UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-20698
Summary Calendar

FRANK E. WHITE,

Plaintiff-Appellant,

VERSUS

RHONE-POULENC BASIC CHEMICALS CO., ET AL.,

Defendants,

RHONE-POULENC BASIC CHEMICALS COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District Texas

(CA-H-92-3151)

(March 1, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Plaintiff-Appellant, Frank E. White ("White") appeals the district court's grant of summary judgment for Defendant-Appellee, Rhone-Poulenc Basic Chemicals Company ("Rhone-Poulenc"). White also alleges that the district court erred in dismissing Local 4-

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Pursuant to that Rule, the Court has determined that this opinion should not be published.

277 of the Oil Chemical and Atomic Workers International Union, AFL-CIO ("the Union"). Finding no error, we affirm.

FACTS

Rhone-Poulenc operates an industrial chemical plant in Houston, Texas. White worked at that plant as a preventative maintenance technician. On January 29, 1991, after approximately 17 years of employment by Rhone-Poulenc, White was terminated for violating work rules that prohibited fighting or causing a fight, and insubordination.

On the morning of January 29, 1991, White and Arthur Buske ("Buske"), a maintenance foreman who was not White's supervisor, were involved in a verbal exchange in which White used profanities and make derogatory remarks about Buske. After this incident, Buske informed White that he was suspended and requested that White leave the premises.

White instead went to the maintenance office, where plaintiff and Buske met Bobby Fayle, White's supervisor. White continued to use vulgarities and appeared on the verge of losing his self-control. The maintenance manager, Gavin Floyd, and the maintenance supervisor, Roger Cline, were also at the maintenance office. Floyd told White to leave the plant, but White refused and insisted on seeing the plant manager, W. H. Colvin ("Colvin"). White told Colvin that Buske had been harassing him by following him around the plant, verbally abusing him, and making racial slurs. Buske denied this and claimed that White had used profanities and been insubordinate.

After consulting with White's supervisors, Colvin decided to discharge White. White, through the Union, filed a grievance and appealed the decision to discharge him. The arbitrator found that White fabricated the story that Buske had used vulgar language or made racial slurs, and upheld the decision to terminate White.

On October 13, 1992, White, acting *pro se*, filed suit against Rhone-Poulenc, the Union, and J. Gayle Chumley, the arbitrator who heard his grievance. The district court dismissed the case against Chumley, and appointed an attorney to represent White. White, through his appointed attorney moved to non-suit the Union, which motion the district court granted. On April 13, 1994, the court granted White's motion to allow his attorney to withdraw, and allow him to proceed *pro se*, once again. Thereafter, Rhone-Poulenc filed a motion for summary judgment. White did not respond, and the district court issued a memorandum and order granting the summary judgment in favor of Rhone-Poulenc.

STANDARD OF REVIEW

In reviewing a grant of summary judgment, this Court reviews the record *de novo. Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.), *cert. denied*, 113 S.Ct. 82, 121 L.Ed.2d 46 (1992). Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56. The moving party bears the initial burden of identifying those portions of the record which it believes demonstrates the absence of a genuine issue for trial. *Matsushita v. Zenith Radio Corp.* 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1355-

56, 89 L.Ed.2d 538 (1986). Where the moving party has met its burden, the nonmovant must come forward with specific facts showing that there is a genuine issue for trial. *Id.* In deciding a summary judgment motion, the nonmovant's evidence is to be believed and all justifiable inferences are to be drawn in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986).

RACIAL DISCRIMINATION

White claims he was discharged because of his race. We will assume, with the district court, that White's pleadings established a *prima facie* case of race discrimination. That is, that (1) he is an African American and therefore is a member of a protected class; (2) he was qualified to perform the job; (3) he was discharged; and (4) he was replaced by a person outside the protected class. *See, McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

Once White satisfied this initial burden, the burden shifted to Rhone-Poulenc to articulate a legitimate, nondiscriminatory reason for the discharge. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981). Rhone-Poulenc met this burden by producing evidence that White was discharged for using vulgarities, threatening Buske, and insubordination.

