

No. 19-1109

In The

Supreme Court of the United States

TIMOTHY C. YOAKUM,

Petitioner

v

SABRE GLBL INCORPORATED,

Respondent

On Petition For Writ Of Certiorari To The
United States Court Of Appeal For The Fifth Circuit

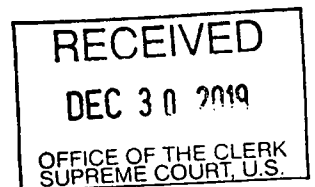
PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

Does the issuance of an undeserved Performance Improvement Plan (PIP) and undeserved employee performance review become actionable under Title VII as an adverse employment action if they negatively affect the employee's compensation and employment?

Whether the appellate court decision to affirm, the district court opinion and final judgment granting the defendants motion for summary judgment as a matter of law, infringed on the rights afforded to us in Amendment VII?

PARTIES TO THE PROCEEDINGS

Petitioner Timothy C. Yoakum is the Plaintiff and Appellant below.

Respondent Sabre GLBL, Incorporated is the Defendant and Appellee below

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OPINIONS BELOW

There was no opinion provided by the Court of Appeals. The order affirmed per curiam and is included as Appendix A Motion for leave to file out of time for rehearing was GRANTED and motion to petition for rehearing was DENIED included as Appendix B. The district court opinion, order and final judgement is included as Appendix C.

JURISDICTION

The Fifth Circuit issued its order per curiam August 22, 2019. Then denied the Petition for Rehearing on September 24, 2019. The Court has jurisdiction under 28 USC § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VII states "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

1. The -Plaintiff Appellant Timothy C. Yoakum ("Yoakum" or "Plaintiff") filed charges of discrimination with the Equal Employment Opportunity Commission October 23, 2017 which was 252 days beyond the last date a violation of discrimination took place February 13, 2017. However, the harassment and hostile work environment started in March 2016 and continued through February 13, 2017. Administrative remedies were exhausted with the EEOC and plaintiff received a Right to Sue Letter.
2. Plaintiff established a relationship with McBeth Law Office, Hiram McBeth III, Esquire. Plaintiff filed charges against the defendant Sabre GBLB Incorporated ("Sabre" or "Defendant") in the United States District Court, Northern District of Texas, Dallas Division on February 1, 2018 and by order of the court the case transferred on February 14, 2018 to Fort Worth Division in Tarrant County
3. Yoakum's leadership and comparable. Mr. Chris Wilding ("Wilding") Senior Vice President, Air Commerce (Tibor's Supervisor) Mr. Chad Tibor ("Tibor") Vice President, Air Commerce – (Yoakum's Supervisor) Ms. Rowena Capili ("Capili") Principle, Account Manager Air Commerce –(Comparable)
4. Sabre filed a motion for Summary Judgement pursuant to Rule 56 Federal Rules of Civil Procedure on November 16, 2018.

5. Plaintiff filed a motion and brief in opposition of defendant's motion for summary judgment on December 6, 2018. Defendant filed a reply in support of its motion for summary judgement on December 18, 2018.

"Citing *Turner v. Novartis Pharmaceuticals Corp.*, 442 F. (5th Cir. 2011), the Defendant suggests that Tibor's reviews and his decision to issue Yoakum a PIP cannot serve as adverse employment actions."

"In *Turner*, the court did not hold such decisions can never serve as adverse employment actions; rather, the court explained that the PIP could not serve this purpose where "[t]here [was] no evidence that Turner was demoted or received reduced compensation due to the PIP.""

"(Defendant ties decreased bonus to negative review) (PIP telegraphs impending demotion with change of job title and responsibilities). Yoakum further explained in his deposition that the PIP he received was effectively a termination letter."

"In March 2016, Yoakum received the 2015 bonus, which was part of his compensation through Sabre's Variable Compensation Plan ("VCP"). (VCP is one of the plans under which bonuses were paid). Upon receipt, Yoakum noticed that his 2015 payment was lower than that received in the previous two years. (Yoakum received a 2015 payment of \$1,728 compared to a 2014 payment of \$6,150 and a 2013 payment of \$6,648). When Yoakum asked his supervisor, Tibor, about this drop in pay, Tibor refused to look Yoakum in the eye while telling him that

bonuses were lower that year because "the company did not make its goals."'''

"The Defendant's only response in opposition to the application of the continuing violation doctrine appears to be that "Plaintiff conspicuously failed to check 'continuing action' on his charge." Such reliance on form over substance, however, is not one of the limitations on the doctrine recognized by the courts. See, e.g., *Stewart v. Miss. Transp. Comm'n*, 586 F.3d 321,328 (5th Cir. 2009) (continuing violation doctrine is limited in three ways: (1) plaintiff must demonstrate that separate acts are related or else there is no single violation that encompasses earlier acts, (2) violation must be continuing and intervening action by employer, among other things, that will sever acts that preceded it from those subsequent to it, precluding liability for preceding acts outside filing window, and (3) continuing violation doctrine is tempered by court's equitable powers, which must be exercised to honor Title VII's remedial purpose without negating particular purpose of charge-filing requirement)."

