IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-41217
Summary Calendar

BENJAMIN DENNIS,

Plaintiff-Appellant,

versus

INTERNATIONAL PAPER COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of Texas
(5:93-CV-86)

(June 5, 1995)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:[*]

Benjamin Dennis, a long-time black employee of International Paper Company, appeals the district court's grant of summary judgment in favor of International Paper on claims of race discrimination, age discrimination, retaliation, and intentional infliction of emotional distress. International Paper asks that we order Dennis's attorney to pay its attorneys' fees and costs

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

incurred on this appeal pursuant to § 1927. Finding no error, we affirm the judgment of the district court. Finding further that International Paper's request for costs is fully justified in this case, we remand this case to the district court for a determination of the appropriate sanction.

I

In 1992, International Paper declined to promote Dennis to a new managerial position at its Texarkana, Texas facility, and filled it with a white man who is eight years younger than he. In so doing, Dennis alleged in his complaint, International Paper violated Title VII and the Age Discrimination in Employment Act, retaliated against him for allegations he had made concerning discriminatory practices at the facility, and intentionally inflicted emotional distress upon him.

In the course of its opinion on summary judgment, the district court examined the evidence before it and concluded that Dennis had failed to produce evidence to show that he was qualified for the new managerial position and that International Paper's conduct was "extreme and outrageous," as Texas cases have defined that term. And, even assuming that Dennis had evidence to make out a prima facie case, the district court concluded, he had not produced evidence to show that International Paper's justification for its promotion decision was pretextual.

II

This appeal amounts to a dispute over whether Dennis had produced sufficient evidence to forestall summary judgment on his claims. Dennis does not contend that International Paper had failed to discharge its burden as movant on summary judgment. Instead, he asserts that there exist material issues of disputed fact. In his response to International Paper's motion for summary judgment, however, Dennis did not produce any evidentiary documents of any kind.[1] Moreover, neither Dennis's brief nor his reply brief cites any evidentiary documents. After a careful study of the record and the briefs of the parties, we have no doubt that the district court's judgment is correct.

III

Having determined that Dennis's appeal is without merit, we turn to International Paper's request for its costs and attorneys' fees under § 1927, which provides: "Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess

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[1]We cannot accept Dennis's argument that his performance evaluations constitute evidence of his qualification that is sufficient to avoid summary judgment. The evaluations were filed as trial exhibits two months after Dennis filed his pleading in response to International Paper's motion for summary judgment and a month after International Paper filed a reply. Until this appeal, Dennis had not pointed to them as evidence that he was qualified for the new position. Because this particular argument was not made in the trial court, we deem it waived. Moreover, the fact that his performance "meets expectations" in one position is not probative, without more, of his qualification for another position.

costs, fees, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. We have described § 1927 as "penal in nature" and, accordingly, construed it strictly "so that the legitimate zeal of an attorney in representing her client is not dampened." Browning v. Kramer, 931 F.2d 340, 344 (5th Cir. 1991) (citations omitted). At the same time, however, we have recognized that § 1927 "imposes a continuing obligation on attorneys by prohibiting the persistent prosecution of a meritness claim." Thomas v. Capital Sec. Servs., 836 F.2d 866 (5th Cir. 1988) (en banc). We have awarded costs plus reasonable expenses and reasonable attorneys' fees incurred in responding to a frivolous appeal. In Re Reed, 861 F.2d 1381, 1383 (5th Cir. 1988).

Dennis's attorney stated in his out-of-time reply brief, in response to International Paper's charge that this appeal is frivolous, that he "would be derelict in his duty to his client if he did not advise Appellant of his right to appeal the ruling, especially since Appellant sincerely believes he was denied the promotion because of his race," and repeats that there are genuine disputes of material fact. In addition, Dennis's attorney characterized International Paper's request for sanctions as sanctionable conduct in itself, but "[i]n order not to delay this procedure," declined to seek sanctions against International Paper.

We agree, of course, that Dennis's attorney has a professional obligation to advise his client of his right to appeal. We cannot

agree, however, that his client's sincere belief in his cause suffices to makes this appeal something other than frivolous.

Quite apart from the merits of Dennis's appeal, the briefs in support of the appeal, despite our clear directive in FED. R. APP. P. 28, are completely devoid of any citation to the record. We have awarded sanctions pursuant to § 1927 in similar situations. E.g., Plattenburg v. Allstate Ins. Co., 918 F.2d 562, 564 (5th Cir. 1990). This failure to cite the record is particularly egregious on an appeal from a grant of summary judgment when, as in this case, the appellant must specify the evidentiary documents in the record that create a genuine dispute of material fact. Moreover, the argument section, which is set out in the margin exactly as it appears[2], is in total disregard for FED. R. APP. P. 28(a)(6), which specifies that the argument section

> must contain the contentions of the appellant on the issues presented, the reasons therefor, with citations to

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[2] ARGUMENT

The District Court erred granting the Defendant's Summary Judgment Motion because there are genuine issues of fact that are material, the Plaintiff has made a prima facie case of age discrimination, Retaliation is a genuine issue of the fact and whether or not defendant Committed the Tort of Intentional Infliction of emotional distress are all genuine issue that should be decided at a trial on the facts.

Topalina vs. Enrman, 954 F. 2d.112 (5th Cir) Cert Denied 113 S. Ct. 82, 121 L.ed. 46 (1992) held that when there is no actual dispute as to an essential element the moving party may be entitled to Summary Judgment. In this case there are several actual disputes as to essential elements or facts, therefore Defendant's motion for summary judgment should be reversed.

> the authorities, statutes, and parts of the record relied on. The argument must also include for each issue a concise statement of the applicable standard of review; this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues.

Dennis's brief does not comply with this rule. We are satisfied, based upon the evident carelessness in which Dennis's attorney has presented this appeal and its obvious deficiency on the merits, that Dennis's attorney has persisted in prosecuting a meritless appeal in contravention of § 1927. We find, therefore, that some measure of sanctions is appropriate.

IV

The judgment of the district court is AFFIRMED. The case is REMANDED to the district court, however, for further proceedings concerning the appropriate measure of sanctions in this case. See Browning, 931 F.2d at 340 (describing the procedures required to support an award under § 1927); Thomas, 836 F.2d at 878-881 (describing what constitutes reasonable sanctions).

AFFIRMED and REMANDED.