IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-50557
Summary Calendar

DAVID ARIZPE,

Plaintiff-Appellant,

versus

SHEILA E. WIDNALL, Secretary of Air Force,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas
(SA-93-CA-477)

(June 26, 1995)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

David Arizpe brought an action against the defendants, the United States Air Force and Sheila E. Widnall, Secretary of the Air Force, alleging discrimination under Title VII, 42 U.S.C. § 2000e et seq.; handicap discrimination under Sections 501 and 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 791, 794 et seq.; and

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

discrimination against a federal employee in violation of 5 U.S.C. § 2302. For the reasons described below, we affirm the judgment of the district court in favor of the defendants.

I

David Arizpe ("Arizpe"), the plaintiff, is a Mexican-American male and a disabled Vietnam War veteran. He began working as a civilian employee for the Department of the Air Force ("Air Force") at Kelly Air Force Base in San Antonio, Texas, in 1973. He worked there continuously until his non-disciplinary discharge in January 1990.

Until 1986, Arizpe's work for the Air Force had proceeded fairly smoothly. Up to that time, he had received various promotions and had received a sustained superior performance award in early 1986. During the spring of 1987, however, Arizpe filed a grievance demanding supervisory pay for filling in for his supervisor while the supervisor was on sick leave. Although he eventually obtained the pay he sought, he alleges that his supervisor remained hostile thereafter.

Arizpe's troubles were magnified when he sustained an on-the-job injury in his position of production machinery mechanic in March 1987. He complained of a pain in his side, which was never precisely diagnosed, but was attributable to hypertension or a slight stroke unrelated to his job. Arizpe missed a month of work while he was recovering, and once he returned, he was placed on light duty status sorting nuts and bolts.

Because of his physical condition, Arizpe's doctor placed certain limitations on him. These included no repeated bending and no lifting or carrying of objects weighing 45 pounds or more. His physical condition further deteriorated when he was involved in an automobile accident in January 1988. His request for advanced sick leave to recover from this accident was denied. Following this accident, Arizpe's lifting limitation was lowered to 30 pounds in April 1988.

In addition to his physical problems, from 1987 to 1989 Arizpe had several conflicts with his supervisors over his duties at work and his work habits, resulting in his suspension from work for several days at various times. During this time, he also filed several EEO complaints and union grievances in response to these suspensions and conflicts. In these complaints and grievances, he complained of handicap discrimination, national origin discrimination, reprisal and retaliation, including discriminatory job assignments, substandard performance evaluations, and unfair, harsh, discriminatory and retaliatory treatment by his supervisors.

In July 1988, Arizpe was placed in a Medically Disqualified Employee Placement Program (the "Program") at Kelly Air Force Base, which assisted employees in finding a job within their physical limitations. The magistrate judge found, contrary to Arizpe's claims, that the government made every effort to accommodate his limitations by recommending him for twenty-seven jobs, without success. For various reasons, ranging from Arizpe's lack of

qualifications, to the job being too physically demanding for Arizpe's limited physical abilities, supervisors rejected him for these jobs. Of the available positions, Arizpe was offered a GS-3 clerical position, but he refused it. The Program also approached him regarding his interest in a position at the GS-5 level, but Arizpe refused to consider the job.

Finally, in December 1989, his superiors recommended that he be discharged, or "separated," because all efforts to place him had been exhausted. Officially, Arizpe still occupied a maintenance mechanic's position, but could not perform the work because of his medical disabilities. The position, furthermore, could not be filled until Arizpe was placed elsewhere or terminated. Thus, the government recommended his separation, and Arizpe's last day of employment was January 31, 1990.

