Kim v. Dial Service Intern., Inc.
United States Court of Appeals, Second Circuit. | June 11, 1998 | 159 F.3d 1347 *(Approx. 4 pages)*

appearing in the Federal Reporter. See Federal Rule of Appellate Procedure 32.1 and this court's local Rule 32.1.1. for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Second Circuit.

Charles D. KIM, Plaintiff-Appellee,

Return to list 77 of 156 results Search term

Yuri Konno, Defendants-Appellants.

No. 97-9142. | June 11, 1998.

Attorneys and Law Firms

APPEARING FOR APPELLANTS: Ronald M. Green,Epstein Becker & Green, P.C., New York, N.Y. (Lawrence Peikes, William J. Milani, May Elizabeth Cisneros, of counsel)

APPEARING FOR APPELLEE: John A. **Beranbaum**, New York, N.Y. (Michael D. Paley, of counsel)

PRESENT: JAMES L. OAKES, THOMAS J. MESKILL, JOSÉ A. CABRANES.Circuit Judges.

Opinion

SUMMARY ORDER

*1 This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York (Denise L. Cote, *Judge*), and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED.

Plaintiff Charles Kim, a Korean-American, brought suit against his former employer Dial Service International ("DSI"), a Japanese-owned company, as well as its parent company in Japan (Dial Service Company, Ltd., or "DSC"), and the owner and Chief Executive Officer of DSI and DSC (Yuri Konno), alleging employment discrimination on the basis of race, national origin, and age, in addition to bringing claims for breach of contract and quasi-contract. Defendants appeal from so much of an order of the district court as denied their motion for judgment as a matter of law or a new trial following a jury verdict in favor of plaintiff on his claim of race discrimination under 42 U.S.C. § 1981.

Defendants assert that, insofar as plaintiff's claim of race discrimination is based on wage differentials between him and DSI employees of Japanese descent, this claim is not viable because it originates from actions taken prior to November 21, 1991, the effective date of the Civil Rights Act of 1991. Prior to that date, § 1981 was construed strictly to apply only to claims of racial discrimination in the formation and enforcement of contracts. *See Patterson v. McLean Credit Union,* 491 U.S. 164, 179-80, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989). The Civil Rights Act of 1991 expanded the scope of § 1981 to cover racial discrimination in the terms and conditions of employment as well. *See* Pub.L. 102-166, § 101, 105 Stat. 1071 (1991). In *Rivers v. Roadway Express, Inc.,* 511 U.S. 298, 313, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994), the Supreme Court held that this provision of the Civil Rights Act of 1991 does not apply retroactively. Plaintiff's claim of wage discrimination dates back to November 1990, when he was promoted to vice president but was paid a salary substantially lower than the salaries of vice presidents of Japanese descent. Defendants argue that, inasmuch as the Civil Rights Act of 1991 does not apply retroactively, plaintiff's claim is barred. This argument ignores the principle stated by the Supreme Court in *Bazemore v. Friday,* 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986), a Title VII case which characterized the harm imposed by a racially discriminatory pay scale by stating that "[e]ach week's paycheck that delivers less to a [disadvantaged class member] than to a

similarly situated [favored class member] is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date" of limitation. *Id.* at 395-96 (Brennan, *J.*, concurring in part, joined by all other members of the Court); *see also Pollis v. New School for Social Research,* 132 F.3d 115, 119 (2d Cir.1997). "Under this view, each continuation or repetition of the wrongful conduct may be regarded as a separate cause of action for which suit must be brought within the period beginning with its occurrence." *Pollis,* 132 F.3d at 119 (internal quotation marks and citation omitted).

2 This view of discriminatory pay scales disposes of defendants' "retroactivity" argument, because plaintiff's claim did not arise at a single point in time prior to the effective date of the Civil Rights Act of 1991, but arose with "each continuation or repetition" of discriminatory pay. This principle similarly disposes of defendant's argument that, because suit was not filed until May 1996, over five years after plaintiff's first discriminatory paycheck was issued, plaintiff's claim is barred by the three-year statute of limitations applicable to § 1981 suits in New York, *see Tadros v. Coleman,* 898 F.2d 10, 12 (2d Cir.), *cert. denied,* 498 U.S. 869, 111 S.Ct. 186, 112 L.Ed.2d 149 (1990). Again, under *Bazemore,* each discriminatory paycheck constituted a new violation for which suit could be brought within the statute of limitations period beginning with its occurrence.

Defendants are correct, however, to argue that even if plaintiff's claim of discriminatory pay was not barred by the three-year statute of limitations, the jury's award of back pay should have been limited to the three-year period preceding the initiation of plaintiff's suit. This becomes clear from our recent decision in *Pollis*-which, we note, was published after the district court's opinion in this case. Although in cases of "continuing violations" of the anti-discrimination laws we have upheld awards of relief for injuries sustained prior to the beginning of the limitations period, *see Acha v. Beame,* 570 F.2d 57, 65 (2d Cir.1978), we explained in *Pollis* that such relief is not available for a claim of discriminatory pay, which "is fundamentally unlike other claims of ongoing discriminatory treatment because it involves a series of discrete, individual wrongs rather than a single and indivisible course of wrongful action." 132 F.3d at 119. Hence, while each paycheck amounts to a new wrong from which the statute of limitations runs anew, the statutory period still delimits the time frame within which back pay can be recovered. *See id.* (in Equal Pay Act case, "join[ing] the other circuits to have considered the issue, which have unanimously adopted the reasoning of *Bazemore* and concluded that backpay cannot be recovered under the Equal Pay Act for salary differentials outside the limitations period.... [A] plaintiff who complains of willful violation of the Equal Pay Act over a ten-year period of employment is not barred from bringing suit but should not be allowed to collect for damages outside the three-year limitations period.") (internal quotation marks and citation omitted); *cf. Klehr v. A.O. Smith Corp.,* 521 U.S. 179, ---- - ----, 117 S.Ct. 1984, 1990-91, 138 L.Ed.2d 373 (1997) (referring to principle of antitrust law, and adopting it in civil RICO case, that "each overt act that is part of the violation and that injures the plaintiff ... starts the statutory period running again ... [b]ut the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period").

