

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1853
Summary Calendar

ROBERT ALCALA,

Plaintiff-Appellant,

VERSUS

DALLAS COUNTY SHERIFF'S DEPARTMENT,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(3:90 CV 2587 T)

(March 12, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

Robert Alcala sued the "Dallas County Sheriff's Department" under title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, alleging employment discrimination on the basis of race. The district court granted the defendant's motion for summary judgment based upon the defendant's assertion that it is not a separate legal entity subject to suit in a title VII ac-

* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

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The district court is correct. Alcalá has pointed us to no case in which a Texas sheriff's department has been deemed a legal entity for purposes of defending in an action such as the instant one.

In *Darby v. Pasadena Police Dep't*, 939 F.2d 311, 313-14 (5th Cir. 1991), we held that, in a title VII case, "[i]n order for a plaintiff to sue a city department, it must enjoy a separate legal existence." (Citation and internal quotation marks omitted.) "Accordingly, our cases uniformly show that unless the true political entity has taken explicit steps to grant the servient agency with jural authority, the agency cannot engage in any litigation except in concert with the government itself." *Id.* (citations omitted). As in *Darby*, Alcalá "has failed to show that [Dallas County] ever granted its [sheriff's] department the capacity to engage in separate litigation. His suit, as it stands, seeks recovery from a legal entity that does not exist for his purposes." *Id.* at 314.

Alcalá claims that, even if the sheriff's department is not the appropriate legal entity for a title VII suit, the district court should have allowed him to amend his suit to include Dallas County as a defendant. Alcalá has had ample opportunity to do so and, in fact, never until now has even asked for the chance to amend. This is in spite of the fact that the defendant's motion for summary judgment plainly raised the fact that the department is not the proper entity for suit.

In *Darby*, the plaintiff, in response to the defendant's motion to dismiss based upon the fact that the wrong entity had been served, requested leave to amend, but the district court denied permission. We reversed, concluding that the district court should have allowed an amendment and noting that the defendant had waited two and one-half years to raise the issue. In *Chancery Clerk of Chicksaw County, Miss. v. Wallace*, 646 F.2d 151, 159-61 (5th Cir. Unit A Mar. 1981) (on petition for rehearing), we remanded to allow for amendment to reflect the proper public officials as defendants, observing that the defendant had raised the defect for the first time on appeal.

Here, on the other hand, the defendant raised the issue in its original answer, then in its motion for summary judgment. At no time, in the district court, did Alcalá request leave to amend to change the designation of the defendant. Just as we held in *Chancery Clerk of Chicksaw County, Miss.*, that the defendant had waited too long to assert a defect in the designation of parties, we conclude here that Alcalá has foregone his opportunity to seek to amend. The summary judgment, accordingly, is AFFIRMED.