United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
January 11, 2022
Lyle W. Cayce
Clerk

No. 21-20070

TARIQ B. ALABBASSI,

Plaintiff—Appellant,

versus

JOHN E. WHITLEY, *Acting Secretary, U.S. Department of the Army*,

Defendant—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CV-3131

Before JONES, HIGGINSON, and DUNCAN, *Circuit Judges*.

PER CURIAM:*

Appellant Taqir Alabbassi held a term appointment as a civilian employee for the Army. He applied for another term but was not selected. Alabbassi sued the Acting Secretary of the Army John Whitley[1] (the

* Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

[1] This suit began before Whitley became Acting Secretary and he was later substituted as the proper defendant.

"Secretary") under Title VII of the Civil Rights Act of 1964, alleging national origin discrimination. The district court dismissed some of Alabbassi's claims as unexhausted, and dismissed his remaining claim on summary judgment. We affirm.

I.

In 2010, Alabbassi worked as a cultural advisor in the Civilian Expeditionary Workforce for the United States Army Central Command in Iraq. This position is a term appointment. On March 12, 2010, the Army denied Alabbassi's request for a change in his service computation date to reflect his private sector experience. Additionally, in April of that year, Army officials downgraded his award from Meritorious Civilian Service Commendation ("MCSC") to Joint Civilian Service Commendation. Upon learning that another employee received the recommended MCSC award, Alabbassi questioned the agency and his MCSC award was reinstated.

Alabbassi also applied for another term as a cultural advisor. During his interview, Brigadier General Bryan Roberts asked: "what brought you to Houston?" and "where were you born?" Alabbassi responded that he was born in Kuwait, and Roberts wrote "Kuwait" at the top of his résumé. Alabbassi learned that he was not selected for the position on October 30, 2011.

Alabbassi contacted the EEOC on November 25, 2011, and ultimately filed a complaint with the EEOC on May 15, 2012. He claimed that discrimination based on his Kuwaiti national origin led to (1) his change in service computation being denied, (2) his MCSC award being initially downgraded, and (3) his not receiving a second term as cultural advisor. On May 24, 2012, the EEOC dismissed as untimely Alabbassi's claims relating to his award and service computation. The EEOC accepted for investigation Alabbassi's claims that he faced discrimination in his interview and his failure

to obtain another cultural advisor term. On August 1, 2016, the EEOC issued a final order finding no discrimination on these claims. The EEOC affirmed this decision on appeal on March 15, 2018, and Alabbassi received his right-to-sue letter from the EEOC on June 7, 2018.

Alabbassi then sued the Secretary in federal district court, bringing the same claims of national origin discrimination. The court dismissed the two claims the EEOC had found untimely for failure to exhaust administrative remedies. This left only Alabbassi's claim that he was not selected for the advisor position due to his national origin. After Alabbassi failed to provide initial discovery, the Secretary moved for summary judgment on that claim. The court granted summary judgment without considering new exhibits Alabbassi submitted. Alabbassi now appeals (1) the dismissal of his claims, (2) the grant of summary judgment, and (3) the court's decision not to reopen discovery. We address each issue in turn.

II.

Alabbassi challenges the exhaustion-based dismissal of his national origin discrimination claims concerning his service computation and his downgraded MSCS award.[2] Our review is *de novo*. *Budhathoki v. Nielsen*, 898 F.3d 504, 507 (5th Cir. 2018).

Under Title VII, an employer cannot refuse to hire or discriminate against an individual because of his national origin. 42 U.S.C. § 2000e-2. Before pursuing such a claim in court, a plaintiff must first exhaust administrative remedies. *Davis v. Fort Bend County*, 893 F.3d 300, 303 (5th

[2] Alabbassi also challenges dismissal of his "termination" claim as unexhausted. As the government explained to the district court, however, this claim is indistinguishable from Alabbassi's failure-to-hire claim. As discussed *infra*, the failure-to-hire claim was properly dismissed on summary judgment.

Cir. 2018). He must first file a formal complaint with the EEOC. *Ibid*; *see also* 29 C.F.R. § 1614.106(a). Contact with the EEOC must occur "within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the date of the action." 29 C.F.R. § 1614.105(a)(1). Failure to initiate timely contact means a claim is unexhausted and therefore cannot proceed in court. *Davis*, 893 F.3d at 308.