3 Accordingly, defendants are correct to argue that plaintiff cannot recover back pay for any period that extends beyond the three-year statute of limitations. However, a remand to the district court is unnecessary inasmuch as defendants conceded before the district court that the jury's award of $170,000 in back pay did not include payments for any period more than three years prior to the initiation of suit in May 1996. During a post-trial hearing regarding the amount of pre-judgment interest to apply to the back pay award, defendants explained the jury's $170,000 back pay award by arguing that "the only reasonable conclusion to come to is that the jury decided Mr. Kim was entitled to $85,000 a year and decided to award him that figure for the two-year period of time from July of 1995 when he was terminated until the approximate time of trial." The court subsequently adopted defendants' view in calculating pre-judgment interest. Defendants are therefore barred from claiming that some portion of the back pay award was intended to compensate plaintiff for a period of time prior to May 1993. *See Bates v. Long Island R.R. Co.,* 997 F.2d 1028, 1038 (2d Cir.1993) (party judicially estopped from raising argument where the party "argued an inconsistent position in a prior proceeding" and "the prior inconsistent position [was] adopted by the court in some manner").

Apart from these timeliness arguments, defendants argue that they are entitled to judgment as a matter of law because of the inadequacy of plaintiff's evidence of race discrimination. Although plaintiff's evidence was not by any means overwhelming, substantially for the reasons stated by the district court we are not persuaded that "there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or ... [that] there is such an overwhelming

amount of evidence in favor of the movant that reasonable and fair minded persons could not arrive at a verdict against it," *Eagleston v. Guido,* 41 F.3d 865, 875 (2d Cir.1994) (internal punctuation and citation omitted), *cert. denied,* 516 U.S. 808, 116 S.Ct. 53, 133 L.Ed.2d 18 (1995). *See Kim v. Dial Service Int'l, Inc.,* No. 96-Civ-3327, 1997 WL 458783, at *8 (S.D.N.Y. Aug.11, 1997). Substantially for the reasons stated by the district court, we also reject defendant's argument that a new trial is required because of inconsistent verdicts. *See id.* at *7.

Defendants also raise four challenges to the court's jury instructions: (1) the instructions confusingly blended together the standards in so-called "pretext" cases and those in so-called "mixed motives" cases, *see generally Fields v. New York State Office of Mental Retardation and Developmental Disabilities,* 115 F.3d 116, 119-20 (2d Cir.1997) (comparing these two broad categories of discrimination cases); (2) to the extent that this was a "mixed motives" instruction, plaintiff's evidence was insufficient to warrant such an instruction; (3) to the extent that this was a "pretext" instruction, the court understated plaintiff's burden of proof in a "pretext" case; and (4) the court failed to instruct the jury on the so-called "same actor" inference.

***4** Although aspects of the court's charge might suggest that it was treating this as a "pretext" case, we are satisfied that the instructions on the whole accurately stated the requirements for a "mixed motives" case without confusing the two tests in a way that would be prejudicial to defendants. Moreover, we do not believe that the court erred in issuing a "mixed motives" instruction. Such an instruction is warranted where, *inter alia,* there is "evidence of statements or actions by decisionmakers that may be viewed as *directly reflecting* the alleged discriminatory attitude." *Raskin v. Wyatt Co.,* 125 F.3d 55, 60-61 (2d Cir.1997) (internal quotation marks and citation omitted). Among the direct evidence presented in this case was a memorandum written by DSC General Manager Shohei Ito, and forwarded to the then-President of DSI by Konno, which made a disparaging remark about Koreans. Testimony was adduced at trial that tended to show that Ito was a "decisionmaker" for purposes of the actions upon which plaintiff's claims of discrimination are based. Under these circumstances, we cannot say that the court erred by giving a "mixed motives" instruction.

Finally, we are not persuaded that a new trial is required based on the court's failure to instruct the jury that it could consider, as a factor weighing against a finding of discrimination, that the "same actor" (*i.e.,* Konno) made the decision to hire and fire plaintiff. Although we have recognized the validity of this "same actor" argument, *see Grady v. Affiliated Central, Inc.,* 130 F.3d 553, 560 (2d Cir.1997), we do not believe that defendants were prejudiced by the court's refusal to give an instruction on this issue, particularly inasmuch as over six years had passed between the time plaintiff was hired and the time he was fired. *See id.* ("same actor" inference particularly appropriate "when the firing has occurred only a short time after the hiring"). Notably, although the court told defendants that they remained free to make the "same actor" argument to the jury, defendants failed to rely on this allegedly crucial aspect of their case in their closing argument.

We have considered all of defendants' other arguments, and find them to be without merit.

Parallel Citations

1998 WL 514297 (Table)

End of Document