

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60414
Summary Calendar

BOB LAMB,

Plaintiff-Appellant,

versus

JIM EDWARDS, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Mississippi
(3:93-CV-160-S-D)

(February 8, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:¹

Bob Lamb appeals the judgment as a matter of law dismissing his bankruptcy discrimination and constitutional claims against the New Albany Municipal Airport Board and its members, New Albany, Mississippi, and Union County, Mississippi. We **AFFIRM**.

I.

Lamb operated an aircraft refinishing business (Bob Lamb Aircraft Services, Inc.) at a hangar at the New Albany Municipal Airport. The hangar was built on land leased by Lamb from the New

¹ 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 Pursuant to that rule, the court has determined that this opinion should not be published.

Albany Municipal Airport Board, and subleased to Lamb Aircraft Services. Lamb Aircraft Services filed a Chapter 11 bankruptcy petition in July 1990. And, in February 1991, Lamb lost his Federal Aviation Administration air frame and power plant mechanic's license.

Since its inception in 1959, the New Albany Municipal Airport has been governed by regulations requiring, *inter alia*, that commercial businesses operating at the airport be financially sound. In the spring of 1991, the Airport Board amended the airport regulations to require that, effective July 1, 1991, any person "operat[ing] any type of commercial business or engag[ing] in any type of commercial activity on the grounds of the airport ... obtain[] from the Board a permit" and provide proof of liability insurance. The amended regulations gave the Board the authority "to deny a permit based upon a poor financial record of the applicant." Lamb did not apply for a permit.

On August 6, 1991, the Board filed suit in state court, seeking an injunction to restrain Lamb and Lamb Aircraft Services from engaging in commercial activity at the airport "until such time as a proper permit for such activity has been granted and issued" The state court conducted a hearing on October 10, 1991, at which Lamb both stated that he had filed a formal complaint with the FAA Regional Airport Authority "concerning the activities of the airport board" and requested additional time to obtain the results of the FAA investigation. The state court ruled that the Board was entitled to an injunction, but withheld its

imposition until November 15, 1991, to give Lamb an opportunity to obtain a permit from the Board and to receive the results of the FAA investigation.²

Lamb did not apply for a permit. The state court conducted a second hearing on November 15, and enjoined Lamb to remove all business-related items from the hangar by November 22; the injunction was to "remain permanent unless and until such time as [Lamb] shall apply for and receive a permit from the appropriate airport authority under existing regulations to operate a commercial business on the airport property."

Lamb filed suit against the Airport Board and its members,³ the City of New Albany, and Union County, alleging, *inter alia*, that the defendants violated his rights to equal protection and substantive due process by enacting and selectively enforcing the permit requirement with the intent to discriminate against him.⁴ The action proceeded to trial before a jury. After Lamb rested, the district court granted the defendants judgment as a matter of

² The FAA found that the Board members were "not being discriminatory in their operation of the airport."

³ The members of the airport board were Jim Edwards, Henry Potts, Paul King Shannon, Buddy Twitty, Leroy McMillin.

⁴ Lamb also claimed that his property had been taken without just compensation, in violation of the United States and Mississippi Constitutions, and asserted supplemental claims for abuse of process and malicious interference with business. Lamb abandoned his malicious interference claim after he rested his case at trial. Because he did not brief his abuse of process and takings claims, he has abandoned them. See *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993) (issues not presented and argued in brief are abandoned).

law, concluding that Lamb's evidence and all reasonable inferences which could be drawn therefrom "clearly show[] there is no issue for a jury."

II.

Lamb contends that the district court erred in granting judgment as a matter of law, asserting that reasonable jurors could have found that the defendants discriminated against him in violation of 11 U.S.C. § 525(a) (prohibiting discrimination because of status as a debtor under the Bankruptcy Code)⁵ and principles of equal protection and substantive due process. "In reviewing a district court's disposition of a motion for judgment [as a matter of law], we apply the same test as did the district court, without any deference to its decision". *Little v. Republic Refining Co.*, 924 F.2d 93, 95 (5th Cir. 1991).

[T]he Court should consider all of the evidence--not just that evidence which supports the non-mover's case--but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict,

⁵ Lamb did not plead a § 525(a) violation, nor was such a claim mentioned in the pretrial order. However, in response to the motion for judgment as a matter of law, Lamb asserted that the issue had been tried by consent. The defendants did not dispute that assertion, did not attempt to exclude any evidence regarding the bankruptcy, and did not object to the district court's ruling on the issue. Accordingly, we reject their contention that the issue was not tried by consent. See Fed. R. Civ. P. 15(b) ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings"); *Wallin v. Fuller*, 476 F.2d 1204, 1210 (5th Cir. 1973) (failure of defense to seek to limit evidence during trial in accordance with pretrial order establishes consent to trial of issues not raised in pleadings).

granting of the motion[] is proper. On the other hand, if there is substantial evidence opposed to the motion[], that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion[] should be denied There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

Boeing Co. v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc).

A.

