UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-2038

(Summary Calendar)

ANTHONY O. HURMAN,

Plaintiff-Appellant,

VERSUS

PORT OF HOUSTON AUTHORITY, ET AL.,

Defendants,

PORT OF HOUSTON AUTHORITY,

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Texas
CA H 90 3900

(March 26, 1993)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Plaintiff, Anthony O. Hurman, proceeding pro se and in forma pauperis, brought an employment discrimination suit against his employer, Port of Houston Authority (the "PHA"). Hurman appeals the district court's sua sponte order dismissing his suit for failure to prosecute. Finding that the district court abused its

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* 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 Pursuant to that rule, the court had determined that this opinion should not be published.

discretion by dismissing Hurman's suit with prejudice, we reverse and remand.

Hurman also appeals the district court's denial of his two motions for court-appointed counsel. We affirm the district court's order denying Hurman's first motion for court-appointed counsel. Because the district court did not enter an order disposing of Hurman's second motion for court-appointed counsel, we remand for entry of an order disposing of this motion.

I

Hurman, an African-American employee of the PHA, filed an employment discrimination complaint with the Equal Employment Opportunity Commission ("the EEOC"), alleging that the PHA failed to promote him and discharged him because of his race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1988). The EEOC issued Hurman a right-to-sue letter.

On December 18, 1990, Hurman filed a Title VII suit against the PHA in federal district court.[1] Hurman and the PHA attended a

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[1] The ensuing litigation proceeded as follows:

1. On December 18, 1990, Hurman also filed an application to proceed in forma pauperis, which the district court granted.
2. On January 11, 1991, Hurman filed an amended complaint, adding the EEOC as a defendant.
3. On March 15, 1991, Hurman filed a motion for appointment of counsel.
4. On March 19, 1991, the EEOC filed a motion to dismiss Hurman's claims against it, pursuant to Fed. R. Civ. P. 12(b)(1), (5)-(6).
5. On March 22, 1991, the district court denied Hurman's motion for appointment of counsel.
6. On April 8, 1991, Hurman submitted to deposition by the PHA.
7. On April 15, 1991, the district court granted the EEOC's motion to dismiss.
8. On May 9, 1991, Hurman filed a second request for court-appointed counsel. He also filed a motion for reconsideration of the district court's order granting the EEOC's motion to dismiss. Further, the motions were accompanied by a letter from Hurman to the district court, in which he claimed that he had not been informed by

pretrial conference on April 10, 1991, at which they agreed upon a schedule and deadlines. The schedule and deadlines were incorporated into a scheduling order, which was entered on April 15, 1991. The scheduling order required each party to file a pretrial order by September 15, 1991, and to appear at docket call on September 27, 1991. The PHA filed a proposed pretrial order on September 16, 1991. Hurman failed to file a pretrial order and failed to appear at docket call. As a result, on October 4, 1991, the district court sua sponte dismissed Hurman's complaint against the PHA for failure prosecute.[2] Hurman appeals.[3]

II

A

(i)

Hurman claims that the district court abused its discretion in dismissing his case for failure to prosecute. Federal Rule of Civil Procedure 16(f) provides that the court may impose sanctions

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the court that the EEOC's motion had been granted, or that his motion for appointment of counsel had been denied.
9. On August 13, 1991, the PHA filed a motion for summary judgment.
10. On August 26, 1991, Hurman responded to the PHA's summary judgment motion. On September 5, 1991, the PHA filed a response to Hurman's response. Hurman then filed a response to the PHA's response. The district court denied the PHA's motion for summary judgment on September 9, 1991.

[2] The district court noted that although Hurman was appearing pro se, he "was advised completely and clearly . . . of his obligations to prosecute his case and to comply with the requirements of the scheduling order." Record on Appeal at 156.

