United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

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October 11, 2018

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 18-30011 Joseph Chhim v. Golden Nugget Lake Charles
USDC No. 2:16-CV-1094

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

Connie C Brown

By: _____
Connie Brown, Deputy Clerk
504-310-7671

Mr. Joseph Chhim
Mr. Tony R. Moore
Ms. Kathlyn Gloria Perez

Appendix A.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-30011

JOSEPH CHHIM,

Plaintiff - Appellant

v.

GOLDEN NUGGET LAKE CHARLES, L.L.C., improperly referred to as Golden Nugget Casino Lake Charles,

Defendant - Appellee

Appeals from the United States District Court
for the Western District of Louisiana

ON PETITION FOR REHEARING

Before REAVLEY, GRAVES, and HO, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/JAMES E. GRAVES, JR.
UNITED STATES CIRCUIT JUDGE

12.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-30011
Summary Calendar

JOSEPH CHHIM,

Plaintiff-Appellant,

v.

GOLDEN NUGGET LAKE CHARLES, L.L.C., improperly referred to as Golden Nugget Casino Lake Charles,

Defendant-Appellee.

Appeals from the United States District Court
for the Western District of Louisiana
USDC No. 2:16-CV-1094

Before REAVLEY, GRAVES, and HO, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant Joseph Chhim, who proceeds in this action *pro se*, appeals from the district court's grant of summary judgment in favor of Defendant-Appellee Golden Nugget Lake Charles, L.L.C. ("Golden Nugget"), on his claims that Golden Nugget failed to hire him in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* For the reasons that follow, we affirm.

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

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In June 2014, Golden Nugget was in the midst of a mass recruiting effort to attract employment candidates in advance of the December 2014 opening of its casino resort in Lake Charles, Louisiana. Chhim, a now-seventy-three-year old U.S. citizen of Cambodian descent, applied for a position as facilities supervisor through Golden Nugget's online application system. His application was automatically rejected. In a subsequent email exchange, Golden Nugget's Director of Human Resources, Laura Jasso, informed Chhim that the rejection was due to his failure to complete an online assessment, required of all employment applicants, that is designed to gauge an applicant's strength in customer service and engagement. Chhim completed the assessment, scoring a twelve percent—well below the recommended minimum of thirty percent. Based on this low score, Golden Nugget's system generated and sent an automated rejection to Chhim on July 12, 2014. Golden Nugget never filled the position for which Chhim applied.

Chhim later filed the instant action, alleging that Golden Nugget discriminated against him on the basis of race, national origin, and age by not hiring him as facilities supervisor. The district court granted summary judgment in favor of Golden Nugget, and Chhim timely appealed.

We review a grant of summary judgment *de novo*, applying the same standards as the district court. *Ezell v. Kan. City S. Ry. Co.*, 866 F.3d 294, 297 (5th Cir. 2017). Summary judgment "is appropriate only if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (per curiam). We construe the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *R & L Inv. Prop., LLC v. Hamm*, 715 F.3d 145, 149 (5th Cir. 2013).

In both Title VII and ADEA failure-to-hire cases based on circumstantial evidence, federal courts analyze plaintiffs' claims using the well-trod framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S.

792 (1973). *See, e.g., Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 896 n.2 (5th Cir. 2002) ("This circuit applies the *McDonnell Douglas* rubric to both Title VII and ADEA claims."). As this court explained to Chhim in a previous appeal, under this framework, a plaintiff must first establish a prima facie case of discrimination by demonstrating that "(1) he is a member of a protected class; (2) he was qualified and applied for the job; (3) the employer rejected him for the job despite his qualifications; and (4) a similarly situated applicant outside the protected class was hired." *Chhim v. Univ. of Tex.*, 836 F.3d 467, 470 (5th Cir. 2016) (per curiam); *see also Rogers v. Pearland Indep. Sch. Dist.*, 827 F.3d 403, 408 (5th Cir. 2016); *Blow v. City of San Antonio*, 236 F.3d 293, 296 (5th Cir. 2001). It is undisputed that Chhim satisfies the first prong of this test as well as half of the second (he applied for the facilities supervisor position) and half of the third (Golden Nugget rejected him). But even if we were to assume that Chhim was qualified for the job (the district court found he was not) and that he was rejected despite those qualifications, he has failed to establish a genuine issue on the fourth prong, because he has offered no evidence to refute Golden Nugget's contention, supported by competent evidence, that the facilities supervisor position was never filled. Specifically, Golden Nugget submitted a declaration by Elizabeth Guest, Manager of Corporate Recruiting for Landry's Management, LP, a company that provides human resources support to Golden Nugget, attesting that Golden Nugget never hired anyone to fill the position for which Chhim applied.