"The connection in the case at bar is evident from the beneficiary at the end of all of Yoakum's mistreatment-his female coworker, Capili. The rules that were imposed on Yoakum were not applied to Capili, compare R. App. 12:16-24, with *id.* at 13:1-3. The compensation through bonuses and stock options that Yoakum was denied inevitably

ended up being funneled to Capili. This was the case despite the fact that Capili was responsible for the very problems that were being attributed to the Plaintiff. See, e.g., R. App. 8:3-10:6. Tibor's preferential treatment of Capili even provided her with access to meetings where Yoakum's demotion and reassignment was planned. Id. at 6:19-7:"

6. District Court filed an opinion, order and final judgment granting the motion for summary judgment and dismissed all Yoakum's claims on December 19, 2018.

"For example, placing an employee on a performance improvement plan is not an adverse employment." "Plaintiff's receipt of a smaller bonus than in prior years was not connected to his PIP; nor was his failure to receive stock options. Those events were tied to his 2015 performance review, which took place a year before the PIP. "Further, plaintiff has nothing but his own speculation to support the contention that the PIP invariably would have resulted in his termination. Plaintiff resigned instead of making any effort whatsoever to improve his performance or even address what he considered to be unjust requirements." "In fact, the court is satisfied that this claim is frivolous. Plaintiff does not point to any evidence that even establishes the nature of the hostility he claims existed. There is no evidence that race played any role. His claim of sexual discrimination appears to be based solely on his speculation that Capili was conspiring with Tibor to harm plaintiff. See, e.g., Doc. 24 at R. App. 6-7, 24 (assuming "[s]he was sabotaging my work" refers to

Capili), 25- 26, 27. And, there is no evidence of the existence of a hostile work environment of the type that would support a claim at all.”

7. Yoakum filed a timely Notice to Appeal pro se with the District Court on January 18, 2019.
8. Yoakum filed a motion to file out of time on the Principle Brief it was GRANTED on May 29, 2019 and the Principle Brief was filed May 29, 2019.

The statement of issues presented for review on appeal were the following. “(1) Whether the plaintiff is similarly situated to his comparator? (2) Whether the continuing violations doctrine will be invoked for the hostile work environment and constructive discharge violations beyond the 300-day limitation period? (3) Whether the plaintiff established a prima facia case of discrimination? (4) Whether the Performance Improvement Plan (‘PIP’) is pretextual for discrimination and a tangible adverse job action? (5) Whether the discrimination forced a constructive discharge?”

9. Sabre GLBL filed an Appellee brief on June 28, 2019.
10. Yoakum filed a reply brief on July 19, 2019

Court of Appeals filed summary calendar PER CURIAM AFFIRMED see rule 47.6 on August 22, 2019

As the appellate court delivered no opinion there is no specificity in their affirmation of the district court. “Rule 47.6 Affirmance Without Opinion. The judgment or order may be affirmed or enforced without opinion when the court determines that an opinion would have no precedential value and that any one

or more of the following circumstances exists and is dispositive of a matter submitted for decision: (1) that a judgment of the district court is based on findings of fact that are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) in the case of a summary judgment, that no genuine issue of material fact has been properly raised by the appellant; and (5) no reversible error of law appears. In such case, the court may, in its discretion, enter either of the following orders:

"AFFIRMED. See 5TH CIR. R. 47.6." or "ENFORCED."

11. Yoakum filed a motion for leave to file petition for rehearing out of time which was GRANTED on September 24, 2019. Yoakum filed a petition for rehearing DENIED September 24, 2019.

REASONS FOR GRANTING THIS PETITION

1. The underserved performance improvement plan

In the District Court, Yoakum was a represented plaintiff and his attorney argued and shared the case law from the fifth and ninth circuits who recognize that with evidence an undeserved negative employee review and a performance improvement plan that demote or reduce compensation are considered an adverse employment action. The district court and appellate court believed the defendants proffered reason for placing Yoakum on the PIP “after receiving multiple customer complaints against Yoakum in 2016, Tibor placed Yoakum on a PIP” as noted in the district court’s opinion further noted *“Internal complaints had been lodged, as well as customer complaints”* This is testimonial evidence brought forward from the defendant in the declaration of Mr. Chad Tibor. However, there is no physical evidence brought forward by the defendant of internal or customer complaints lodged against Mr. Yoakum. No physical evidence from the defendant to prove their nondiscriminatory reason is their true motivation for placing Mr. Yoakum on PIP. The undisputed facts state in 2015 – 2016 Yoakum’s title was Principal Named Accounts and his pay consisted of salary and bonus. Under item 2 of the underserved PIP Yoakum had been demoted to Principal Account Manager and reprimanded for a delay to a project that took place when he was a Principle Named Accounts in October 2016. Yoakum was not a Principal Account Manager in October 2016 on this project, although he was on the project, his co-worker and comparator

