United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-7159 **September Term, 2015**

FILED ON: DECEMBER 22, 2015

JIANQING WU, AND ALL OTHERS SIMILARLY SITUATED,
APPELLANT

v.

SPECIAL COUNSEL, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:14-cv-00376)

Before: GARLAND, *Chief Judge*, BROWN, *Circuit Judge*, and SENTELLE, *Senior Circuit Judge*.

J U D G M E N T

This appeal from the United States District Court for the District of Columbia was considered on the record and the briefs from the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is

ORDERED AND ADJUDGED that the district court's orders filed July 16, 2014 and September 12, 2014 be affirmed.

Appellant Jianqing Wu is an attorney proceeding *pro se*. He is a native Mandarin speaker who sought positions performing Mandarin document review at defendant law firms, Willkie Farr & Gallagher LLP and Morrison & Foerster LLP. He applied for these positions through defendant staffing agencies, Special Counsel, Inc. and Hire Counsel Inc., which each required him to sit for a Chinese language exam administered and developed by the fifth defendant ALTA Language Services. Wu alleged that a passing grade on the exam was 90%. Both times he took the exam, he received a score of 75%, and he was not offered a position at either firm. He alleged that ALTA's language tests discriminated on the basis of age in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, and on the basis of national origin and race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* He also asserted state law claims for breach of contract and negligence against

ALTA. The district court granted the Defendants' motions to dismiss, holding that Wu failed to state a claim on his federal claims and declining to exercise supplemental jurisdiction over the remaining state law claims.

Wu's appellate briefs do not discuss his intentional discrimination and state contract and negligence claims. Nor do they address his claim of disparate impact based on race. He has therefore waived any challenge to their dismissal. *See World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1160 (D.C. Cir. 2002). This leaves only his claims of disparate impact based on national origin and age.

Wu's underlying contention is that the test disproportionately favors non-native speakers with little experience and poor language skills, and in that way disproportionately disadvantages older candidates from China. Leaving aside the dubious plausibility of firms intentionally using a test that skews in favor of incompetence (as he alleges) -- which is alone sufficient ground for dismissal under Rule 12(b)(6), *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) -- Wu's complaint fails for another reason as well.

As the district court correctly noted, to sustain a disparate impact claim, a "plaintiff must generally demonstrate with statistical evidence that the practice or policy has an adverse effect on the protected group." *Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep't of Hous. & Urban Dev.*, 639 F.3d 1078, 1085-86 (D.C. Cir. 2011) (citation omitted). Although neither prima facie proof nor detailed factual allegations are necessary to withstand a Rule 12(b)(6) motion, *see Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 555-56, a complaint must nonetheless contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Iqbal*, 556 U.S. at 678, and "must be enough to raise a right to relief above the speculative level," *Twombly*, 550 U.S. at 555.

Wu's complaint fails these requirements. It contains not a hint that he has or can obtain statistical evidence that ALTA's tests have the disparate impacts he claims. Instead, the complaint relies on anecdotal evidence, principally sourced to blog posts, which he supplements in his appellate briefing with hypothetical "simulations" of his own invention. Such evidence would not -- under our case law -- permit a reasonable inference of disparate impact. Although Wu need not present statistical evidence in his complaint, he must be able to present such evidence at some point. *Greater New Orleans Fair Hous. Action Ctr.*, 639 F.3d at 1085-86. And Wu's briefs confirm that he will not be able to do so. In the industry in which he seeks employment, Wu states, "impartial statistical data are unavailable and valid statistical proof is impossible." Wu Br. 10. So, too, he suggests, is evidence of any relevant "comparators." Reply Br. 21. In making these concessions, Wu has effectively "ple[d] himself out of court" by making clear that he cannot prove the facts necessary to sustain his cause of action. *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1116 (D.C. Cir. 2000).

Pursuant to D.C. CIRCUIT RULE 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk