

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

S)))))))))Q

No. 94-60835  
Summary Calendar  
S)))))))))Q

RILEY SUMMERS, Individually and  
on Behalf of All Persons Similarly  
Situating,

Plaintiff-Appellant,

versus

THE MAYOR AND ALDERMEN OF THE CITY  
OF VICKSBURG, MISSISSIPPI, ET AL.,

Defendants-Appellees.

S)))))))))Q

Appeal from the United States District Court for the  
Southern District of Mississippi  
(5:91 CV 91 BRN)

S)))))))))Q

(June 15, 1995)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.\*

PER CURIAM:

In this employment discrimination case, the district court granted the motion for summary judgment of defendants-appellees and dismissed the suit of plaintiff-appellant Riley Summers (Summers),

---

\* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

who claimed that the City of Vicksburg, Mississippi Fire Department had refused to hire him in 1990 on account of his race, black. We affirm.

The summary judgment evidence, which is uncontroverted, reflects that Summers was not hired because he failed to pass the required background investigation. This is a legitimate, nondiscriminatory reason, *see Fowler v. Blue Bell, Inc.*, 737 F.2d 1007, 1012 (11th Cir. 1984), and the summary judgment record is not such as would sustain a finding that this reason was pretextual or otherwise that the reason Summers was not hired was his race.

This suit was filed in October 1991. Following discovery, on October 30, 1992, defendants filed their motion for summary judgment. This motion was supported, among other things, by the affidavit of the Chief of the Vicksburg Fire Department, who had been employed in that capacity since July 1986, and had been with the Fire Department a total of 27 years. This affidavit reflected that the applicable written civil service rules, which were publicly posted, required that an applicant for employment with the Fire Department, among other prerequisites, "must be of good moral character as evidenced by a background check"; that either the Chief or the Deputy Chief does the background check; that the Chief did the background check on Summers, which included contacting ten or twelve people, only one of whom gave a favorable recommendation. Several of those contacted characterized Summers as "trouble looking for a place to happen," "had a problem dealing with authority," and "did not like to take orders." These people would not recommend Summers for the Fire Department. The Chief reported his findings to the Civil Service Commission and requested that the

Commission remove Summers' name from the civil service list of those eligible to be hired. The Civil Service Commission did remove Summers' name from the list and notified him that he had not passed the background check. This rendered him ineligible for employment. The Civil Service Commission consisted of three members, two black males and one white female.

Of the thirteen individuals hired by the Fire Department at this hiring, six were black men and seven were white men. Other summary judgment evidence shows that since Doris Sprouse (Sprouse) has been Fire Chief, the Fire Department has hired nineteen blacks and twenty-three whites. Further, by failing to answer defendants' request for admissions, Summers admitted that he "did not pass the background check" and that he was so notified by the Commission.

Sprouse's affidavit also reflects that he investigated the allegation in Summers' complaint in this case that Barry Cole had been hired by the Fire Department although he had committed a felony. Sprouse personally had done the background check on Barry Cole, and the check had *not* revealed a felony conviction. After his deposition was taken in this case, Sprouse investigated and found out that Cole had indeed been convicted of a felony but that his arrest and conviction had been previously expunged by a court order, a copy of which was attached to Sprouse's affidavit. Sprouse's affidavit also explained that Jimmy Ervin had been employed by the Fire Department in 1964 and rehired in 1972, although he had a previous felony conviction. Sprouse averred that he did not discriminate against Summers on account of his race, and that Summers was not hired solely because of the information Sprouse had obtained during his background check.

On November 19, 1992, Summers moved for additional time, until November 27, 1992, in which to reply to the motion for summary judgment. The district court ultimately gave Summers until December 7, 1992, in which to reply. However, Summers never filed a timely reply. The only reply or opposition Summers ever filed was a brief which was filed sometime *after* December 7, 1992. This brief is *not* included in the record.

By orders of the magistrate judge dated May 20, 1993, and June 28, 1993, discovery was reopened and extended initially to June 10, 1993, and then to July 1, 1993. On October 14, 1993, the district court issued its memorandum opinion granting the defendants' motion for summary judgment. A separate order granting the motion was entered October 25, 1993. On November 15, 1993, Summers filed a motion to alter or amend the judgment. In denying Summers relief on this motion, the district court in essence found, with ample support in the record, that Summers had failed to show any reasonable basis for his belated attempt to urge evidentiary matters not of record. As the court also noted, no evidentiary matter was submitted with Summers' motion.

On this record, it is clear that defendants articulated, and supported by proper summary judgment evidence, a legitimate, nondiscriminatory reason why Summers was not hired. There is no summary judgment evidence of record which would support a finding that this reason was pretextual or that the real reason was Summers' race. Accordingly, summary judgment for the defendants was proper. The judgment of the district court is therefore

AFFIRMED.