Ms. Capili was the Principal Account Manager on this project. In the defendant's testimony as a reason for the demotion Mr. Tibor states it was a "reorganization that never occurred" this is referring to a meeting Mr. Tibor scheduled in November 2016 when he informed Mr. Yoakum of the demotion. However, that was 1 month after the delayed projected had completed in October 2016. After the November 2016 meeting, there was no more discussion about the demotion until the issuance of the underserved PIP in February 2017. This is when Mr. Wilding and Mr. Tibor documented the demotion by identifying Yoakum as the Principal Account Manager to reprimand him, even though Capili was the Principle Account Manager on the project, she was not reprimanded. In Yoakum's sworn testimony he states Mr. Tibor and Ms. Capili were conspiring against him. Mr. Tibor shared with Ms. Capili in her 2015 performance review that job changes in 2016 would inevitably occur and they were keeping a close eye on opportunities for Ms. Capili. Mr. Tibor required her to be included on all Mr. Yoakum's customer calls and meetings. Mr. Tibor was keeping a close eye out for Ms. Capili and Ms. Capili was motivated to keep her job and she sabotaged Mr. Yoakum's work

In 2016 Mr. Yoakum was subject to reduced compensation and demotion through issuance of an undeserved performance improvement plan and employee performance review. The underserved PIP is where the discrimination culminated and although the employee performance review is outside of the limitation period it is a continuation of discrimination that

connects to the underserved PIP and their reasons of motivation are disputed. The 4 elements of a prima facie case have been met 1) The plaintiff is a member of a protected group. 2) The plaintiff was qualified for the position he was performing 3) The plaintiff satisfying the normal requirements of the position. 4) The plaintiff singled out for discipline and discharge while a similarly situated employee was not comparably disciplined and retained.

“When there is a conflict in the underlying evidence material to the determination of the ultimate fact, there is of course a triable question for the jury.” “ [I]t is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.” *Summary Judgment Under Federal Rules*, 99 F.R.D. 465, 472 (N.D. Cal. 2008)

Mr. Wilding and Mr. Tibor provided 30 days in the PIP for Yoakum to improve but success would never be attainable or allowed. The PIP was Yoakum's notice of termination an after a year of harassment in 2016, from Mr. Wilding questioning his manhood, Mr. Tibor's underserved comments, yelling and criticism and the conspiracy between Mr. Tibor and Ms. Capili made for a hostile workplace feeling isolated it was incredibly unbearable. Yoakum had no other option their actions forced him to resign.

2. The undeserved employee performance review

Its Yoakum's sworn testimony, that the overall performance evaluation rating given to Yoakum for his 2015 performance is clearly misaligned with the goals he achieved in that same year. Further to his sworn testimony there is no documentation provided in the evaluation that would substantiate the comments made by Mr. Tibor about Mr. Yoakum. "Among [the] employment decisions that can constitute an adverse employment action are termination, dissemination of a negative employment reference, issuance of an undeserved negative performance review and refusal to consider for promotion. Brooks v. City of San Mateo, 229 F. 3d 917 - Court of Appeals, 9th Circuit 2000." Yoakum's sworn testimony states that he never has had a customer or internal complaint raised against him and this was Yoakum's first and only negative performance review in his career working for the defendant

It is also Yoakum's testimony that his supervisor Mr. Chad Tibor and his colleague who is an Asian female in a similarly situated role, Ms. Rowena Capili met bi-weekly and Ms. Capili shared with Mr. Tibor inaccurate information about Mr. Yoakum, which amounted to nothing more than gossip and innuendo meant to sabotage Mr. Yoakum's work. Mr. Tibor used this information against Mr. Yoakum in his 2015 performance evaluation as Mr. Tibor notes "he had received internal feedback." Further, evidence of their conspiring, Mr. Tibor informed Ms. Capili in her 2015 performance evaluation of forward looking information about job changes in 2016 about keeping his

eyes open for opportunities and about job changes which would enviably occur, yet Mr. Tibor did not shared the same information with Yoakum in his 2015 evaluation. Further, in Yoakum's sworn testimony, he found out from a co-worker, that Ms. Capili told this co-worker, but only after he had retired, that she had a voice in the decision of Yoakum's demotion.