Although we usually draw reasonable inferences in favor of the nonmoving party in reviewing a summary judgment motion, we do so only where both parties have submitted evidence of contradictory facts; we cannot assume, in the absence of proof, that the nonmoving party could or would prove the necessary facts. *McCarty v. Hillstone Rest. Grp., Inc.*, 864 F.3d 354, 358 (5th Cir. 2017). Golden Nugget proffered evidence on the fourth prong of the prima facie case,

and Chhim proffered nothing to counter it. Thus, he fails to satisfy this prong, which alone is fatal to his claims. *E.g.*, *McClaine v. Boeing Co.*, 544 F. App'x 474, 477 (5th Cir. 2013) (per curiam). His status as a pro se litigant does not alter this conclusion. *See EEOC v. Simbaki, Ltd.*, 767 F.3d 475, 484 (5th Cir. 2014) ("Despite our general willingness to construe pro se filings liberally, we still require pro se parties to fundamentally abide by the rules that govern the federal courts. . . . Pro se litigants must properly . . . present summary judgment evidence . . . ." (citations and internal quotation marks omitted)).

The judgment of the district court is **AFFIRMED**.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

JOSEPH CHHIM	*	**CIVIL ACTION NO. 2:16-CV-1094**
	*	
v.	*	
	*	**JUDGE WALTER**
GOLDEN NUGGET LAKE CHARLES LLC	*	
	*	
	*	**MAGISTRATE JUDGE KAY**
	*	
	*	

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JUDGMENT

For the reasons stated in the Report and Recommendation (Rec. Doc. 28) of the Magistrate Judge previously filed herein, after an independent review of the record, including the objections (Rec. Doc. 32, 33), response (Rec. Doc. 34), and reply (Rec. Doc. 37) thereto; a *de novo* determination of the issues; and determining that the findings are correct under applicable law,

IT IS ORDERED that Defendant's Motion for Summary Judgment (Rec. Doc. 15) is hereby **GRANTED** and Plaintiff's claims against Defendant Golden Nugget Lake Charles LLC are hereby **DISMISSED WITH PREJUDICE** at Plaintiff's cost.

THUS DONE AND SIGNED, in Shreveport, Louisiana, this 6th day of December, 2017.

Donald E. Walter

DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

Appendix C
17.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

JOSEPH CHHIM	:	**DOCKET NO. 16-cv-1094**
VERSUS	:	**UNASSIGNED DISTRICT JUDGE**
GOLDEN NUGGET LAKE CHARLES LLC	:	**MAGISTRATE JUDGE KAY**

REPORT AND RECOMMENDATION

Before the court is a Motion for Summary Judgment [doc. 15] filed pursuant to Rule 56 of the Federal Rules of Civil Procedure by defendant Golden Nugget Lake Charles LLC ("Golden Nugget"). The plaintiff, Joseph Chhim ("Chhim"), opposes the motion with multiple responses. *See* docs. 21, 22, 25. We consider only those responses submitted before Golden Nugget's reply [doc. 26] was received as plaintiff neither sought nor received leave of court to supplement his original opposition.

For the following reasons, **IT IS RECOMMENDED** that the Motion for Summary Judgment be **GRANTED** and that the action be **DISMISSED WITH PREJUDICE** at plaintiff's cost.

