

FILED
United States Court of Appeals
Tenth Circuit

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

MAR 23 1989

ROBERT L. HOECKER
Clerk

LESLIE C. WASHINGTON,
Plaintiff/Appellant,

v.

TOM C. MARTIN, Warden of El Reno
Federal Penal Institution;
LEE KNOWLES, individually and
in his official capacity;
H.S. KAHL, a/k/a STEVE KAHL,
a/k/a HARVEY STEVEN KAHL,
individually and in his official
capacity; NORMAN CARLSON, in
his official capacity,
Defendants/Appellees.

Nos. 86-1982
87-2872
(W.D. Oklahoma)
D.C. No. 85-1977

ORDER AND JUDGMENT*

Before ANDERSON and BRORBY, Circuit Judges, and O'CONNOR,**
District Judge.

Leslie C. Washington was terminated from his position as a
cook foreman at the Federal Correctional Institution, El Reno,
Oklahoma for "unsatisfactory performance." Subsequently, he filed
this action against the director of the Bureau of Prisons,

* This order and judgment has no precedential value and shall
not be cited, or used by any court within the Tenth Circuit,
except for purposes of establishing the doctrines of the law of
the case, res judicata, or collateral estoppel. 10th Cir. R.
36.3.

** Hon. Earl E. O'Connor, Chief Judge, U.S. District Court,
Kansas, sitting by designation.

alleging that his discharge was racially motivated in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. The case was tried to the district court which made findings of fact and conclusions of law, and entered judgment against Washington on May 29, 1986. Washington filed a timely appeal from that judgment on June 30, 1986.

On May 27, 1987, one year after the entry of judgment, and during the pendency of this appeal, Washington filed in the district court a "Motion for Relief from Final Judgment" pursuant to Fed. R. Civ. P. 60(b), in which he alleged ineffective assistance of counsel and newly discovered evidence. That motion was denied by the district court on August 11, 1987. On August 21, 1987 Washington filed a Fed. R. Civ. P. 59 "Motion for New Trial" with respect to the court's adverse ruling on the Fed. R. Civ. P. 60(b) motion, and on September 8, 1987 he filed a motion seeking further discovery. On October 19, 1987 those motions were denied. Washington appealed from those denials on December 18, 1987 and that appeal has been consolidated in this court with Washington's earlier appeal.

Washington's appeal from the underlying judgment proceeds mostly on factual grounds. He strenuously asserts that the district court's findings of fact are clearly erroneous, among other things in that they are contradictory, one-sided, omit critical evidence, and fail to take into account differences in treatment between Washington and other employees. Washington develops this theme at length, including extensive attachments to

his brief. In effect he retries his case to this court, repeatedly characterizing adverse testimony as self-serving, and complaining that his own testimony was not credited by the district court. In reviewing questions regarding fact findings by the trial court, we are limited by settled standards of review. The United States Supreme Court has held that:

"Because a finding of intentional discrimination is a finding of fact, the standard governing appellate review of a district court's finding of discrimination is that set forth in Federal Rule of Civil Procedure 52(a): 'Findings of fact shall not set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.'"

Anderson v. City of Bessemer City, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

In reviewing whether or not the district court's finding of an absence of intentional discrimination was clearly erroneous, we are mindful of the following language from the Supreme Court's decision in Anderson v. City of Bessemer City, 470 U.S. at 573-74, 105 S.Ct. at 1511-12:

"Although the meaning of the phrase 'clearly erroneous' is not immediately apparent, certain general principles governing the exercise of the appellate court's power to overturn findings of a district court may be derived from our cases. The foremost of these principles . . . is that '[a] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed 746 (1948). This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court.

'In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo.' Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123, (1969). If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."

Where findings of the trial court, as in the matter before us, are based in fairly significant part upon credibility determinations, the care with which we review such findings is heightened:

"When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said. This is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination. But when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error."

Anderson v. City of Bessemer City, 470 U.S. at 575, 105 S. Ct. at 1512 (citations omitted).

We have carefully reviewed the record in this case. Applying the standard of review by which we are bound, we conclude that the

district court's findings and conclusions, and in particular the ultimate conclusion that Washington's discharge was not racially motivated, do have support in the record and are not clearly erroneous.¹

On appeal Washington has discovered a new issue which he urges us to consider although it was not contained in his complaint or presented to the district court. For that matter, it was apparently not presented to the Merit System Protection Board in Washington's earlier, unsuccessful proceeding in that forum. He alleges that "[b]oth the manner in which defendants hired and terminated plaintiff Washington appear to be in violation of applicable Federal Statutes [sic] and applicable provisions of the Code of Federal Regulations," citing 5 U.S.C. § 3321, 5 C.F.R. §§ 315.502, 315.301, 315.201, 315.901, 315.907, and the Federal Personnel Manual, chapter 315, sub-chapter 8. Appellant's Brief in Chief at 31-34. He contends that the district court had a duty on its own motion to erect and consider the issues of fact and law raised by the circumstances of plaintiff's hiring and termination, as outlined above, and at least give those circumstances "substantial weight" in determining discriminatory intent. He argues that the district court's failure to do so constitutes

¹ Washington also argues that the district court erred as a matter of law in not finding that a prima facie case was made out. We need not resolve this issue since the district court proceeded with a trial on the merits. In such circumstances disputes about the prima facie case fall away. See, e.g., Kier v. Commercial Union Insurance Cos., 808 F.2d 1254, 1257 (7th Cir.), cert. denied, 481 U.S. 1029 (1987); Morgan v. South Bend Community School Corp., 797 F.2d 471, 480 (7th Cir. 1986). See also United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 713-15, 103 S.Ct. 1478, 1480-82, 75 L.Ed.2d 403 (1983).

fundamental error. We reject that argument. The plaintiff has both the responsibility and discretion to choose and delineate his cause or causes of action. The district court has no duty to make the plaintiff's case for him. Rather, the court's duty is to sit in judgment on the issues presented. No "fundamental error" was committed by the district court.

Furthermore, we generally will not address on appeal issues which were not fairly raised at trial. Gundy v. United States, 728 F.2d 484, 480 (10th Cir. 1984); Kenai Oil & Gas, Ins. v. Dept. of the Interior, 671 F.2d 383, 388 (10th Cir. 1982).

Although the appellee calls into question (as did the district court) the jurisdictional aspects of Washington's Fed. R. Civ. P. 59(a) motion to reconsider the district court's ruling on Washington's Fed. R. Civ. P. 60(b) motion, including the issue of whether the time for appeal was tolled, we elect to assume jurisdiction and rule on the merits. We hold that the district court did not abuse its discretion in denying Washington's various post trial motions. As to Washington's complaints about his trial counsel, we find them unpersuasive and unavailing under Fed. R. Civ. P. 60(b). Additionally, this circuit has ruled that ineffective assistance of counsel is not a ground for a new trial in a civil case. MacCuish v. United States, 844 F.2d 733, 735-36 (10th Cir. 1988). As for the "newly discovered evidence" consisting of a "post-it" note referring to Washington's work, the district court fully explained in its August 11, 1987 order why the note did not furnish grounds for relief under Fed. R. Civ. P.

60(b). The court clearly did not abuse its discretion by denying Washington's motion.

We have considered all of the arguments raised by Washington. While they are urgently and sincerely advanced, they are insufficient to overcome the decisions of the district court. The judgment and subsequent orders of the district court are AFFIRMED.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge