomand's evidence of unlawful discriminatory animus affecting his employment status is *de minimis*, consisting in large part of his being referred to by his co-workers as "the Ayatollah" for a short time in 1985 and his recollection of a co-worker's opinion that Baroomand's harsh treatment stemmed from his being from an "unacceptable minority." Baroomand's evidence demonstrates his unpopularity but it fails to show that the unpopularity stemmed from his national origin. It merely consists of his own testimony of a subjective belief that his difficulties were the result of discrimination. This is insufficient to create a factual issue in the face of proof of a non-discriminatory reason for the denied promotion.[12] Baroomand's evidence was too tenuous to show that his promotion failure was the result of invidious discrimination; summary judgment was proper on his Title VII claim.

Baroomand's retaliation claim also fails to survive close

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[11]Baroomand incorrectly claims that the City's failure to explicitly assert a non-discriminatory reason dooms its summary judgment motion, as a defendant in a Title VII case sustains its burden "by producing evidence . . . of non-discriminatory reasons." **St. Marys Honor Center v. Hicks**, _____ U.S. _____, 113 S.Ct. 2742, 2748 (1993). (Emphasis in original.) Here, the City's motion sustained its burden by noting both the lack of evidence of Gaines' discriminatory motives and Baroomand's own admission that a significant factor in his failure to be promoted was his clash with Gaines.

[12]See **Hornsby v. Conoco, Inc.**, 777 F.2d 243 (5th Cir. 1985).

scrutiny. To prove retaliation by the City, Baroomand must show that he engaged in activity protected by Title VII, that an adverse employment action occurred, and that there is a causal connection between the protected activity and the adverse employment action.[13]

Baroomand correctly asserts that his filing of a complaint with the EEOC was a protected activity under Title VII,[14] and the record contains evidence about how the arrest has adversely affected his current employment by allegedly rendering him incapable of returning to work. Absent from the record, however, is any evidence of a causal connection between the filing of the EEOC complaint and Baroomand's arrest during the hijacking drill.

The record contains no evidence of collusion between Baroomand's employer and the arresting officer; the officer did not know that Baroomand had filed an EEOC complaint. As the causal connection between the complaint and the arrest rests "merely upon conclusory allegations, improbable inferences, and unsupported speculation,"[15] summary judgment was proper in this matter as well.

Finally, we find Baroomand's arguments that the district court erred in finding Officer Bucharski immune to be unpersuasive. Qualified immunity exists to protect "a police officer from liability for civil damages when a reasonable officer could have believed that the challenged conduct did not violate clearly

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[13]**Gonzalez v. Carlin**, 907 F.2d 573 (5th Cir. 1990).

[14]See 42 U.S.C. § 2000e-3(a).

[15]**International Shortstop, Inc. v. Rally's Inc.**, 939 F.2d 1257, 1266 (5th Cir. 1991), cert. denied, _____ U.S. _____, 112 S.Ct. 936 (1992). (Citations omitted.)

established statutory or constitutional rights."[16] Bucharski arrested Baroomand during the hijacking exercise in which he had been told that airport employees were to participate. In the absence of compelling evidence of excessive force or verbal abuse in the arrest, Bucharski's actions did not violate clearly-established constitutional or statutory rights, entitling him to qualified immunity from Baroomand's section 1983 claims. Thus, summary judgment dismissing the section 1983 claims against Bucharski was proper.

The state law claims against Bucharski require like treatment as Texas law also allows for qualified immunity if Bucharski was "acting in good faith within the course and scope of his authority, and performing discretionary functions."[17] Here, Bucharski acted in good faith while executing a function that was both within his authority as an airport police officer and necessarily involved some sort of executive decision-making. These facts result in immunity from Baroomand's state law claims, allowing for summary judgment on these claims as well. Baroomand's other claims are meritless.

The judgment of the district court is AFFIRMED.

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[16]**Simpson v. Hines**, 903 F.2d 400, 402 (5th Cir. 1990).

[17]**Vasquez v. Hernandez**, 844 S.W.2d 802, 804 (Tex.App. -- San Antonio 1992).