I.
BACKGROUND

Chhim, a United States citizen of Cambodian descent, filed the instant *pro se* employment discrimination suit in this court on July 25, 2016, against Golden Nugget, which operates a casino

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identifying portions of pleadings and discovery that show the lack of a genuine issue of material fact for trial. *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995). The court must deny the moving party's motion for summary judgment if the movant fails to meet this burden. *Id.*

Once the movant makes this showing, the burden then shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986). The burden requires more than mere allegations or denials of the adverse party's pleadings. The non-moving party must demonstrate by way of affidavit or other admissible evidence that there are genuine issues of material fact or law. *Celotex*, 106 S.Ct. at 2553. There is no genuine issue of material fact if, viewing the evidence in the light most favorable to the non-moving party, no reasonable trier of fact could find for the non-moving party. *Tolan v. Cotton*, 134 S.Ct. 1861, 1866 (2014). Furthermore, a court may not make credibility determinations or weigh the evidence in ruling on a motion for summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S.Ct. 2097, 2110 (2000). However, the nonmovant must submit "significant probative evidence" in support of his claim. *State Farm Life Ins. Co. v. Gutterman*, 896 F.2d 116, 118 (5th Cir. 1990). If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Anderson*, 106 S.Ct. at 2511.

B. Title VII & ADEA

Chhim alleges that, by failing to hire him, Golden Nugget violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII") and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* ("ADEA"). Doc. 1. In relevant part, Title VII provides that it is unlawful for an employer "to fail or refuse to hire . . . any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The

ADEA outlaws employment discrimination, including refusal to hire, on the basis of an individual's age. 29 U.S.C. § 623(a)(1).

Chhim's claims amount to allegations of disparate treatment based on his race, national origin, and age. *See* doc. 1, pp. 1–2. A disparate treatment claim requires proof of intentional discrimination. *See, e.g., Munoz v. Orr*, 200 F.3d 291, 299 (5th Cir. 2000) ("Disparate treatment refers to deliberate discrimination in the terms or conditions of employment . . . .") Because direct evidence of an employer's discriminatory intent is rare, plaintiffs must ordinarily prove their claims through circumstantial evidence. *Scales v. Slater*, 181 F.3d 703, 709 (5th Cir. 1999). In both ADEA and Title VII cases, this circumstantial evidence is analyzed through the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 93 S.Ct. 1817 (1973). *Moss v. BMC Software, Inc.*, 610 F.3d 917, 922 (5th Cir. 2010). The Fifth Circuit applies the following "modified *McDonnell Douglas* approach" to employment discrimination cases:[3]

> [T]he plaintiff must first demonstrate a prima facie case of discrimination; the defendant then must articulate legitimate, non-discriminatory reasons for its decision to terminate the plaintiff; and, if the defendant meets its burden of production, the plaintiff must then offer sufficient evidence to create a genuine issue of material fact that either (1) the employer's reason is a pretext or (2) that the employer's reason, while true, is only one of the reasons for its conduct, and another "motivating factor" is the plaintiff's protected characteristic.

Burrell v. Dr. Pepper/Seven Up Bottling Group, Inc., 482 F.3d 408, 411–12 (5th Cir. 2007) (citation omitted).

[3] This modified *McDonnell Douglas* approach is applicable to both ADEA and Title VII claims. *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004). However, under intervening Supreme Court precedent, a plaintiff in an ADEA case must show that his age was the "but-for" cause of the adverse employment decision rather than a "motivating factor." *Moss*, 610 F.3d at 928 (citing *Gross v. FBL Fin. Svcs., Inc.*, 129 S.Ct. 2343, 2349–51 (2009)).

In order to set out a prima facie case of employment discrimination based on failure to hire, the plaintiff must demonstrate that: (1) he is a member of a protected class; (2) he applied for a position for which the employer was seeking applicants; (3) he was qualified for the position; (4) he was not selected for the position; and (5) the employer continued to seek applicants for the position or filled the position with someone outside of the protected class. *Goswami v. Unocal*, 2013 WL 5520107, *5 (S.D. Tex. Oct. 3, 2013) (citations omitted).

III.
APPLICATION

Golden Nugget argues that Chhim cannot meet his burden of setting out a prima facie case as he was not qualified for the position based on his score on the assessment score and failure to meet the listed criteria for the position. It also notes that, because the facilities supervisor position was not filled, Chhim cannot show that Golden Nugget continued to seek applicants for the position or filled it with someone outside of his protected classes.

