

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 94-40973

Summary Calendar

---

LESLEY KATELY,

Plaintiff-Appellant,

v.

MARTIN MILLS, INC.,

Defendant-Appellee.

---

Appeal from the United States District Court  
for the Western District of Louisiana  
(6:92-CV-2100)

---

(April 4, 1995)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:\*

Lesley Kately appeals the decision of the district court granting summary judgment in favor of his employer, Martin Mills, Inc, in Kately's Title VII suit. We affirm.

Kately filed his Title VII action after the Equal Employment Opportunity Commission determined that Kately had not been discharged from his employment at Martin Mills because he is black. Kately alleged that Martin Mills created a hostile work

---

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

environment by its action or inaction regarding complaints made by Kately, and that Martin Mills utilized different standards when dismissing white employees and black employees. Kately requested reinstatement of his employment and back pay.

Martin Mills moved for summary judgment, arguing that Kately, who was employed as a shift supervisor, was terminated because he had repeatedly violated the company's policy prohibiting sexual harassment. The district court initially denied the motion for summary judgment, finding that there were genuine issues of material fact. After Martin Mills reurged its motion for summary judgment, the district court found that Kately had failed to establish a prima facie case of employment discrimination because the record showed that his position was filled by a person of Kately's race. The district court further found that the record raised no inference that Martin Mills was motivated by racial animus. The district court granted the motion for summary judgment and dismissed the action. Kately's retained counsel withdrew, and Kately filed document which the clerk for the district court construed as a notice of appeal.

We address first pending motions. The clerk of this court previously dismissed this appeal because Kately failed to comply with the briefing schedule. Subsequently, the clerk reinstated the appeal after Kately filed an unopposed motion to reinstate appeal. Martin Mills has moved to set aside the clerk's reinstatement of the appeal. Martin Mills argues that Kately's motion was unopposed initially because Kately failed to serve it

with the motion. Martin Mills argues that it did file a memorandum in opposition to the motion and that the reinstatement should be rescinded because Kately did not show that his failure to comply with the court's rules was caused by his excusable neglect. Martin Mills does not suggest that it has been prejudiced by Kately's failure to comply with the rules. Since this case has been fully briefed and is ready for decision, we deny Martin Mill's motion to set aside the clerk's reinstatement of the appeal.

Kately, in a filing styled a "motion to keep his appeal alive," Kately requests appointment of counsel. There is no automatic right to appointment of counsel in a Title VII case. Gonzalez v. Carlin, 907 F.2d 573, 579 (5th Cir. 1990). A court may appoint counsel to represent Title VII plaintiffs upon application and "in such circumstances as the court may deem just." 42 U.S.C. § 2000e-5(f)(1). Factors to consider in determining whether to appoint counsel include the probable success of the Title VII claim, the efforts taken by the plaintiff to retain counsel, and the plaintiff's financial ability to retain counsel. Salmon v. Corpus Christi Indep. Sch. Dist., 911 F.2d 1165, 1166 (5th Cir. 1990); Gonzalez, 907 F.2d at 580.<sup>1</sup> As is discussed below, Kately has not shown that he has a

---

<sup>1</sup>Although Gonzalez and Salmon involved appeals from a district court's denial of appointment of counsel, this court has applied the standard enunciated in these cases to evaluate a motion for appointment of counsel brought in this court. See Villalpando v. Conley Lott Nichols Mach. Co., No. 92-1063 (5th Cir. June 1, 1992) (unpublished one-judge order).

valid Title VII claim, he has not demonstrated that he is unable to retain substitute counsel, and he does not suggest that he is financially unable to retain counsel. His motion for appointment of counsel is therefore denied.

Turning to the merits of Kately's appeal, summary judgment is proper where there exists no genuine issue as to any material fact. Fed. R. Civ. P. 56(c). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). This court reviews summary judgments de novo in employment discrimination cases, applying the same standard as the district court.

Title VII of the Civil Rights Act makes it "unlawful for an employer . . . to discharge any individual . . . because of such individual's race." 42 U.S.C. § 2000e-2. To establish a prima facie case of race discrimination, a plaintiff must demonstrate that (1) he is a member of a protected group; (2) he was qualified for the job that he held; (3) he was discharged; and (4) after his discharge, his employer filled the position with a person who is not a member of the protected group. Vaughn v. Edel, 918 F.2d 517, 521 (5th Cir. 1990). A plaintiff may also establish a prima facie case by presenting direct evidence of discrimination. Young v. City of Houston, Tex., 906 F.2d 177, 180 (5th Cir. 1990).

If the plaintiff establishes a prima facie case, he raises a presumption of discrimination, Texas Dep't of Community Affairs

v. Burdine, 450 U.S. 248, 254 (1981), and the burden shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for the adverse employment action. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The defendant may meet this burden by presenting evidence that, "*if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action." St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2747 (1993). If the defendant meets its burden, the presumption raised by the plaintiff's prima facie case disappears. Burdine, 450 U.S. at 255 & n.10. The plaintiff then has the opportunity to demonstrate, through presentation of his own case and through cross-examination of the defendant's witnesses, that the proffered reason was not the true reason for the employment decision and that race was. St. Mary's, 113 S. Ct. at 2747.

Because Kately was replaced by a member of his own race and because he had failed to introduce evidence raising an inference of discrimination, the district court held that Kately had failed to establish a prima facie case. Kately's main complaint on appeal is that Martin Mills failed to give him adequate notice that his behavior could result in his discharge and that Martin Mills should have taken the intermediate step of suspending him before discharging him for sexual harassment. He seems to suggest that the absence of intermediate punishments proves that Mills's express reason for discharging him was pretextual. In the district court, Kately argued that he was not warned, but he

did not suggest that the failure to impose intermediate punishments was indicative of the defendant's racism. "[I]ssues raised for the first time on appeal are not reviewable by this court unless they involve purely legal questions and failure to consider them would result in manifest injustice." Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991). The issue whether the absence of intermediate punishments proves that Mills's express reason for discharging Kately was pretextual is not a purely legal question and we decline, therefore, to address it for the first time on appeal. We agree with the district court that Kately failed to establish a prima facie case because he was replaced by a member of his own race. We turn then to whether Kately established a prima facie case by presenting direct evidence of discrimination, and we look at the summary judgment evidence presented by Kately that might bear on that issue.

The affidavit introduced by Kately in opposition to the motion for summary judgment pertains entirely to the question whether Kately engaged in sexual harassment. The decision to discharge Kately was made by the plant manager, Donald Watts. Kately stated in his deposition that he did not believe Watts was a racist, only that Watts had been misled by Kately's immediate supervisor, Benny LeBlanc. Although Kately believed that LeBlanc was motivated by racism, he did not suggest any basis for that belief. Instead, Kately suggested that friction between him and LeBlanc resulted from Kately's refusal to do the work of LeBlanc's girlfriend, who resented being supervised by a black.

Kately admitted in his deposition that Watts would not have discharged him if he had not believed the allegations of sexual harassment.

Kately argues in his brief that the work environment at Martin Mills was racially hostile. There is no support in the summary judgment evidence for this proposition. Kately refers to a diary he kept detailing LeBlanc's racist acts. Although the diary was attached to Kately's notice of appeal, it is not in evidence. This appeal must be decided on the basis of the summary judgment evidence which was presented to the district court.

In summary, Kately failed to establish a prima facie case by presenting direct evidence of discrimination.

The judgment of the district court is AFFIRMED.