

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20585
Summary Calendar

JOHNNY SPENCER,

Plaintiff-Appellant,

versus

HOUSTON INDEPENDENT SCHOOL
DISTRICT, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Texas
(CA H 93-2400)

(February 6, 1995)

Before POLITZ, Chief Judge, JONES and BARKSDALE, Circuit Judges.

POLITZ, Chief Judge:*

Johnny Spencer appeals an adverse summary judgment dismissing his Title VII and due process discrimination complaint against his employer, the Houston Independent School District (HISD). Finding no error, we affirm.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.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

In 1976 HISD hired Spencer as an hourly employee in its food service department. Spencer later became a salaried food services district supervisor with responsibilities for 19 school cafeterias. He worked a schedule coterminous with the regular school year, 10 to 10.5 months. To supplement his income, Spencer regularly sought and secured summer employment with HISD, first as a maintenance supervisor and then as an area supervisor in the summer school cafeteria program.

In the spring of 1992 Spencer applied for an area supervisor assignment during the summer term. He was not employed; 18 others, including 17 females, were employed. Nine of the 18 slots were for area supervisors, five of whom worked for HISD on a year-round contract and thus occasioned no increased costs to HISD for their summer services. The remaining four supervisors were filled from a pool of four women and three men, all of whom were on regular school-year contracts. The four slots went to the four females.

Unable to secure a satisfactory explanation from anyone in HISD, Spencer filed a charge with the EEOC contending that he was not given summer employment because of his sex and in retaliation for a racial discrimination claim he had filed in 1988.¹ Upon receipt of a right-to-sue letter, Spencer filed the instant complaint, alleging Title VII and due process violations.

The HISD moved for summary judgment, challenging Spencer's

¹That EEOC charge was declined and a lawsuit was filed. That suit was dismissed by agreement of the parties.

discrimination claim and offering summary judgment evidence that the hiring decision was based on financial considerations (with the possible exception of one, all area supervisors appointed were either not paid any additional salary or were paid a sum below Spencer's rate of compensation) and Spencer's performance evaluations. Spencer contends that these reasons were pretextual but offered no countervailing evidence, advancing only conclusory assertions.

The district court rendered summary judgment dismissing the Title VII claims, finding that Spencer had not shown the HISD's proffered reasons for its action to be pretextual. It dismissed the due process claim as unopposed.² Spencer timely appeals.³

Analysis

We review a district court's grant of summary judgment *de novo*, applying the same standard as the district court.⁴ "Summary judgment is proper when no issue of material fact exists and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was proper, all fact questions

²Spencer concedes that he had no viable due process claim as he had no constitutional right to summer employment.

³Spencer appeals only the gender-based discrimination claim; he does not appeal the retaliation claim. See Atwood v. Union Carbide Corp., 847 F.2d 278 (5th Cir. 1988), cert. denied, 489 U.S. 1079 (1989).

⁴Armstrong v. City of Dallas, 997 F.2d 62 (5th Cir. 1993).

are viewed in the light most favorable to the non-movant."⁵

Spencer challenges the district court's finding and conclusion that he did not provide summary judgment evidence that the HISD reasons are pretextual. We accept Spencer's contention that he made out a *prima facie* claim of sex discrimination, he applied for and was denied a position for which he was qualified, and a female was hired instead.⁶ This showing required HISD to articulate a legitimate nondiscriminatory reason for its action.⁷

The HISD offered evidence that it based its decision on financial considerations and Spencer's performance evaluation. The financial considerations were as noted above -- five of the persons assigned were paid on a year-round basis and thus cost the HISD no additional sum for their service. At least three of the remaining four were paid at a level less than that which HISD would have had to pay Spencer. These are valid considerations; there is no summary judgment evidence even suggestive of pretext. This satisfies the HISD's burden of production.⁸

The HISD's articulation of legitimate non-discriminatory reasons for its action required Spencer to provide sufficient

⁵**Moore v. Eli Lilly Co.**, 990 F.2d 812, 815 (5th Cir.) (citations omitted), cert. denied, 114 S.Ct. 467 (1993).

⁶**Davis v. Chevron U.S.A., Inc.**, 14 F.3d 1082 (5th Cir. 1994).

⁷**Davis**, 14 F.3d at 1087 (citing **McDonnell Douglas Corp. v. Green**, 411 U.S. 792 (1973), and **Texas Dep't of Community Affairs v. Burdine**, 450 U.S. 248 (1981)).

⁸**St. Mary's Honor Center v. Hicks**, 113 S.Ct. 2742, 2748 (1993) ("By producing evidence (whether ultimately persuasive or not) of nondiscriminatory reasons, petitioners sustained their burden of production") (emphasis in original).

summary judgment evidence to allow a trier of fact to find that the reasons proffered are a pretext for sex discrimination.⁹ Spencer could have shown pretext by supplying evidence, if available, that the HISD's decision was more likely the result of a discriminatory motive or that the HISD's reasons are "unworthy of credence."¹⁰ We conclude that Spencer has failed to offer sufficient evidence to permit a finding that proscribed discrimination grounded the HISD's decision not to hire him.

A review of the summary judgment evidence persuades us that the HISD hiring decision Spencer challenges was not motivated by gender bias or animus.

The judgment appealed is AFFIRMED.

⁹**Bodenheimer v. PPG Industries, Inc.**, 5 F.3d 955 (5th Cir. 1993).

¹⁰**Burdine**, 450 U.S. at 256.