[3] The EEOC filed a brief on appeal, asserting that the district court did not err in granting its motion to dismiss. Hurman has appealed only the order dismissing his suit against the PHA for failure to prosecute. Therefore, the propriety of the district court's order granting the EEOC's motion to dismiss is not before this Court.

for failure to obey a scheduling or pretrial order. Fed. R. Civ. P. 16(f). One of the authorized sanctions, by reference to Fed. R. Civ. P. 37(b)(2)C), is dismissal of the case. The same criteria developed for evaluating dismissals for failure to prosecute under Rule 41(b) are applied to Rule 16(f) cases. *Price v. McGlathery*, 792 F.2d 472, 474 (5th Cir. 1986); *Callip v. Harris County Child Welfare Dept.*, 757 F.2d 1513, 1518-19 (5th Cir. 1985). Rule 41(b) permits the district court to dismiss an action on its own motion, or that of the defendant, for failure to prosecute. *Berry v. CIGNA/RSI-CIGNA*, 975 F.2d 1188, 1190-91 (5th Cir. 1992); *Morris v. Ocean Systems*, 730 F.2d 248, 251 (5th Cir. 1984); *Rogers v. Kroger Co.*, 699 F.2d 317, 319-20 (5th Cir. 1982). This authority is based on the "courts' power to manage and administer their own affairs to ensure the orderly and expeditious disposition of cases." *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31, 82 S. Ct. 1386, 1389, 8 L.Ed.2d 734 (1962), *see also Berry,* 975 F.2d at 1190 (quoting *Wabash R.R. Co.*).

(ii)

To determine the proper standard of review, we first determine whether the district court's order effectively dismissed Hurman's claim with prejudice. The district court's order of dismissal for failure to prosecute does not state whether Hurman's suit was dismissed with or without prejudice. Because the relevant statute of limitations had run at the time of dismissal, we treat the dismissal as a dismissal with prejudice. *See Berry,* 975 F.2d at 1191 (where plaintiff was time-barred from bringing another Title

VII claim, we treated dismissal without prejudice as a dismissal with prejudice); *Morris,* 730 F.2d at 252 (where plaintiff was time-barred from bringing another claim under the Jones Act and district court did not specify whether dismissal was with or without prejudice, we treated dismissal as dismissal with prejudice).

Furthermore, a civil action under Title VII must be brought within ninety days of receipt of a right-to-sue letter from the EEOC. 42 U.S.C. §2000e-5(f); *Price v. Digital Equip. Corp.,* 846 F.2d 1026, 1027 (5th Cir. 1988). If a Title VII complaint is timely filed pursuant to an EEOC right-to-sue-letter and is later dismissed, the timely filing of the complaint does not toll the ninety-day limitations period. *See Digital Equip. Corp.,* 846 F.2d at 1027 (where plaintiff's Title VII suit had been dismissed for failure to prosecute, ninety-day limitations period had not been tolled by timely filing of Title VII suit, and second Title VII lawsuit was time-barred).

We review a dismissal with prejudice for failure to prosecute for abuse of discretion. *Berry*, 975 F.2d at 1191; *McGlathery*, 792 F.2d at 474; *Callip*, 757 F.2d at 1519. A dismissal with prejudice is an extreme sanction as it bars further litigation of the plaintiff's claim. Therefore, this Court has limited the district court's discretion in dismissing cases with prejudice. *Berry*, 975 F.2d at 1191; *McGlathery*, 792 F.2d at 474; *Callip*, 757 F.2d at 1519.

We will affirm an order dismissing a case with prejudice for failure to prosecute only when (1) there is a clear record of delay or contumacious conduct by the plaintiff, and (2) the district court has expressly determined that lesser sanctions would not prompt diligent prosecution, or the record shows that the district court employed lesser sanctions that proved to be futile. *Berry*, 975 F.2d at 1191; *McGlathery*, 792 F.2d at 474; *Callip*, 757 F.2d at 1519-21. A clear record of delay is established by "significant periods of inactivity." *Morris*, 730 F.2d at 252; *see also Berry*, 975 F.2d at 1191 n.5 (quoting *Morris*). Additionally, when this Court has affirmed dismissals with prejudice for failure to prosecute, we found at least one of three aggravating factors: "(1) delay caused by [the] plaintiff himself and not his attorney; (2) actual prejudice to the defendant; or (3) delay caused by intentional conduct." *McGlathery*, 792 F.2d at 474; *see also Berry*, 975 F.2d at 1191 (quoting *McGlathery*); *Callip*, 757 F.2d at 1529.