The district court properly dismissed these two claims as unexhausted. Alabbassi learned that his request to change his service computation date was denied on March 12, 2010, a decision that was affirmed on September 2, 2011. He learned that his MSCS award had been downgraded in April 2011; it was reinstated in August of that year. Yet it was not until November 25, 2011, that Alabbassi attempted to contact an EEOC counselor about these alleged instances of discrimination. He thus failed to act within the required 45-day period as to either claim. *See Ramsey v. Henderson*, 286 F.3d 264, 269 (5th Cir. 2002). As a result, the EEOC did not accept his claims and dismissed them as untimely. Alabbassi's claims are therefore unexhausted and were properly dismissed. *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 379 (5th Cir. 2002) (explaining that "[e]xhaustion occurs when the plaintiff files a timely charge with the EEOC").[3]

[3] Alabbassi claims an "*ex parte* hearing" between the Secretary and the district court contributed to the dismissal of his claims. Specifically, he contends that he was unable to join a scheduled telephone hearing and that, as a result, the Secretary presented false information outside his presence that influenced the court's decision. Alabbassi provides no support for these claims. As the Secretary points out, there was no improper *ex parte* communication because Alabbassi knew about the hearing but failed to attend. Nor does Alabbassi substantiate his accusation that "false information" was presented at the hearing. Furthermore, the district court ultimately decided to reschedule the hearing so Alabbassi could attend.

III.

Alabbassi next challenges the grant of summary judgment on his failure-to-hire claim. Our review is again *de novo*. *In re La. Crawfish Producers*, 852 F.3d 456, 462 (5th Cir. 2017). Summary judgment is proper where, taking the facts in the light most favorable to the nonmovant, there is no genuine dispute as to any material fact. FED. R. CIV. P. 56(a).

A Title VII plaintiff can make a prima facie case through either direct or circumstantial evidence. *Etienne v. Spanish Lake Truck & Casino Plaza, LLC*, 778 F.3d 473, 475 (5th Cir. 2015). Direct evidence consists of statements or documents that show a discriminatory motive on their face. *Herster v. Bd. of Supervisors of La. State Univ.*, 887 F.3d 177, 185 (5th Cir. 2018). This is "evidence which, if believed, proves the fact without inference or presumption." *Jones v. Robinson Prop. Grp., LP*, 427 F.3d 987, 992 (5th Cir. 2005). Lacking direct evidence, the plaintiff must navigate the *McDonnell Douglas* burden-shifting framework. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). If a plaintiff makes a prima facie case, the burden shifts to the defendant to offer a "legitimate, nondiscriminatory reason" for the challenged decision. *Ibid.* If the defendant does so, the burden shifts back to the plaintiff to show that the proffered reasons are a pretext for discrimination. *McCoy v. City of Shreveport*, 492 F.3d 551, 557 (5th Cir. 2007). To overcome summary judgment, the plaintiff must offer evidence rebutting each of the defendant's nondiscriminatory reasons. *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 220 (5th Cir. 2001).

First, Alabbassi claims the district court erred by employing *McDonnell Douglas*. He argues that General Roberts's writing "Kuwait" on his résumé and asking, "what brought you to Houston?" and "where were you born" are direct evidence of discrimination. We disagree. As explained, direct evidence requires the discriminatory motive to be apparent on its face.

Herster, 887 F.3d at 185. But merely asking where someone was born or what brought them to a city—standing alone—does not facially show discriminatory motive. Such background questions are a standard part of interviews. Nor does the fact that Roberts wrote "Kuwait" at the top of Alabbassi's résumé, by itself, show discriminatory motive. One would have to infer that Roberts wrote "Kuwait" not for any benign reason but because he harbored discriminatory animus against Kuwaitis. So, Alabbassi provided no direct evidence of discrimination and *McDonnell Douglas* applies.

