IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2334
Summary Calendar

KAREN BALUSEK,

Plaintiff-Appellant,

v.

WACKENHUT SERVICES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 90 338)

(December 9, 1992)

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

EDITH H. JONES, Circuit Judge:

This is an appeal from a summary judgment in an employment discrimination case. The district court granted summary judgment to the defendant and dismissed the plaintiff's claims. The plaintiff now appeals. Finding summary judgment appropriate in this case, we affirm.

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*.Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I

The plaintiff, Karen Balusek, began working for defendant Wackenhut Services, Inc. ("Wackenhut") in late 1986. Citing misconduct on the job, Wackenhut sent Balusek a letter of reprimand on September 2, 1987, and gave her a seven-day suspension two days later. On September 9, 1987, Balusek filed a gender discrimination charge with the Equal Employment Opportunity Commission ("EEOC") in connection with the suspension. Two weeks later, Wackenhut fired Balusek for "unsatisfactory job performance." The next day, on September 24, Balusek filed a second discrimination charge with the EEOC, claiming that the discharge was in retaliation for the filing of the first EEOC charge.

The EEOC determined that Balusek's first charge did "not establish a violation" of Title VII and informed her of her right to file a lawsuit within ninety days after the determination became final. The EEOC ultimately found reasonable cause on the second charge and filed suit on Balusek's behalf in the federal district court in Houston. The presiding judge dismissed the suit and the EEOC did not appeal.

On August 15, 1988, the ninetieth day after the EEOC determination on the first charge became final, Balusek filed a Title VII suit in the United States District Court for the Southern District of Texas in Galveston. However, Balusek failed to serve her complaint on Wackenhut within the 120 days required by the federal rules of civil procedure. The District Court sua sponte dismissed the complaint for want of prosecution on June 14, 1989.

Counsel for Balusek did not learn of the dismissal until September 29. On that date, Balusek filed suit in state court in Harris County, Texas. Balusek alleged violations of Title VII. On January 30, 1990, the cause was removed to the United States District Court for the Southern District of Texas in Houston. In June, Balusek amended her complaint by adding a claim that she had been wrongfully discharged in violation of Article I, Section 3a of the Texas Constitution, the Texas Equal Rights provision.

Wackenhut moved for summary judgment on both claims in July, 1990. On February 14, 1992, less than a month before the scheduled trial, Balusek moved for leave to add several new causes of action, including new claims under the federal and state constitutions, as well as state common law claims for negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress. On April 1, 1992, the district court granted the defendant's motion for summary judgment and dismissed Balusek's claims. It also denied her motion for leave to amend her complaint. Balusek appeals the grant of summary judgment.

II

Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Fed R Civ P 56(c). The movant has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex Corp. v Catrett, 477 US 317, 325 (1986).

In this case the material facts are undisputed and the legal principle applicable to them is straightforward. A court may dismiss a Title VII claim not filed within ninety days after the EEOC determination on a charge becomes final. 42 USC § 2000(e)-5(f)(1); Espinoza v Missouri Pacific R.R., 754 F2d 1247 (5th Cir 1985). The EEOC determination became final on May 18, 1988. Although Balusek initially filed suit within the requisite ninety-day period, her suit was dismissed for want of prosecution. She filed this action on September 29, 1989, thirteen months after the ninety day limitation expired. On its face, Balusek's claim is untimely.

Balusek seeks to excuse her untimely filing. First, she claims that Wackenhut's registered agent for service moved without leaving a forwarding address with the Texas Secretary of State. Thus, she claims that she was unable to locate him within the required time. Second, she cites the fact that she did not have notice of the dismissal of the first suit until September 29, 1989, more than three months after the Galveston district court made its decision. Based on these events, Balusek would have this Court invoke its equitable powers to fashion an "exception" to the ninety-day filing requirement in cases where the actions of other parties (for example, the court or defendant) prevent the Title VII plaintiff from timely filing her complaint.

An equitable tolling of the ninety-day filing requirement is not warranted in this case. That equity rewards the diligent, not the dilatory, is a principle of our jurisprudence almost as old

as the rocks. See Baldwin County Welcome Center v Brown, 466 US 147, 151, 104 S Ct 1723, 1725 (1984). In dismissing the plaintiff's action, the Galveston court noted that the "plaintiff has taken no action in this case since August 15, 1988, a period in excess of 120 days." A timely claim dismissed without prejudice ordinarily does not toll the statute of limitations. Dupree v Jefferson, 666 F2d 606, 610-11 (D C Cir 1981).

That the defendant did not leave a forwarding address with the Texas Secretary of State does not save Balusek's claim. Balusek did not attempt any alternative method of service available under Rule 4 of the Federal Rules of Civil Procedure. She also did not seek to enlarge the time in which to serve the defendant. Fed R Civ P 6(b). She simply discovered that there was no current address filed with the Secretary of State and sat on her case until she learned it had been dismissed. A lack of diligence in effecting service cannot be the basis for the equitable tolling of the filing period. Wilson v Grumman Ohio Corp., 815 F2d 26, 29 (6th Cir 1987) (Title VII).

Because the time eaten up by Balusek's dilatory failure to serve the defendant more than consumes the ninety days she had to file her suit, we need not address her second contention that the Galveston court did not notify her of the dismissal.

We also need not consider Balusek's claim that the defendant's actions violated Article 1, Section 3a of the Texas Constitution. Balusek has not addressed this question on appeal and we will not consider issues neither briefed nor argued. Pan

Eastern Exploration v Hufo Oil, 855 F2d 1106, 1124 (5th Cir 1988). Similarly, Balusek does not appeal the district court's denial of leave to add several new causes of action to her complaint.

Finally, because we decide this case on timeliness grounds, it is unnecessary to consider the position of the district court and the defendant that summary judgment is warranted under res judicata principles.

The judgement of the district court is **AFFIRMED**.