(ii)

We find that the district court abused its discretion by involuntarily dismissing Hurman's suit for failure to prosecute. Although Berry had failed to file a pretrial order and had failed to appear at docket call, nothing in the record indicates a clear record of delay or contumacious conduct.[4] Only ten months elapsed

[4] Generally, where a plaintiff has failed only to comply with a few court orders or rules, we have held that the district court abused its discretion in dismissing the suit with prejudice. *See, e.g.*, *Berry v. CIGNA/RSI-CIGNA*, 975 F.2d 1188, 1191-92 (5th Cir. 1992) (no clear record of delay or contumacious conduct established by counsel's failure to file motion for default judgment);

from the date Hurman filed his complaint to the date of its dismissal. Within that period, Hurman had filed an amended complaint, attended a pretrial conference, filed two motions for appointment of counsel, responded to motions filed by the EEOC and the PHA, submitted to deposition by the PHA, and sent correspondence to the district court. *See supra* note 1. This conduct does not represent a significant period of inactivity. Nor does the record indicate a pattern of contumacious conduct. *See Morris,* 730 F.2d at 252 (although we stated that attorneys acted imprudently, we found no contumacious conduct where attorneys failed twice to comply with court-imposed deadlines). Furthermore, the district court's order dismissing the case did not include any express findings that lesser sanctions would not prompt diligent prosecution, nor does the record show that the court employed any

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Morris v. Ocean Systems, 730 F.2d 248, 252 (5th Cir. 1984) (no clear record of delay or contumacious conduct established where counsel failed twice to comply with court-imposed deadlines requiring counsel to notify court of plaintiff's rejection of settlement offers); *McGowan v. Faulkner Concrete Pipe Co.,* 659 F.2d 554, 556-58 (5th Cir. 1981) (no clear record of delay or contumacious conduct where counsel failed to comply with scheduling and other pretrial orders); *Burden v. Yates*, 644 F.2d 503, 504-05 (5th Cir. 1981) (although plaintiff's conduct was a "sorely deficient approach to litigation," no clear record of delay or contumacious conduct where plaintiff was late in filing status report, and failed twice to file pretrial order as required by court directive); *Silas v. Sears, Roebuck & Co.,* 586 F.2d 382, 384-85 (5th Cir. 1978) (no clear record of delay or contumacious conduct where counsel failed to appear at pretrial conference, failed to prepare a pretrial stipulation, and failed to reply to interrogatories).

On the other hand, where a plaintiff has failed to comply with several court orders or court rules, we have held that the district court did not abuse its discretion by involuntarily dismissing the plaintiff's suit with prejudice. *See, e.g.*, *Salinas v. Sun Oil Co.,* 819 F.2d 105, 106 (5th Cir. 1987) (clear record of delay where plaintiff did nothing to prosecute her case for over two years, despite three warnings of dismissal); *Price v. McGlathery*, 792 F.2d 472, 474-75 (5th Cir. 1986) (clear record of delay and contumacious conduct established when counsel failed to file a pretrial order, failed to appear at pretrial conference, and failed for almost one year to certify that he would comply with district court's orders); *Callip v. Harris County Child Welfare Dept.*, 757 F.2d 1513, 1515-17 (5th Cir. 1985) (clear record of delay and contumacious conduct established by counsel's failure to comply with nine deadlines imposed by rules of procedure or by orders of court).

lesser sanctions which proved futile.[5] Because there is no clear record of delay or contumacious conduct, and because there has been no showing of the futility of lesser sanctions, we hold that the district court abused its discretion in dismissing Hurman's case for failure to prosecute.[6]

