

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-2433
Summary Calendar

MARVIN L. MCDANIEL and
CHERYL MCDANIEL,

Plaintiffs-Appellants,

VERSUS

SOUTHWESTERN BELL TELEPHONE,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 89 3198)

(November 19, 1992)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:¹

Appellants challenge the district court's dismissal of their action following its grant of summary judgment in favor of defendant Southwestern Bell. We affirm.

Appellants Marvin and Cheryl McDaniel filed this suit against Southwestern Bell. The complaint asserted three causes of action: (1) breach of the collective bargaining agreement between

¹Local 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Communication Workers of America and Southwestern Bell, in violation of § 301 of the LMRA; (2) negligent infliction of emotional distress; and (3) intentional infliction of emotional distress.

Southwestern Bell filed a summary judgment motion for which a response was due on February 27, 1992. No response was filed, and on March 17, 1992, the district court granted defendant's motion. On that same date, plaintiffs filed a motion to extend its time to respond to Southwestern Bell's motion. The district court denied that motion on March 19.

Plaintiffs then filed a Rule 59 motion for reconsideration of the district court's summary judgment. The district court denied that motion because "defendant's uncontroverted summary judgment evidence conclusively established the absence of any genuine issue of material fact" The court also observed that "inadvertence of counsel is not good cause and the plaintiffs' motion failed to establish good cause." Appellants raise a single issue meriting discussion in this appeal: whether the district court erred in granting summary judgment based solely on the McDaniels' untimely response to Southwestern Bell's motion for summary judgment.

The record belies the McDaniels' assumption that the district court granted summary judgment against them solely because of their untimely response. The district court plainly considered the summary judgment evidence submitted by Southwestern Bell and

concluded, based upon that evidence, that the movant was entitled to judgment as a matter of law.

The McDaniels' reliance on **John v. Louisiana (Bd. of Trustees)**, 757 F.2d 698 (5th Cir. 1985), is misplaced. We concluded in that case that the district court may not grant summary judgment where the record reflects contested issues of material fact, even though the non-movant fails to timely respond to the motion. In other words, we concluded that if the moving party fails to establish by its summary judgment evidence that it is entitled to judgment as a matter of law, summary judgment must be denied -- even if the non-movant has not responded to the motion. **Id.** at 708. But where the movant's summary judgment evidence does establish its right to judgment as a matter of law, the district court is entitled to grant summary judgment, absent unusual circumstances. **Id.**

No such unusual circumstances are present in this case. The appellants failed to respond simply because counsel failed to record the proper response deadline on his calendar. The district court did not abuse its discretion in concluding that inadvertence of counsel was an inadequate excuse to vacate the summary judgment and grant additional time to plaintiff to respond. **See Mendez v. Banco Popular de Puerto Rico**, 900 F.2d 4, 7 (1st Cir. 1990); **Pfeil v. Rogers**, 757 F.2d 850, 856 (7th Cir. 1985), **cert. denied**, 475 U.S. 1107 (1986).

Our review of the summary judgment record persuades us that the district court correctly concluded that no genuine issue of

fact was presented and that appellee was entitled to judgment as a matter of law. Accordingly, the judgment of the district court is
AFFIRMED.