Even though Mr. Yoakum voiced his disagreement with his 2015 performance review it was met with Mr. Tibor's accepting no changes and offering no documentation to substantiate his comments about Mr. Yoakum. Mr. Tibor controlled Mr. Yoakum's overall performance score because the defendant weights the company values section at fifty percent of the total score. This gave Mr. Tibor the opportunity of using this subjective values section to manipulate the review and to achieve a 'partially successful' overall score for Mr. Yoakum. While Yoakum never agreed with his 2015 overall evaluation score it was electronically signed and submitted without Yoakum's knowledge or approval a month after it was issued. The underserved negative performance review also became the defendants second proffered reason for negatively affecting Mr. Yoakum's compensation in the form of a significantly reduced, disproportioned annual bonus and for not awarding him with stock options in March 2016. As Mr. Tibor testified, if Mr. Yoakum had a better than "partially successful." overall performance score, his bonus would have been larger, and he would have received stock option awards. However, Ms. Capili had an exceptional overall performance, Mr. Tibor also relying on the values section

to reach her overall performance score. This action by Mr. Tibor and Mr. Wilding gave Mr. Yoakum the feeling of intentional harassment discrimination and with using gossip obtained from the comparator to negatively evaluate Yoakum and adversely affect his compensation. This was exceptionally egregious because Ms. Capili received a larger bonus and stock options for sabotaging Mr. Yoakum's work. When Mr. Wilding and Mr. Tibor imposed this action on Mr. Yoakum it created the hostile work environment. Due to the conspiring between Mr. Tibor and Ms. Capili made the entire work environment of deception and distrust made it difficult to get work done until Yoakum was forced to resign in February 2017.

3. The rulings and Amendment VII

"When ruling on a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,255 (1986); see also *Tucker v. Collier*, 906 FJd 295, 302 (5th Cir. 2018) ("[T]he court views all facts and evidence in the light most favorable to the nonmoving party."). The trial court must also refrain from either making credibility determinations or weighing the evidence. *S. Ins. Co. v. Affiliated FM Ins. Co.*, 830 FJd 337,343 (5th Cir. 2016) (citing *Gray v. Powers*, 673 F.3d 352, 354 (5th Cir. 2012)). Summary judgment may be rejected "in cases where motive, intent, subjective feelings and reactions, consciousness and conscience (are) to be searched, and examination and cross-examination (are) necessary instruments in obtaining

the truth." Jones v. Borden Co., 430 F.2d 568,574 (5th Cir. 1970) (quoting Ala. Great S. R.R. v. Louisville & Nashville R.R., 224 F.2d 1, 5 (5th Cir. 1955)).

In the district court opinion, Yoakum's claims of harassment were recognized as frivolous and Yoakum's certified and sworn testimony was viewed as speculation. In the declaration of Mr. Chad Tibor, the defendant's statements attack Yoakum's character and if these statements were taken as truth it would call Mr. Yoakum's credibility into question. These statements are recognized in the undisputed facts of the district court's opinion "he was regularly late to calls and meetings" "internal complaints had been lodged, as well as customer complaints." "significant improvement was needed" these statements require examination and cross examination because they are historical facts in dispute and are material to the ultimate fact, which is not a question of law, but they questions that need to be determined by a jury. Even though the defendant does not have to prove the articulated proffered reasons were not discrimination, the law does require the party bring forward sufficient admissible evidence to support a particular proposition of fact to satisfy the burden of production.

When James Madison drafted Amendment VII and included it into the Bill of Rights which was added to our United States Constitution on September 5, 1789 and was voted for by 9 out of 12 states on December 15, 1791. This shows the Framers had remarkable foresight, they understood the importance of protecting our civil liberties and maintaining a fair court

system. These reasons are why Amendment VII is a fundamental law of this country and why it remains just as important in the year 2019.

CONCLUSION

This petition for a Writ Of Certiorari should be granted.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Timothy C. Yoakum", written in a cursive style.

Timothy C. Yoakum, *pro se*

APPENDIX A

In The United States Court Of Appeals For The

Fifth Circuit

No. 19-10067

Summary Calendar D.C. Docket No. 4:18-CV-127

TIMOTHY C. YOAKUM,

Plaintiff – Appellant

v.

SABRE GLBL INCORPORATED,

Defendant - Appellee

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

FILED

AUGUST 22, 2019

LYLE W. CAYCE CLERK

**Appeal from the United States District Court for the
Northern District of Texas**

JUDGMENT

**This Before WIENER, HAYNES, and COSTA, Circuit
Judges.**

**Cause was considered on the record on appeal and the
briefs on file. It is ordered and adjudged that the judgment
of the District Court is affirmed. See Rule 47.6.**