B

Hurman also appeals the district court's denial of his two motions for appointment of counsel. Title VII permits a complainant to have court-appointed counsel upon request "in such circumstances as the court may deem just." 42 U.S.C. § 2000e-5(f)(1). Title VII complainants have no automatic right to the appointment of counsel. *Gonzalez v. Carlin,* 907 F.2d 573, 579 (5th

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[5] In its order of dismissal, the court stated only that Hurman was "advised completely and clearly of his obligations to prosecute his case and to comply with the requirements of the scheduling order." Record on Appeal at 156. The district court apparently based its statement on the fact that the pretrial order warned that failure to file a pretrial order may result in the dismissal of Hurman's case. That Hurman received this warning does not affect our analysis. *See Burden,* 644 F.2d at 505 (although district court issued directive requiring submission of pretrial orders and warned that "[f]ailure to comply will result in dismissal of case," we found that district court abused its discretion in dismissing case for failure to prosecute where plaintiff failed to timely file three documents).

[6] The PHA argues that, if the district court erred in dismissing Hurman's claim for failure to prosecute, we, nevertheless, should affirm the dismissal because the district court allegedly erred in denying its motion for summary judgment. *See* Brief for the PHA at 11-15. A district court "has the discretion to deny a [motion for summary judgment] even if the movant otherwise successfully carries its burden of proof if the judge has doubt as to the wisdom of terminating the case before a full trial." *Veillon v. Exploration Servs., Inc.,* 876 F.2d 1197, 1200 (5th Cir. 1989); *see also Marcus v. St. Paul Fire & Marine Ins. Co.,* 651 F.2d 379, 382 (5th Cir. 1981) (district court may perform "negative discretionary function" and deny motion for summary judgment (even if movant is entitled to summary judgment) if parties should be given opportunity to fully develop case). Because the PHA did not have the right to have summary judgment granted, we exercise our discretion not to address the merits of the PHA's motion for summary judgment.

Cir. 1990). Consequently, we review the district court's decision whether to appoint counsel for abuse of discretion. *Carlin,* 907 F.2d at 579. In deciding whether to grant a Title VII complainant's motion for appointment of counsel, the district court should consider: "(1) the merits of the plaintiff's claims of discrimination; (2) the efforts taken by the plaintiff to obtain counsel; and (3) the plaintiff's financial ability to retain counsel." *Gonzalez,* 907 F.2d at 580 (citing *Caston v. Sears, Roebuck & Co.,* 556 F.2d 1305, 1309 (5th Cir. 1977)).

In reviewing Hurman's first motion for appointment of counsel, the district court applied the three *Caston* factors, and found that Hurman did not have the financial ability to retain counsel. *See* Record on Appeal at 33. However, the district court found that Hurman had failed to allege sufficient evidence of racial discrimination, and had failed to show that he had tried to obtain private counsel.[7] *See* id. As a result, the district court denied Hurman's motion. *See id.* Because the record supports the district court's findings, the district court did not abuse its discretion in denying Hurman's first motion for appointment of counsel.

After the district court denied Hurman's first motion for appointment of counsel, Hurman filed a second motion for appointment of counsel. *See* Record on Appeal at 46. In his second motion, Hurman claimed that he had letters from several attorneys who would not accept his case on a contingent fee basis. *See id.*

[7] The district court stated that if Hurman's claims had merit, he should be able to retain independent counsel on a contingent fee basis. *See* Record on Appeal at 33.

The record does not contain any order of the district court, disposing of that motion.[8] Therefore, on remand the district court should enter an order, disposing of Hurman's motion for appointment of counsel and setting forth the reasons for its ruling.

III

For the foregoing reasons, we REVERSE the district court's judgment and REMAND for further proceedings. On remand, the district court should enter an order, disposing of Hurman's second motion for court-appointed counsel.

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[8] There is, however, a docket entry on August 27, 1991 stating that Hurman's second motion for appointment of counsel was denied by prior order. The docket entry is ambiguous, for it is unclear whether the district court actually ruled on Hurman's second motion for appointment of counsel. Absent an order in the record expressly ruling on Hurman's second motion, we do not view the docket entry as a ruling that is reviewable on appeal.