

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40636

MICHAEL R. BROOKS,

Plaintiff-Appellee,

versus

CITY OF BONHAM, ET AL.,

Defendants-Appellants

JIM STIFF, Individually and as City Manager
of the City of Bonham, Texas and MIKE BANKSTON,
Individually and as Chief of Police of the
Bonham Police Department,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Texas
(3:93-CV-52)

(July 14, 1995)

Before KING and JONES, Circuit Judges, and KAZEN*, District Judge.

EDITH H. JONES, Circuit Judge:**

The appellant, Michael Brooks, is a black male who, after a stormy twelve years as a police officer for the City of Bonham,

* District Judge of the Southern District of Texas, sitting by designation.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

was fired. Brooks sued the City, the Police Chief, and the City Manager alleging racial discrimination, harassment and retaliation under Title VII, racial discrimination in violation of section 1981, and other state law torts.¹ Both the City and the individual officers sought summary judgment on the causes of action. The defendants submitted affidavits, deposition testimony, and other documentary evidence supporting their motion. This evidence chronicled a myriad of job-related instances of substandard conduct and performance culminating in a sexual harassment incident that finally provoked his termination. Plaintiff's own deposition provided much of the summary judgment evidence submitted.

On the date set for trial, the plaintiff submitted what he titled "Plaintiff's Judgment Summary" as an opposition to the defendants' motion. The district court extended the plaintiff the benefit of the doubt because he was by then proceeding pro se², found some factual issues in dispute, and denied the defendants' motion. The trial was stayed, however, to enable the individual defendants to file this appeal on qualified immunity grounds.

Before we decided this case, the Supreme Court ruled, confirming this circuit's precedent, that interlocutory appeals may not be heard if the trial court denies qualified immunity solely

¹ In order to expedite matters in the trial court, we note that the employees of Bonham could not be sued in their individual capacity under Title VII. Harvey v. Blake, 913 F.2d 226, 228 (5th Cir. 1990).

² Shortly after Brooks's deposition, his attorney filed a First Amended Petition correcting material factual falsehoods contained in the original petition, then moved to withdraw as counsel based upon Brooks's failure "to effectively communicate . . . the background facts."

because of a question of evidentiary sufficiency. A decision on such grounds, according to the Court, constitutes an order inseparable from the merits of the controversy rather than a distinct question of law that may more readily be characterized as "final" and appealable. Johnson v. Jones, No. 94-455, 1995 U.S. LEXIS 3907 at *16 (June 12, 1995); see Boulos v. Wilson, 834 F.2d 504, 509 (5th Cir. 1987).

The applicability of Johnson to this case is clear. Appellants' entire claim to immunity rests on whether Brooks had submitted sufficient evidence of racial discrimination or retaliation in response to their summary judgment evidence. The district court found that he did.

Accordingly, the appeal is **DISMISSED**.