Affirmed and Opinion filed February 3, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00944-CV

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BENJAMIN C. LOCKETT, Appellant

V.

AMOCO CHEMICAL COMPANY d/b/a AMOCO CHEMICAL, Appellee

On Appeal from the 149th District Court
Brazoria County, Texas
Trial Court Cause No. 96M2941

O P I N I O N

In this employee termination case, Benjamin C. Lockett appeals a summary judgment entered in favor of Amoco Chemical Company d/b/a Amoco Chemical ("Amoco") on the grounds that fact issues existed as to whether Lockett's discharge was the result of: (1) racial discrimination; and (2) his instituting a workers' compensation proceeding. We affirm.

Background

Lockett, an African-American, was employed by Amoco as a maintenance technician. Having received previous disciplinary reprimands, Lockett was fired after he unhooked a process line hose without obtaining a work permit to do so and caused a spill of slop oil.

Lockett filed suit against Amoco claiming wrongful discharge based on racial discrimination and his having instituted a workers' compensation proceeding. Amoco filed a "no evidence" motion for summary judgment[1] on various grounds, including that there was no evidence that his termination was racially motivated or that he had initiated any workers' compensation proceedings which would entitle him to protection. The trial court granted a take-nothing summary judgment in favor of Amoco without stating the ground(s) on which it relied in doing so.

No Evidence Summary Judgment Standard

After adequate time for discovery, a party, without presenting summary judgment evidence, may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. *See* TEX. R. CIV. P. 166a(i). The trial court must grant the motion unless the respondent then produces summary judgment evidence raising a genuine issue of material fact. *See id.*

Racial Discrimination

Lockett's first two points of error argue that the trial court erred in granting Amoco's motion for summary judgment on his racial discrimination claim because fact issues remain whether white employees who were involved in similar acts were not also disciplined.[2]

An employer commits an unlawful employment practice if he discharges an individual based on race. *See* 42 U.S.C. § 2000e-2 (1991); TEX. LAB. CODE ANN § 21.051(1) (Vernon 1996). To establish a *prima facie* case of employment discrimination, a plaintiff must show that: (1) he was a member of a protected class; (2) he suffered an adverse employment action; and (3) non-protected class employees were not treated similarly. *See Farrington v. Sysco*

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1 *See* TEX. R. CIV. P. 166a(i).

2 Lockett also contends that Amoco's purported reason for terminating Lockett's employment is unworthy of credence. However, in reviewing a summary judgment, we do not evaluate whether evidence is worthy of credence but only whether the respective summary judgment burdens have been met.

Food Servs., Inc., 865 S.W.2d 247, 251 (Tex. App.–Houston [1st Dist.] 1993, writ denied) (citing *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

In work-rule violation cases, an employee claiming racial discrimination establishes a *prima facie* case by showing either that he did not violate the rule or that, if he did, white employees who engaged in similar acts were not punished similarly. *See Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1090 (5th Cir. 1995).[3] To demonstrate dissimilar punishment, the employee must show that the white employees were treated differently under "nearly identical" circumstances. *See id*.

In this case, Amoco's "no evidence" motion for summary judgment claimed, in part, that Lockett produced no evidence that he was treated differently than non-minority employees in similar situations. Lockett contends that two white co-workers who were also involved in the incident were not disciplined at all. These individuals were Henson, the maintenance coordinator who instructed Shellenbarger that he and Lockett should use the hose located at the slop oil tank, and Shellenbarger, the co-worker who watched Lockett disconnect the hose.

However, Lockett has cited no evidence that Amoco was aware of the alleged involvement of Shellenbarger in the spill during the period in question. On the contrary, in deposition testimony attached to Amoco's motion for summary judgment, Lockett admitted that at Shellenbarger's request, he deliberately refrained from disclosing Shellenbarger's involvement in disconnecting the hose when he reported the accident. Similarly, although Lockett claims that Henson gave the original instruction to use the hose, he cites no evidence that Henson told Lockett or Shellenbarger to disconnect it without obtaining the necessary permit. Because Lockett thereby failed to produce evidence that any differing treatment of

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[3] One of the purposes of chapter 21 of the Labor Code is to provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments. *See* TEX. LAB. CODE ANN. § 21.001 (Vernon 1996). Therefore, when reviewing an employment discrimination case brought under this chapter, appellate courts may look to federal case law interpreting Title VII when appropriate. *See Farrington v. Sysco Food Servs., Inc.*, 865 S.W.2d 247, 251 (Tex. App.–Houston [1st Dist.] 1993, writ denied).

Shellenbarger or Henson occurred under circumstances nearly identical to his own, no error is shown in granting Amoco's summary judgment on the claim of racial discrimination. Therefore, Lockett's first and second points of error are overruled.

Retaliatory Discharge

Lockett's third, fourth, and fifth points of error argue that the trial court erred in granting the summary judgment because material fact issues existed as to whether Lockett was improperly discharged because he instituted a workers' compensation proceeding against Amoco.