As best as we can construe his allegations in the complaint and briefing, Chhim argues that Golden Nugget has contradicted itself in interrogatory responses and response to his application for facilities lead (see note 1, *supra*) on whether a below-thirtieth percentile score served as an absolute bar to consideration. He also seems to assert that the assessment was not truly neutral, and maintains that he was qualified for the position of facilities supervisor based on his training and experience.[4] *See* doc. 21, pp. 8–21; doc. 22, att. 1, pp. 1–4.

[4] In addition to the assessment, Golden Nugget listed the following among the requirements for the position of facilities supervisor: (1) one to three years of experience in a casino environment, with one to three years in commercial or industrial facilities maintenance preferred; (2) possession of a high school diploma, with preference for a trade school certificate; and (3) supervisory responsibilities for maintenance technician, HVAC engineer, kitchen mechanic, electrician, plumber, painter, and maintenance dispatcher. Doc. 15, att. 2, pp. 5–7.

Golden Nugget attaches Chhim's résumé submitted with his application. *See* doc. 15, att. 5. It shows that he had several years of experience as a custodial lead and custodial supervisor, in addition to three years of experience as assistant manager at a restaurant. *Id.* He also stated that he had received an associate's degree in Maintenance

Chhim's assertions are without merit. He makes various overlapping and confusing allegations and we review only those relevant to the disputed argument that he was properly disqualified from the position of facilities supervisor by virtue of his score on the assessment.[5]

Chhim alleges that Golden Nugget gave conflicting responses on whether his score on the assessment disqualified him from applying for positions below facilities supervisor. *See, e.g.*, doc. 22, att. 1, p. 2. However, this has no bearing on whether his score disqualified him from filling the position(s) for which he applied, and he provides nothing to refute Golden Nugget's evidence that it did. He maintains that the assessment was not actually a hiring requirement but offers no credible evidence in support of this contention. *See* doc. 25, p. 5. Instead, he only shows that there is no entry specifically relating to the assessment in Golden Nugget's employee handbook. *Id.*; *see* doc. 25, att. 1, pp. 8–11. He also provides no evidence in support of his assertion that the assessment was not neutral. His allegation that computer assessments must be given in a controlled environment is nonsensical and unsupported, and his contention that the assessment was programmed with discriminatory criteria is contradicted by competent summary judgment evidence,[6] in the form of a declaration pursuant to 28 U.S.C. § 1746, showing that the assessment

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Technology and Executive Housekeeping and Supervisory Management. *Id.* Accordingly, his background appeared to be custodial rather than relating to facilities and ability to supervise same, despite some educational background in maintenance technology. Furthermore, nothing on his résumé showed any experience in a casino environment.

[5] Chhim also points to Golden Nugget's refusal to respond to interrogatories requesting the source of the assessment's answer key and the names of other applicants who failed the assessment and were warned by human resources not to apply for other positions. Doc. 25, pp. 5–6. He does not show, however, how this creates a dispute as to any material fact – rather, these contentions only point to his own ability to offer evidence in support of the assessment's alleged lack of neutrality or some other subterfuge by Golden Nugget.

[6] Chhim makes various unsupported allegations against the declarant, Elizabeth Guest, alleging that she is not competent to make any statement in support of this motion because she was not involved with Golden Nugget at the time he applied for the position of facilities supervisor. Doc. 25, p. 8. He also appears to allege that she has been convicted of a felony. *Id.* He offers nothing in support of these allegations. Guest states that she is the manager of corporate recruiting for a firm that provides human resources support to Golden Nugget and that she is familiar with Chhim's allegations based on that role. Doc. 15, att. 2, pp. 1–2. Chhim's allegations give us no basis for striking her sworn declaration.

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties have fourteen (14) days from receipt of this Report and Recommendation to file written objections with the Clerk of Court. Failure to file written objections to the proposed factual findings and/or the proposed legal conclusions reflected in this Report and Recommendation within fourteen (14) days of receipt shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the District Court, except upon grounds of plain error. *See Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1429–30 (5th Cir. 1996).

THUS DONE AND SIGNED in Chambers this 12th day of September, 2017.

KATHLEEN KAY
UNITED STATES MAGISTRATE JUDGE

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