

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 94-60405  
Summary Calendar

---

LAWRENCE F. BUFORD, JR.,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA POSTAL SERVICE  
and VANCE O. LIPE, Postmaster of Greenville,  
Mississippi, office,

Defendants-Appellees.

---

Appeal from the United States District Court  
for the Northern District of Mississippi  
(4:92-CV-97 S O)

---

(December 20, 1994)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:<sup>1</sup>

Lawrence F. Buford, Jr., appeals from the summary judgment in favor of the United States Postal Service and Vance O. Lipe. We

**AFFIRM.**

I.

Buford was hired in 1986 as a letter carrier at the Greenville, Mississippi, Post Office. In January 1990, he was suspended for 14 days for insubordination and for violating safe

---

<sup>1</sup> Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

driving rules and regulations. And, effective September 1991, he was discharged for failure to follow instructions and violation of a policy prohibiting verbal altercations.<sup>2</sup>

Buford filed an "EEO Complaint of Discrimination" in which he charged that his 1990 14-day suspension was motivated by race (black) and sex (male) discrimination. The Postal Service investigated the complaint and found it to be without merit. In March 1992, after Buford waived a hearing by an Equal Employment Opportunity Commission administrative judge, the Postal Service issued a final agency decision, finding no discrimination.

Buford challenged his dismissal in an appeal to the Merit Systems Protection Board, raising affirmative defenses of race and sex discrimination, and retaliation for EEO and union activity.<sup>3</sup> Following a hearing, the administrative law judge held that Buford had not sustained his burden of proving the affirmative defenses, and that the Postal Service had met its burden of proving the charges that Buford had failed to follow his supervisor's instructions on two occasions, and had violated a policy prohibiting verbal altercations. The ALJ therefore affirmed the Postal Service's decision to discharge Buford. Because Buford did

---

<sup>2</sup> Buford received a letter of warning on August 1, 1990, for showing disrespect to his supervisor, and a second letter of warning on June 28, 1991, for failing to follow his supervisor's instructions. Both letters warned that future misconduct would result in more severe disciplinary action, including suspension or removal from the Postal Service.

<sup>3</sup> Buford had filed a grievance charging that his supervisor had given preferential treatment to a female carrier. He also made a complaint charging that Postmaster Lipe and others had misused union social and recreation funds.

not petition the MSPB to review the ALJ's decision, that decision became final on March 5, 1992.

Buford filed this action in April 1992, challenging the MSPB decision and claiming that his suspension and discharge were based on race and sex discrimination. The appellees' motion for summary judgment was granted, and Buford's motion for reconsideration was denied.

## II.

We review the summary judgment *de novo*, applying the same standard used by the district court, and viewing all facts and the inferences to be drawn from the facts in the light most favorable to the non-movant. **LeJeune v. Shell Oil Co.**, 950 F.2d 267, 268 (5th Cir. 1992). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "The movant has the initial burden of demonstrating the absence of a material fact issue." **Forsyth v. Barr**, 19 F.3d 1527, 1533 (5th Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 115 S. Ct. 195 (1994). If the movant "satisfies that burden, the non-movant must identify specific evidence in the summary judgment record demonstrating that there is a material fact issue concerning the essential elements of its case for which it will bear the burden of proof at trial." **Id.** To avoid summary judgment on his Title VII claims of race and sex discrimination, Buford had the

burden of identifying evidence that the appellees "intentionally discriminated against him." See **Moham v. Steego Corp.**, 3 F.3d 873, 875 (5th Cir. 1993), *cert. denied*, \_\_\_ U.S. \_\_\_, 114 S. Ct. 1307 (1994).

Needless to say, the scope of review of MSPB decisions is limited. **Oliver v. United States Postal Serv.**, 696 F.2d 1129, 1130 (5th Cir. 1983). A reviewing court must uphold the agency's decision unless it is arbitrary or capricious, is not supported by substantial evidence, or the agency failed to follow applicable procedures. **Bonet v. United States Postal Serv.**, 712 F.2d 213, 215 n.5 (5th Cir. 1983) (citing 5 U.S.C. § 7703). The reviewing court "may not reweigh the evidence or substitute its own judgment for that of the Board even if [it] finds that the evidence preponderates against the Board's decision." **Id.** at 216.