Arizpe pursued an action against the Air Force, claiming violations of his civil rights under 42 U.S.C. § 2000e et seq., handicap discrimination under 29 U.S.C. §§ 791 and 794, and discrimination against a federal employee under 5 U.S.C. § 2302.[1] The parties consented to magistrate jurisdiction pursuant to 28

[1]5 U.S.C. § 2302 prohibits discrimination against federal employees on the basis of race, color, religion, sex, or national origin under 42 U.S.C. § 2000e-16 and on the basis of a handicapping condition under 29 U.S.C. § 791. Section 2302 also forbids discrimination against federal employees on the basis of age, sex, marital status, or political affiliation, and gives other protections as well. This section does not extinguish any right of the employee to pursue other remedies for discrimination available through 42 U.S.C. §2000e-16, 29 U.S.C. § 791, and other sections not relevant here.

U.S.C. § 636(c)(1), and the magistrate judge conducted a nonjury trial April 4-7, 1994.

The magistrate judge concluded that a preponderance of the evidence did not support Arizpe's contentions that he had been discriminatorily treated with respect to any alleged incident. He further found that the government's actions considered as a whole did not indicate a pattern of handicap or retaliation discrimination. Indeed, he concluded that the government, through the Program, had made every effort reasonably to accommodate Arizpe's physical limitations, and that the program itself was not discriminatory. Finally, the court determined that Arizpe failed to establish a causal connection between his various protected employment activities and his termination. The trial court concluded that Arizpe was discharged for a nondiscriminatory reason: that he was no longer medically qualified for his production machinery mechanic job, and that job placement efforts had failed.

Arizpe now appeals.

II

Arizpe raises several errors on appeal. First, he argues that the trial court erred in determining that there was no causal connection between his substantial protected EEO activity and his termination. As a component of this charge of error, Arizpe asserts that the magistrate judge erred by excluding testimony and evidence going to the merits of his protected activity, and then

evaluating the merits of his protected activity and the employer's disciplinary actions to determine there was no discriminatory treatment and no causal connection between the protected activity and the discharge. As another component of his first allegation, Arizpe contends that the trial court erred in determining that his union activity may have caused the adverse action taken against him and may not have been "protected activity." Finally, as a separate point of error, Arizpe claims that his supervisor's efforts to accommodate him were not reasonable or legally sufficient, and that these actions discriminated against Arizpe on the basis of his handicap.

We now turn to address these alleged errors.

III

We review the trial court's factual findings for clear error, whereas we review the trial court's conclusions of law for legal error. Shirley v. Chrysler First, Inc., 970 F.2d 39, 41-42 (5th Cir. 1992). The findings of a magistrate judge trying a case with the consent of the parties receive the same deference as do the findings of a district judge. Carter v. South Central Bell, 912 F.2d 832, 841 (5th Cir. 1990).

A

We first address Arizpe's contention that the magistrate judge erred when he determined that Arizpe did not establish a causal connection between his protected EEO activity and his termination. A plaintiff establishes a prima facie case of retaliation by

showing: (1) he engaged in a activity protected by Title VII, i.e., filing EEO complaints; (2) that an adverse employment action occurred; and (3) that there was a causal connection between the participation in the protected activity and the adverse employment decision. Shirley, 970 F.2d at 42. Arizpe contends that he established a prima facie case by proving each of these requirements.

Arizpe asserts that in evaluating the causal connection between the protected activity and the adverse employment decision, the magistrate judge examined each EEO complaint and union grievance in isolation, like scenes in a play, and, thus, failed to evaluate the "entire performance." See Robinson v. Southeastern Pennsylvania Transp. Auth., 982 F.2d 892, 896 (3d Cir. 1993). This statement is meaningless and without support. Although Arizpe argues that he demonstrated causation according to the factors outlined in Nowlin v. Resolution Trust Corporation, 33 F.3d 498 (5th Cir. 1994), we find that he did not, and, thus, the magistrate judge did not commit clear error.

