

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-30174

(Summary Calendar)

STUART H. SMITH JR.,

Plaintiff-Appellant,

versus

WATERMAN STEAMSHIP CORPORATION
and DENNIS K. O'LAUGHLIN,

Defendants-Appellees.

Appeals from the United States District Court
For the Eastern District of Louisiana
(CA-93-2307-I)

(September 8, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:*

Plaintiff Stuart Smith sued his former employer and the master of the S/S STONEWALL JACKSON for wrongful discharge. The district court granted the defendants' motion for summary judgment and this appeal followed. We affirm.

I

Smith was employed by defendant Waterman Steamship Corporation

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

("Waterman") as a third mate aboard the S/S STONEWALL JACKSON. The master of the vessel, Dennis K. O'Laughlin, assigned Smith the duty of reporting the distance between the stern of the vessel and the wharf during an undocking maneuver. The stern of the vessel hit the wharf during the undocking procedure, damaging both the vessel and the wharf. The next day Smith was terminated for not carrying out his assigned duties. Investigations by both the Coast Guard and O'Laughlin indicated that Smith had provided incorrect information to the bridge.

Smith filed suit against Waterman and O'Laughlin, claiming that he was discharged without cause in violation of 46 U.S.C. § 10313(c). The defendants moved for summary judgment, arguing that Smith's employment was "at will" and not covered by § 10313,¹ and because Smith was not wrongfully discharged, but was discharged for not carrying out his assigned duties. The district court granted the defendants' motion for summary judgment, finding that Smith was not wrongfully discharged. Smith appeals the decision of the district court, arguing that the Coast Guard Report of Investigation (the "Report") should not have been considered by the court in support of the motion for summary judgment.

II

In support of summary judgment, the defendants relied on the Report to demonstrate the absence of a genuine issue of fact

¹ For purposes of this opinion we will assume *arguendo* that the collective bargaining agreement between Smith's union and Waterman is sufficient to invoke 46 U.S.C. § 10313(c) and that Smith could only be discharged for just cause.

regarding Smith's claim of wrongful discharge. Smith argues that the report is hearsay, does not meet the standards of trustworthiness required by Federal Rule of Evidence 803(8) as an exception to the hearsay rule, and therefore should not have been considered when deciding the motion for summary judgment.² We disagree. Evaluative reports are presumed admissible under Rule 803(8)(C) and the burden is on the non-moving party to prove the report's untrustworthiness. *Moss v. Ole South Real Estate Inc.*, 933 F.2d 1300, 1305 (5th Cir. 1991). Smith did not introduce any evidence indicating that the report is untrustworthy. In fact, the record indicates that: (1) the investigation was timely; (2) that a formal hearing to determine fault was not warranted because this was not a major marine accident; (3) that Smith was given input into the investigation, that his statement was included in the report; and (4) that the investigator kept the case open at Smith's request; it was only when no additional information could be provided to support Smith's position that the case was closed. We therefore reject Smith's argument about the admissibility of the report.

² Rule 803(8) provides that "public records and reports" are not excluded by the hearsay rule, even though the declarant is available to testify. The rule defines "public records and reports" in relevant part as follows:

Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth (C) in civil actions and proceedings... factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

The Advisory committee suggested four factors which are helpful in determining trustworthiness: (1) the timeliness of the investigation; (2) the special skill or expertise of the official; (3) whether a hearing was held and at what level; and (4) possible motivational problems.

We review a district court decision granting summary judgment *de novo* applying the same standard as the district court. A court will grant a motion for summary judgment if the record discloses "that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. The party seeking summary judgment bears the initial burden of identifying those portions of the pleadings and discovery on file, together with any affidavits, that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 310, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986). Once the party seeking summary judgment carries its initial burden, the non-moving party must show that summary judgment should not be granted. *Id.* Although we must "review the facts drawing all inferences most favorable to the party opposing the motion," *Reid v. State Farm Mut. Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986), the non-moving party cannot rest upon the mere allegations or denials in its pleadings, but must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57, 106 S. Ct. 2505, 2514, 91 L. Ed. 2d 202 (1986).

In support of summary judgment, the defendants submitted the Report and O'Laughlin's affidavit. The Report states that "[a]ll available witness statements indicate that the third mate on the stern of the vessel relayed incorrect distance information to the bridge. The master of the vessel, not having an unobstructed view of the stern, made engine and steering orders based on this

incorrect information." Although the report alludes to other possible causal factors for the accident, the Report concludes that Smith failed to relay correct distance information to the bridge. O'Laughlin's affidavit demonstrates that Smith was discharged due to his failure to give accurate information to the bridge. Based on these evidentiary documents, the defendants met their burden of demonstrating the absence of a genuine issue of material fact.

The burden therefore shifted to Smith to set forth specific facts in the record that would have supported a reasonable jury in finding that he was wrongfully discharged. *Anderson*, 106 S. Ct. at 2510. After carefully reviewing the record, we conclude that Smith did not meet this burden. Smith's assertion in his opposition motion that he followed the instructions given to him and that he gave estimates of the distance from the dock to the nearest part of the vessel within 90% accuracy, is not supported by any facts in the summary judgment record. See *Leonard v. Dixie Well Serv. & Supply, Inc.*, 828 F.2d 291, 295 (5th Cir. 1987) (stating that "ultimate facts or conclusions of law can neither support nor defeat a motion for summary judgment"). Similarly, Smith's affidavit fails to set forth any specific facts establishing an issue for trial. Because no genuine factual dispute exists as to whether Smith was wrongfully discharged, we hold that the district court's grant of summary judgment was proper.

III

For the foregoing reasons, we AFFIRM the judgment of the district court.