

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-41144

RAMON L. GASPARINI,

Plaintiff-Appellant,

versus

BOEING DEFENSE & SPACE-CORINTH CO.,

Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of Texas
(4:93-CV-173)

(July 26, 1995)

Before JOLLY and BENAVIDES, Circuit Judges, and DUPLANTIER*,
District Judge.

PER CURIAM:**

Ramon L. Gasparini appeals the district court's entry of summary judgment in this national origin discrimination suit brought pursuant to 42 U.S.C. § 2000e (Title VII). Gasparini argues that he introduced sufficient evidence to overcome the

* District Judge of the Eastern District of Louisiana, 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

motion for summary judgment filed by his former employer, Boeing Defense & Space Corinth Company. Finding that there is a genuine issue of material fact regarding whether unlawful discrimination was the motivation for Gasparini's termination, we reverse and remand.

In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973), the Supreme Court set forth the allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory-treatment cases. St. Mary's Honor Center v. Hicks, ___ U.S. ___, 113 S.Ct. 2742, 2746 (1993). The plaintiff must first establish by a preponderance of the evidence a prima facie case of racial discrimination. Id. at 2746-47. To do so, the plaintiff must show (1) that he belongs to a racial minority; (2) that he was qualified for the job; (3) that he was terminated; and that the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications. Id. at 2747.

Such a showing creates a presumption that the employer unlawfully discriminated against the employee. Id. (citing Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094 (1981)). This presumption places on the defendant the burden of producing an explanation to rebut the prima facie case that the adverse employment actions were taken for a legitimate, nondiscriminatory reason. Id. The defendant must show, through the introduction of admissible evidence, the reasons for its actions which (if believed by the trier of fact) would support a finding that unlawful discrimination was not the

cause of the employment action. The ultimate burden of proving unlawful discrimination always remains on the plaintiff. Id.

In regard to the first two steps, it is undisputed that Gasparini made a prima facie showing of national origin discrimination and that Boeing articulated a non-discriminatory reason for Gasparini's termination (behavior inconsistent with Boeing's team-based environment which was disruptive to the operations). As to the third step, the court below opined as follows: "Boeing argues and the Court agrees, that while Gasparini may have created some doubt as to some of Boeing's explanations, he has presented the Court with no evidence, direct or indirect, that would satisfy his burden under Bodenheimer [v. PPG Industries, Inc., 5 F.3d 955 (5th Cir. 1993)] and show unlawful discrimination." Boeing and Gasparini are in dispute regarding whether a plaintiff must introduce evidence not only that the defendant's proffered explanation for the plaintiff's termination was pretextual, but also other evidence showing that the termination decision was motivated by illegal discrimination. The more stringent test for the plaintiff has been called "pretext plus." A case involving the pretext plus test is currently pending before this Court en banc. Rhodes v. Guiberson Oil Tools, 39 F.3d 537, 543 (5th Cir. 1994), rehearing en banc granted by 49 F.3d 127 (5th Cir. 1995). In any event, this Court's en banc decision in Rhodes will not be outcome determinative because we find that Gasparini's evidence is sufficient to create a genuine issue of material fact even under

the more demanding test.

During his deposition Gasparini testified that he confronted his immediate supervisor (O'Fallon) with his concerns regarding other employees making racial slurs about him. According to Gasparini, O'Fallon responded by turning his back on Gasparini and refusing to discuss the issue. O'Fallon was the Boeing employee that later made the decision to terminate Gasparini. We find such evidence together with Gasparini's summary judgment evidence that Boeing's explanation was pretextual sufficient to create a genuine issue of material fact regarding whether unlawful discrimination was the motivation behind Gasparini's termination. Therefore, we conclude that the district court's grant of summary judgment was erroneous and remand for further proceedings.

CONCLUSION

For the reasons set forth above, we REVERSE the district court's summary judgment and REMAND the case for further proceedings.