For guidance in determining causation, the Nowlin Court recommended (1) an examination of the employee's past disciplinary record, (2) an investigation whether the employer followed its typical policy and procedures in terminating the employee, and (3) an examination of the temporal relationship between the employee's conduct and discharge. Nowlin, 33 F.3d at 508. We now turn to examine Arizpe's causation argument in the light of these factors.

First, Arizpe argues that after his injury in 1986 and his EEO activities in 1987, he was constantly disciplined, and no reasonable efforts were exerted reasonably to accommodate him. The record belies this contention, for there is sufficient evidence to show that each disciplinary action was justified and that the government tried to accommodate his needs. For instance, he was disciplined on several occasions for leaving his work post without permission and for arguing with his supervisors about his duties, not because he had previously filed EEO complaints. Furthermore, he was enrolled in the Program, during which time his employers attempted to accommodate his special needs by placing him in different temporary jobs that accommodated his physical needs and by recommending him for several permanent jobs. Thus, an examination of the record shows that this argument is without support.

Second, Arizpe argues that the government violated its own policies and procedures established by the Program and the union contract by refusing to reassign him to a division other than the one in which he was working, the Plant Management Division. The record contradicts this argument because it shows that, in accordance with regulations, his name was included on lists of eligible employees for several positions within his directorate and one position basewide. He was selected for only one position, which he refused. Furthermore, the government approached him concerning his interest in another position outside of his

division, but he refused to consider the job. Additionally, with this argument Arizpe attempts to slightly reword the second Nowlin consideration. The procedures to be analyzed under this factor are those for termination, not necessarily those for reassignment. In any event, the record shows that the government followed its regulations in its attempt to find other employment for him and in his eventual termination.

Finally, Arizpe argues that under the third Nowlin factor an examination of the temporal relationship between his protected activity and his discharge reveals that he was discharged in the midst of pursuing EEO complaints, therefore, the only conclusion that can be drawn is that he must have been discharged because of this activity. An inspection of the record negates this contention. His first EEO complaint was filed in 1987, and he was not discharged until 1990. Furthermore, although he was in the process of pursuing complaints when he was discharged, the record shows that he was given a non-disciplinary termination only after all efforts to accommodate his physical limitations had been exhausted.

Thus, under the Nowlin factors, Arizpe has failed to establish causation, and, therefore, the district court did not err in finding that he did not establish a prima facie case of retaliation. Because the district court did not err in this determination, we pretermit addressing the two issues that he raised as components of this alleged error, issues regarding the

exclusion of evidence and his union activity as a basis for discharge.[2]

B

Turning to Arizpe's final point of error, he contends that his employer's efforts to accommodate him were not reasonable or legally sufficient, and that these actions discriminated against him on the basis of his handicap. This contention is belied by the record before us. While he was in the Program, Arizpe was placed in several jobs that were within his physical capabilities. Moreover, through the Program he was referred to several jobs, some of which could not be modified to meet his needs. After spending years trying to place him, during which time the base began to freeze hiring and to prepare for downsizing, the Program twice offered him a clerical job within his skills and physical limitations. Even though his salary would have remained the same, he refused the position. The record clearly demonstrates that the base made reasonable efforts to accommodate him. Thus, he has not carried his burden of proof, and he has failed to prove a prima facie case of handicap discrimination. See Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993)(The burden of proof for establishing handicap discrimination remains with the plaintiff.).

[2]Arizpe argues that his union activity should be considered in evaluating his employer's motive for discharge. The district court correctly pointed out that retaliation for union activity was not considered under any statutes that protected this activity, such as the National Labor Relations Act, but instead was being considered under Title VII and the Rehabilitation Act.

IV

Because Arizpe has failed to present prima facie cases of discrimination under Title VII, 42 U.S.C. § 2000e et seq., and the Rehabilitation Act of 1973, 29 U.S.C. §§ 791 and 794, he cannot, consequently, state a claim under 5 U.S.C. § 2302. Finding no clear error of fact nor any error of law, the decision of the magistrate judge is therefore

A F F I R M E D.