Buford contends that the MSPB's decision is not supported by substantial evidence, and is arbitrary and capricious, as well as procedurally defective, because the ALJ prematurely ruled on certain issues and unduly restricted his presentation of evidence.<sup>4</sup> And, he asserts that summary judgment was inappropriate on his discrimination claims because his complaint and the testimony of witnesses before the MSPB contained evidence that white union

---

<sup>4</sup> Buford identifies three rulings by the ALJ: (1) the Postal Service did not have to present evidence of a nexus between the charges and the "efficiency of the service", which is part of the agency's burden of proof in a discharge proceeding, see **Bonet v. United States Postal Serv.**, 661 F.2d 1071, 1074 (5th Cir. 1981); (2) there would be no review of three challenged disciplinary actions; and (3) Buford's claims of race and sex discrimination were not related to his discharge and would not be considered in the administrative proceeding.

stewards were not subjected to similar harassment and discipline; that a female employee was provided benefits and privileges not accorded to him; and that he was subjected to constant, unjustified reprisals by his supervisors.

Buford failed to raise any of these issues in his response to the appellees' motion for summary judgment. His response consists of five pages in which he denies the allegations in the summary judgment motion, and admits in part and denies in part the allegations in the appellees' statement of material and uncontested facts. Buford did not contend in the district court that the MSPB's decision was arbitrary, capricious, procedurally defective, or unsupported by substantial evidence; and he neither presented affidavits in opposition to summary judgment nor made any attempt to specifically point to evidence sufficient to demonstrate the existence of a material fact issue on whether the appellees intentionally discriminated against him on the basis of his race or sex, or whether they retaliated against him for engaging in protected activity. Accordingly, he failed to satisfy his burden "to identify specific evidence in the record, and to articulate the 'precise manner' in which that evidence supported [his] claim[s]."

***Forsyth v. Barr***, 19 F.3d at 1537.

In his motion for reconsideration, Buford cited two portions of the administrative record and one paragraph of his complaint in support of his assertion that there was a genuine issue of material fact on his claim that white union stewards were not subjected to similar disciplinary actions and harassment. Notwithstanding the

untimeliness of such citations, the first citation refers to an unsworn, handwritten statement by Marion Smith, in which Smith states that he is a white male and former president of the union and was never treated in the manner Buford was treated. Buford, however, pointed to no evidence that Smith engaged in misconduct similar to that for which he was disciplined and dismissed. The second citation is to one page of Smith's testimony before the ALJ. But none of the testimony on that page has anything to do with differential treatment accorded to white union stewards. Of course, Buford's attempt to rely on his complaint to demonstrate the existence of a material fact issue is insufficient to preclude summary judgment, because he was required to "go beyond the pleadings and by ... affidavits, or by the `depositions, answers to interrogatories, and admissions on file,' designate `specific facts showing that there is a genuine issue for trial.'" **Celotex Corp. v. Catrett**, 477 U.S. 317, 324 (1986).

Buford's attempt, in his appellate brief, to designate specific evidence in opposition to summary judgment "comes far too late--obviously, it should have been done in the district court." **Forsyth v. Barr**, 19 F.3d at 1537. But, even if we were to overlook Buford's failure to comply with the procedural rules for opposing a summary judgment motion, and consider the evidentiary material designated for the first time in his appellate brief, we would still affirm the summary judgment. The administrative record contains overwhelming evidence to support the ALJ's finding that Buford was disciplined and discharged because he was insubordinate

(in refusing to comply with specific orders to deliver all of his mail on two occasions) and verbally abusive to his supervisor (by calling his supervisor, who is also a black male, an "ignorant ass nigger" and a "stupid ass nigger"). Buford submitted no evidence that any employee who had engaged in misconduct, similar to that for which he was disciplined and dismissed, did not receive similar treatment.

In sum, Buford presented no evidence that would permit a rational trier of fact to find that he was discriminated against because of his race or sex, or that he was retaliated against because of EEO or union activities. Accordingly, summary judgment was appropriate.

III.

For the foregoing reasons, the judgment is

**AFFIRMED.**