Next, Alabbassi contends the district court erred in applying the burden-shifting framework. The court found Alabbassi made a prima facie case but failed to rebut the Secretary's assertions that Mr. Haddad, who was selected for the position, was more qualified. Specifically, the court found that Alabbassi failed to show he was "clearly better qualified" than Haddad. *See Price v. Fed. Exp. Corp.*, 283 F.3d 715, 723 (5th Cir. 2002) ("[A] showing that the unsuccessful employee was clearly better qualified is enough to prove that the employer's proffered reasons are pretextual.").

This showing requires evidence that "no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question." *Moss v. BMC Software, Inc.*, 610 F.3d 917, 923 (5th Cir. 2010) (quoting *Deines v. Tex. Dep't of Protective & Regul. Servs.*, 164 F.3d 277, 280–81 (5th Cir. 1999)). This is a high bar. Courts must hesitate to second-guess an employment decision unless a plaintiff's qualifications "leap from the record and cry out to all who would listen that he was vastly . . . more qualified for the subject job." *Price*, 283 F.3d at 723 (quoting *Odom v. Frank*, 3 F.3d 839, 847 (5th Cir. 1993)). That is not the case here. As the district court found, Haddad was the most qualified candidate for the position based on Roberts's declarations about their respective qualifications. Alabbassi thus could not even show he was more qualified,

much less clearly better qualified. Accordingly, the district court did not err by granting summary judgment on Alabbassi's failure-to-hire claim.[4]

IV.

Finally, Alabbassi contends the district court erred by refusing both to consider his exhibits and to reopen discovery. The court granted summary judgment without reopening discovery after Alabbassi failed to submit his initial disclosures. Our review is for abuse of discretion. *Marathon Fin. Ins., RRG v. Ford Motor Co.*, 591 F.3d 458, 469 (5th Cir. 2009). To reverse, there must be "unusual circumstances showing a clear abuse." *Ibid.* (internal quotation marks and citation omitted). "[D]istrict court judges have 'power to control their dockets by refusing to give ineffective litigants a second chance to develop their case.'" *Leza v. City of Laredo*, 496 F. App'x 375, 376–77 (5th Cir. 2012) (per curiam) (internal quotation marks and citation omitted).

The requirement that parties identify individuals likely to have discoverable information is automatic—no discovery request is necessary. FED R. CIV. P. 26(a)(1)(A)(i). This disclosure requirement seeks to "end two evils that had threatened civil litigation: expensive and time-consuming pretrial discovery techniques and trial-by-ambush." *Olivarez v. GEO Grp.,*

[4] Alabbassi's other arguments are meritless. For instance, he claims Roberts's testimony was inadmissible hearsay from someone not qualified as an expert. But Roberts's testimony about interviewing Alabbassi and Haddad was within his personal knowledge and was therefore neither hearsay nor expert testimony. *See* FED. R. EVID. 702, 801. Alabbassi also argues the court erred in granting summary judgment while his motion to strike the Secretary's affirmative defenses was pending. He cites no authority for this proposition. The court was not required to rule on his pending motion before resolving summary judgment. *See Snider v. L-3Commc'ns Vertex Aerospace, LLC*, 946 F.3d 660, 667 (5th Cir. 2019) ("When a district court enters a final judgment, it has implicitly denied any outstanding motions, even if the court does not explicitly deny a particular motion.").

Inc., 844 F.3d 200, 204 (5th Cir. 2016) (quoting *Standley v. Edmonds-Leach*, 738 F.3d 1276, 1283 (D.C. Cir. 2015)). Alabbassi failed to provide any initial discovery. Therefore, he was barred from using any evidence he failed to disclose. *See* FED R. CIV. P. 37(c)(1) ("If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless.").

Moreover, reopening discovery generally requires "good cause." FED. R. CIV. P. 16(b)(4). This Alabbassi cannot show. He argues that defense counsel waited until the deadline to raise his lack of disclosures and that this evinces bad faith. But the defense had no obligation to remind Alabbassi of litigation deadlines. *See* FED. R. CIV. P. 26(a)(1)(A). Alabbassi claims he was unaware of any deadlines. But he was informed of the discovery deadlines and so cannot be excused for failing to comply with them. The district court did not abuse its discretion by not reopening discovery to consider Alabbassi's untimely exhibits.

AFFIRMED