An employer may not discharge an employee because the employee has: (1) filed a workers' compensation claim in good faith; (2) hired a lawyer to represent the employee in a claim; (3) instituted or caused to be instituted in good faith a workers' compensation proceeding; or (4) testified or is about to testify in a workers' compensation proceeding ("retaliatory discharge"). *See* TEX. LAB. CODE ANN. § 451.001 (Vernon 1996). The burden of proof in an action for violation of section 451.001 is on the employee. *See id.* § 451.002(c). In order to invoke the protection of section 451.001, an employee need not have actually filed a workers' compensation claim, but need only to have taken steps toward instituting such a proceeding.[4] The act of informing the employer of an injury sufficiently institutes a compensation proceeding for this purpose.[5]

In the present case, Amoco moved for summary judgment on Lockett's retaliatory discharge claim, in part, on the ground that there was no evidence that Lockett had taken any of the actions enumerated in section 451.001. On appeal, Lockett does not challenge Amoco's summary judgment assertions and proof that he filed no formal workers' compensation

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[4] *See Stephens v. Delhi Gas Pipeline Corp.*, 924 S.W.2d 765, 771-72 (Tex. App.–Texarkana 1996, writ denied); *Palmer v. Miller Brewing Co.*, 852 S.W.2d 57, 60-61 (Tex. App.–Fort Worth 1993, writ denied); *see also Gauthreaux v. Baylor Univ. Med. Ctr.*, 879 F. Supp. 634, 639 (N.D.Tex. 1994).

[5] *See Stephens*, 924 S.W.2d at 772; *Palmer*, 852 S.W.2d at 61; *see also Munoz v. H & M Wholesale, Inc.*, 926 F. Supp. 596, 609 (S.D.Tex. 1996); *Gauthreaux*, 879 F.Supp. at 639.

proceeding concerning the slop oil spill, hired no attorney to represent him in any such proceeding, and never testified or was about to testify in any such proceeding. Therefore, our review is confined to whether Lockett constructively "instituted" a workers' compensation proceeding by informing Amoco of an injury. Amoco claims that Lockett did not do so because he neither suffered nor reported any injury from the slop oil spill.

Immediately after being soaked in slop oil, Lockett notified the operations foreman of the spill. The operations foreman advised him to get out of his oil soaked clothing and take a shower. After taking a shower, Lockett went to the nurse on staff at Amoco for benzene testing due to the exposure to the slop oil. After the nurse took blood samples from Lockett, he finished his day at work. The next week, the nurse called Lockett back into her office and informed him that the blood test showed a low-level exposure to benzene but that he should not be concerned about it. Lockett obtained no other medical treatment or tests regarding possible effects of the spill.

After the spill, Lockett filled out an incident report and wrote "not applicable" under the section entitled "injury description." Lockett also admitted in his deposition that he suffered no physical injury as a result of the slop oil spill and that he never told anyone at Amoco either that he was going to file a workers' compensation claim regarding the incident or hire an attorney to represent him. Therefore, although Lockett informed Amoco of the incident, he did not inform it of any injury therefrom or any other reason to suspect a workers' compensation action.

Lockett contends that he instituted a proceeding by notifying Amoco of being soaked in slop oil and seeking medical benefits for his exposure to benzene. However, Lockett cites no legal authority for the former[6] and no factual support for the latter. Because Lockett thus

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[6] In all of the cases cited by Lockett, the employees both suffered an actual injury and reported the fact that they were injured to the employer. *See Munoz v. H & M Wholesale, Inc.*, 926 F.Supp. 596, 603 (S.D.Tex. 1996) (noting that before the company terminated the employee, the employee sustained an on-the-job back injury for which the company sent him to the doctor and chiropractor and the company filed its First Report of Injury regarding the incident); *Duhon v. Bone & Joint Physical Therapy Clinics*, 947 S.W.2d 316, 317-18 (Tex. App.–Beaumont 1997, no writ) (holding

failed to produce evidence to raise a fact issue whether he instituted a workers' compensation proceeding prior to his termination, no error is shown in granting summary judgment on his retaliatory discharge claim. Accordingly, Lockett's third, fourth, and fifth points of error are overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed February 3, 2000.

Panel consists of Justices Fowler, Edelman, and Frost.

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that employee invoked protection of statute when she sustained an on-the-job injury and reported it to her employer the next day); *Worsham Steel Co. v. Arias*, 831 S.W.2d 81, 82, 84 (Tex. App.–El Paso 1992, no writ) (commenting that an employee informing his supervisor of a back injury sustained while in the scope of his employment before he was terminated was an affirmative step toward instituting a workers' compensation proceeding); *Hunt v. Van Der Horst Corp.*, 711 S.W.2d 77, 80 (Tex. App.–Dallas 1986, no writ) (concluding that employee instituted a proceeding when he informed his supervisor that he had suffered an injury on the job and that he was going home and to see a doctor). During oral argument, Lockett asserted that an employer should not be able to fire an employee before the employee can institute a workers' compensation proceeding in order to escape liability for retaliatory discharge. Again, however, because Lockett has cited no authority to support this contention, it affords no basis for relief.