IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2457
Summary Calendar

LAWRENCE GRICE,

Plaintiff-Appellant,

v.

AETNA LIFE INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 91 400)

(December 11, 1992)

Before GARWOOD, JONES, and EMILIO GARZA, Circuit Judges.[1]

EDITH H. JONES, Circuit Judge:

In this case we review the district court's issuance of summary judgment in favor of Aetna in an ERISA matter. Finding no error, we affirm.

Suit was filed in state court by appellant Grice alleging a variety of state law claims stemming from the discontinuance of his disability benefits under an employee welfare benefit plan. Aetna removed the case to the federal district court on the basis

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[1] 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

of ERISA preemption and diversity and then filed a motion for summary judgment asserting ERISA preemption. Grice did not respond. Based on the lack of response and the merits of Aetna's motion, the district court granted summary judgment in favor of Aetna. Within the time specified by Fed. Rule Civ. Proc. 59, Grice filed a motion for leave to file his response to defendant's motion for summary judgment and "plaintiff's motion for new trial". Aetna opposed the motion and the district court denied it. Grice thereupon appealed to this court.

STANDARD OF REVIEW

Fed. Rule Civ. Proc. 56(c) empowers the district court to render summary judgment "if . . . there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Hogue v. Royse City, 939 F.2d 1249, 1252 (5th Cir. 1991). The standard of review used by this court in reviewing summary judgment is de novo. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2458, 2552, 91 L.Ed. 265 (1986); Duplantis v. Shell Offshore, Inc., 948 F.2d 187, 189 (5th Cir. 1991).

DISCUSSION

Grice concedes that summary judgment was correctly granted in regard to ERISA preemption, but he now argues that even so, ERISA law, 29 U.S.C. § 1132, afforded a cause of action in his case. Grice bases this argument on the fact that Aetna's motion for summary judgment is based exclusively on ERISA preemption and not on the absence of a claim for relief founded on ERISA.

We find this argument unavailing. Although the Federal Rules of Civil Procedure only require notice pleading, there is no notice in Grice's pleadings that he sought relief under ERISA in addition to or in substitute for his state law claims. Aetna would have had to be prescient in order to have moved for summary judgment against an unstated ERISA claim. Moreover, this case was not decided on the pleadings but after a summary judgment motion had been filed and properly supported. For this reason, Grice incorrectly cites Conley v. Gibson, 355 U.S. 41, 45, 78 S. Ct. 99, 102 2 L.Ed. 80 (1957), for the proposition that the complaint should not be dismissed unless the plaintiff can prove no set of facts in support of his claim which entitle him to relief. Conley does not overcome the summary judgment requirement, under Rule 56 and Celotex, supra, that Grice state a precise legal and factual basis for his claim against Aetna. Appellant could have sought to recover under ERISA at any time between the filing of his petition and the court's grant of summary judgment fourteen months later. He did not do so.

Similarly, Grice's citation of Haddock v. The Board of Dental Examiners of California, 777 F.2d 462 (9th Cir. 1985) is inapposite. In Haddock, the court ruled upon a motion to dismiss against a pro se plaintiff. Id. at 464. Such an analysis cannot be applied to the instant case, involving a summary judgment motion and an appellant represented by counsel.

Finally, Grice asserts that final judgment was wrongly granted as dismissal under Fed. Rule Civ. Proc. 12(b)(6). This

argument contradicts the express language of Judge Hittner's opinion, which grants summary judgment based on Rule 56(c).

For these reasons, the trial court judgment is **AFFIRMED**.