Once the employer has articulated a legitimate, nondiscriminatory reason, the burden shifted back to White to create a genuine issue of material fact that the employer's

articulated reasons were a pretext for discharging him because of his race. White relies on evidence in the record that Caucasian employees were disciplined for repeated violations of company rules with reprimands and suspensions, while he was discharged on the basis of one incident, after many years of employment with an unblemished disciplinary record. A plaintiff who relies on the treatment of other employees must show that such treatment occurred under "nearly identical circumstances." *Little v. Republic Refining Co., Ltd.*, 924 F.2d 93, 97 (5th Cir. 1991). The record includes evidence that one individual fought with a co-worker, but not a member of management. Another individual cursed a co-worker, but likewise was not insubordinate with a member of management. A third individual was disciplined for failing to follow standard operating procedures by leaving machines running improperly. The instances of treatment of other employees cited by White are not sufficiently analogous to the circumstances of White's discharge to create a genuine issue of material fact in regard to whether the reasons articulated for his discharge were a pretext for racial discrimination.

White further contends that two racially derogatory comments were made by Buske during their altercation and that there were other racially derogatory remarks made to him in the workplace. The record does not disclose when or by whom these additional remarks were made. Racially derogatory remarks made by a person who did not participate in the decision to discharge a plaintiff do not create a genuine issue of material fact on the question of

pretext. *Normand v. Research Inst. of America, Inc.*, 927 F.2d 857, 864 n.3 (5th Cir. 1991). Colvin, the plant manager made the decision to fire White after consulting with White's supervisors. Buske was not one of his supervisors. Again, White failed to create a genuine issue of material fact on his racial discrimination claim.

COLLECTIVE BARGAINING AGREEMENT

White claims that Rhone-Poulenc violated the written language in the collective bargaining agreement ("CBA") and that the work rules under which he was terminated are "illegal" because they are not contained in the CBA. This claim amounts to a cause of action under § 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. § 185. The district court held that his claim for breach of the CBA was time-barred under *DelCostello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151, 169, 103 S.Ct. 2281, 2293, 76 L.Ed.2d 476 (1983). In that case the Supreme Court applied the six-month statute of limitations from § 10(b) of the National Labor Relations Act to a hybrid breach of collective bargaining agreement/fair representation claim. The arbitration award was made on September 23, 1991 and White filed this lawsuit on October 13, 1992, more than six months later. The district court was correct in finding the CBA claim was time barred.

The district court further found that White failed to create a genuine issue of material fact with regard to whether the union breached its duty of fair representation, a prerequisite to the maintenance of a breach of CBA suit. We agree. White attached to

his original complaint the grievance filed by the union, and the union attorney's brief which was filed during the grievance procedure. White's own pleadings, as well as other summary judgment evidence indicate that the union fairly represented White. Summary judgment for Rhone-Poulenc on White's CBA claim was appropriate. *Gutierrez v. United Foods, Inc.*, 11 F.3d 556, 559 n.8 (5th Cir. 1994) (to maintain a suit against his employer under § 301, an employee must prove the union breached its duty of fair representation by acting in a "discriminatory, dishonest, arbitrary, or perfunctory manner.")

DISMISSAL OF THE UNION

White moved to dismiss the union pursuant to Federal Rule of Civil Procedure 41(a)(2), and the court granted the motion. We review that decision for abuse of discretion. *Templeton v. Nedlloyd Lines*, 901 F.2d 1273, 1274-75 (5th Cir. 1990). An abuse of discretion may be found when (1) the court's decision is clearly unreasonable, arbitrary or fanciful; (2) the decision is based on an erroneous conclusion of law; (3) the court's findings are clearly erroneous; or (4) the record contains no evidence upon which the court rationally could have based its decision. *Hendler v. United States*, 952 F.2d 1364, 1380 (Fed. Cir. 1991). White bases his argument on the allegation that he was not notified by his attorney that the union would be non-suited, and did not give his consent to the non-suit. There is no evidence in the record that supports this claim, or any other arguable bases that supports a finding of abuse of discretion. We find that the district

court's dismissal of the union was not an abuse of discretion.

CONCLUSION

For the foregoing reasons, the district court's final judgment dismissing this action with prejudice is AFFIRMED.