Section 525(a) of the Bankruptcy Code provides that

a governmental unit may not deny ... a ... permit ... or other similar grant to, condition such a grant to, [or] discriminate with respect to such a grant against ... a person that is or has been a debtor under this title ... or another person with whom such ... debtor has been associated, solely because such ... debtor is or has been a debtor under this title

11 U.S.C. § 525(a). Our court has adopted a "narrow construction" of § 525(a). **In re Exquisito Services, Inc.**, 823 F.2d 151, 154 (5th Cir. 1987). Section 525(a) "`does not prohibit consideration of other factors, such as future financial responsibility or ability, and does not prohibit imposition of requirements such as net capital rules, if applied nondiscriminatorily.'" **Id.** at 153 (quoting S.Rep. No. 989, 95th Cong., 2d Sess. 81, reprinted in 1978 U.S.C.C.A.N. 5867). "Only discrimination based solely on the debtor's status is precluded." **Id.** at 153.

Lamb contends that "the Board's refusing to issue [him] a permit for not paying debts discharged in bankruptcy violates

federal law." The evidence would not permit any rational juror to make such a finding. The Board did not refuse to issue Lamb a permit; instead, the evidence is undisputed that he never applied for one and never sought to obtain a waiver of the liability insurance or financial requirements.⁶ Moreover, Lamb introduced no evidence as to any debts discharged in bankruptcy.

Viewing the evidence in the light most favorable to Lamb, a rational juror could not conclude that Lamb had been discriminated against in violation of § 525(a). The original airport regulations, which were enacted when the airport was built in 1959, were based on guidelines from the Mississippi Aeronautics Commission, and required airport fixed-base operators to be financially sound. Lamb offered no evidence that would support finding that the 1991 amendments, giving the Board the authority to deny a permit on the basis of an applicant's poor financial record, were enacted for the purpose of discriminating against Lamb because his corporation had filed a bankruptcy petition.

B.

Lamb contends that the defendants violated principles of substantive due process by arbitrarily enacting and enforcing the permit requirement in violation of his alleged property right to

⁶ There was evidence that, had Lamb requested it, a waiver of those requirements might have received favorable consideration. Lamb testified that, after the injunction was granted, the Board informed him that he could get a waiver of the insurance requirement. Appellee Edwards testified that if Lamb had applied for a permit and stated that his assets were \$2,000, he probably would have received a permit. Another person testified that the Board waived the insurance requirement for him in 1992, after he purchased Lamb's hangar.

operate a business at the airport. Lamb has made no showing that he had a protected property interest in operating a business at the airport. But even assuming such an interest, Lamb failed to introduce evidence sufficient to support a finding that the Board, in the face of his continued refusal to apply for a permit or to seek a waiver of the financial soundness and liability insurance requirements, arbitrarily and capriciously deprived him of such an interest by enacting and enforcing the permit requirement. Lamb points to testimony that, around the time the injunction proceedings were initiated, the airport manager told another person that he understood that it was "his job" to get rid of Lamb. This testimony is not evidence of arbitrary action by the Board or its members; Tyre was not a member of the Board, and there was no evidence that any Board member had led him to believe that it was his job to "get rid of" Lamb.

C.

Finally, Lamb asserts that the defendants violated principles of equal protection by requiring him to comply with the permit requirement, but failing to enforce it against other commercial operators at the airport. He maintains that the Board enacted and enforced the permit requirement against him because he had financial problems.

To succeed on an equal protection claim, the plaintiff "must prove purposeful discrimination resulting in a discriminatory effect among persons similarly situated." *Muhammad v. Lynaugh*, 966 F.2d 901, 903 (5th Cir. 1992). Because the classification of

businesses on the basis of financial condition does not disadvantage a suspect class or impinge on a fundamental right, the regulations at issue are subject only to the most minimal scrutiny, and must be upheld if they are a rational means of advancing a legitimate governmental purpose. See *Delahoussaye v. City of New Iberia*, 937 F.2d 144, 149 (5th Cir. 1991).

The Board's enactment of the permit requirement to regulate businesses located at the airport is a rational means of ensuring safe and responsible airport operations. Lamb failed to produce evidence sufficient to permit rational jurors to find that other similarly situated persons were allowed to operate businesses at the airport without complying with the permit requirement. The other commercial operators identified by Lamb -- the airport manager, who sold fuel and aviation supplies at the airport pursuant to his contract of employment, which predated the enactment of the permit requirement; two crop dusters who used the airport only sporadically; and an individual, Crumpton, who purchased and sold airplanes -- were not similarly situated. After the permit requirement was enacted, persons seeking to operate businesses at the airport were required to obtain permits. Crumpton was told that he would need a permit if he decided to open a brokerage business. And, two Union County residents, who previously worked for Lamb, were denied a permit to operate an aircraft reupholstery business because they lacked the requisite FAA licenses.

The only possible evidence of disparate enforcement is the fact that the airport manager permitted Lamb's employer at the time of trial to perform mechanical work in the county hangar without a permit during 1991. However, that person was required to obtain a permit when he purchased Lamb's hangar and began to operate a formal business. "A mere scintilla of evidence is insufficient to present a question for the jury." **Boeing Co. v. Shipman**, 411 F.2d at 374.

III.

For the foregoing reasons, the judgment is

AFFIRMED.⁷

⁷ We reject the appellees' contention that the district court lacked jurisdiction to review the injunction issued by the state court. Federal jurisdiction is proper because Lamb sought monetary damages, not modification of the injunction. See **Lampkin-Asam v. Supreme Ct. of Fla.**, 601 F.2d 760, 760 (5th Cir. 1979), cert. denied, 444 U.S. 1013 (1980). Appellees claim also that the district court erred in denying their motion for summary judgment on the grounds that (1) the action is barred by *res judicata* and (2) Lamb lacked standing to sue. These contentions are without merit.