UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2023
Summary Calendar

OTTO WOOTEN,

Plaintiff-Appellant,

VERSUS

MCGINNIS CADILLAC, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-91-3588)

June 18, 1993

Before JOLLY, BARKSDALE, and E. GARZA, Circuit Judges.

PER CURIAM:[1]

Otto Wooten appeals an adverse summary judgment. We **AFFIRM**.

I.

Wooten was a salesman for McGinnis Cadillac from 1982 until he was terminated in May 1990. On December 6, 1991, he filed an employment discrimination action against McGinnis, alleging a pattern of wrongful denials of promotion, and, eventually, wrongful

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 Pursuant to that rule, the court has determined that this opinion should not be published.

termination.[2] Wooten contends that he was qualified for certain promotions, but was denied those promotions and was finally terminated because he is black. McGinnis counters that Wooten was terminated because of unexcused absences and other misconduct.

On March 25, 1992, the magistrate judge granted Wooten's attorney leave to withdraw and ordered that pleadings and correspondence be sent directly to Wooten at his home address until new counsel was retained. Two days later, McGinnis propounded requests for admission to Wooten at his home address, sending one copy through regular mail and another via registered mail. (The latter was returned to McGinnis with a notation from the postal service that it had not been claimed after two notices to the addressee. The former, however, was never returned to McGinnis.) Wooten acknowledged in his deposition that the address to which both copies of the requests were mailed was his correct address.

Five months later, not having received a response to the requests, and therefore, pursuant to Fed. R. Civ. P. 36(a), taking the matters addressed as admitted, McGinnis moved for summary judgment. In support of the motion, it also offered the affidavit of McGinnis' vice-president, explaining Wooten's dismissal. Wooten retained a new lawyer and was granted an extension of time to reply to the motion. When he did, he offered only his own conclusory

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[2] A formal charge of discrimination was entered on February 11, 1991, and Wooten was issued a notice of right to sue on September 9. This Title VII suit was properly filed within 90 days of that notice.

affidavit in opposition. The district court granted summary judgment for McGinnis.

II.

As always, we review the appropriateness of summary judgment by applying, *de novo*, the same standard as did the district court. ***Herrera v. Millsap***, 862 F.2d 1157, 1159 (5th Cir. 1989). After an independent review of the record, we will affirm the judgment if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law". Fed. R. Civ. P. 56(c). Though we draw all factual inferences in favor of the nonmoving party, ***Herrera***, 862 F.2d at 1159, we must be ever mindful of the ultimate burdens of proof in a particular case. If a plaintiff does not offer evidence which can establish each element of its prima facie case, then, by definition, there is no genuine issue of material fact, "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial". ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322 [106 S.Ct. 2548, 2552] (1986). Wooten has failed to create triable issues of fact critical to both of his claims. Indeed, he has admitted them away.

A.

To establish discrimination in McGinnis's failure to promote him, Wooten is required to show that (1) he belongs to a racial minority, (2) he applied for and was qualified for a job the employer was seeking to fill, (3) he was rejected in spite of his qualifications, and (4) after that rejection, the job remained open

and the employer continued to seek applicants with Wooten's qualifications. *See* ***Arenson v. Southern Univ. Law Ctr.***, 911 F.2d 1124 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 1417 (1991).

It is uncontested that Wooten belongs to a racial minority, but even if we assume that he was qualified for a managerial position, he has failed to create a fact issue regarding the remaining elements. By failing to respond to McGinnis's requests for admission, Wooten admitted[3] that he withdrew his name from consideration for the new car sales manager's position in 1985.[4] In his affidavit, he confirms that he withdrew his name "[a]fter it became apparent that [McGinnis] was going to appoint a white person". Whatever his reason, Wooten withdrew his name and, therefore, could not have been rejected.

In his affidavit, Wooten also asserts that eight additional management positions became available during his tenure at McGinnis. However, he does not even contend that McGinnis sought to fill those positions or that he was qualified for them.

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[3] Matters set forth in requests for admission are, of course, admitted unless the party to whom the request is made answers or objects within 30 days. Fed. R. Civ. P. 36(a). In his brief, Wooten contends that his "Reply to Request for Admissions" raised genuine issues of material fact and laments that the district court failed to consider it. This cited Reply, however, is to Wooten's reply, including his affidavit, filed in opposition to summary judgment. He never responded to McGinnis's requests for admission, nor did he seek to withdraw or amend the deemed admissions. Accordingly, his admissions remain. Fed. R. Civ. P. 36(b).

[4] Certainly this claim, raised for the first time in 1991, presents a statute of limitations problem. McGinnis, however, did not assert this possible bar in district court; nor does it attempt to raise it here.

Therefore, he failed to create a genuine issue for trial on a critical element of his claim of wrongful failure to promote.

B.

To establish a prima facie case of discriminatory discharge, in addition to again establishing protected class membership, Wooten must show that (1) he was discharged, (2) he was qualified for the position from which he was dismissed, and (3) the position was filled with someone who was not a protected class member. ***Vaughn v. Edel***, 918 F.2d 517 (5th Cir. 1990). Wooten has not offered any evidence that his former position was filled by someone who is not black. As such, he has failed to establish a triable issue on a critical element of his discriminatory discharge claim.[5]

III.

Accordingly, the judgment is

AFFIRMED.

[5] We note that, even if a prima facie case had been established, McGinnis clearly met its burden to respond by articulating a "legitimate nondiscriminatory reason for its action", ***Vaughn***, 918 F.2d at 521, by offering proof of Wooten's series of unexcused absences and its policy of discharging employees on that basis. The burden would then shift back to Wooten to show that the proffered legitimate reason was a mere pretext. Wooten did not meet that burden; he admitted that he was "terminated for a valid and credible nondiscriminatory cause".