UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2576
Summary Calendar

PAUL VINCENT,

Plaintiff-Appellant,

VERSUS

ANTHONY M. FRANK, ET AL.,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Texas
(CA-H-90-3030)

March 29, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Paul Vincent, *pro se*, appeals the district court's grant of appellees' motion for summary judgment, contending, *inter alia*, that he was not properly notified of the consequences of his failure to respond to that motion. Finding no reversible error, we **AFFIRM**.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Vincent, an alcoholic[2] employed by the United States Postal Service (USPS), was terminated for directing numerous threats toward his co-workers and supervisory staff[3]; he had received letters of warning and several suspensions.[4] Vincent contested his termination by filing an administrative complaint of discrimination against the USPS, alleging that he had been terminated because of his race (Caucasian) and handicap (alcoholism), and in retaliation for prior EEOC activities. His complaint was reviewed by the USPS, and, subsequently, by the Equal Employment Opportunity Commission (EEOC); both agencies concluded that Vincent had failed to establish discrimination or retaliation and that Vincent's removal did not violate the Rehabilitation Act, 29 U.S.C. § 791, *et. seq.*

On June 14, 1990, the EEOC issued its final decision denying Vincent's request to reopen, and attached a right to sue letter. Almost three months later, on September 10, 1990, Vincent filed his employment discrimination complaint and application to proceed *in forma pauperis*. In a letter accompanying his complaint, Vincent explained that he personally did not receive the right to sue

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[2] The administrative record reflects that Vincent began drinking in December 1982.

[3] For example, Vincent allegedly threatened to blow off the head of his Union Steward, to wait with a rifle on an overpass and shoot a supervisor, and to "blow the supervisors away" if he lost his job.

[4] These disciplinary actions included: (1) two letters of warning; (2) a seven day suspension issued in March 1983; (3) a 14 day suspension issued in January 1984; and (4) a notice of removal (later reduced to a 14 day suspension) issued in November 1985.

letter until August 19, 1990, because the agency ignored his May 1990 letter, in which he provided his change of address and notice that his attorney of record, Steven Brown, was no longer his agent. He explained that the EEOC mailed the certified letter to Brown, who was not aware of Vincent's address change until mid-August, thus resulting in his delayed filing.

The district court allowed the lawsuit to proceed, but denied the *in forma pauperis* application,[5] and subsequent applications for appointment of counsel, "subject to being reurged following service on Defendant". Because of numerous extensions, summonses were not issued until March 9, 1992; on April 13, Vincent submitted an unsworn "affidavit" stating that he had completed service of process. On May 6, 1992, appellees moved to dismiss the action, or, alternatively for summary judgment; they filed an amended motion on May 12, 1993, contending, *inter alia*, that the action was untimely filed, and attached evidence to the motion establishing that the final agency decision was rendered on June 14, 1990. Rather than submit opposing evidence, Vincent filed "Plaintiff's Motion to Vacate Order for Summary Judgment", asserting that the court had "erred in dismissing plaintiff's complaint by not allowing plaintiff notice that a motion to dismiss, or

[5] The court subsequently granted *in forma pauperis* status in February 1992 based on Vincent's incarceration in state prison as of January 1991.

alternatively for summary judgment, was pending before the court".[6]

On July 8, 1992, the district court granted appellees' amended motion for summary judgment, holding that it lacked jurisdiction because Vincent's complaint was filed more than 30 days after receipt of the final agency decision, in violation of 42 U.S.C. § 2000e-16(c).[7] Vincent filed a motion to vacate, which was denied, and timely appealed both the underlying judgment,[8] and the denial of his motion to vacate.

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[6] Vincent also filed a notice of appeal from the district court's "final order entered in this action on May 12, 1992", stating that "[p]laintiff submitted a motion to vacate said order in this matter on May 19, 1992, and said motion has not been ruled upon. Plaintiff therefore submits this notice of appeal to comply with appeal time limitations".

[7] The district court erroneously dismissed the case for lack of jurisdiction. The time limitation specified in § 2000e-16(c) is a statute of limitation subject to equitable tolling, not a jurisdictional bar. ***Irwin v. Veterans Admin.***, 498 U.S. 89, 111 S. Ct. 453, 457 (1990). The error is harmless, however, because we may properly characterize the court's disposition as a grant of summary judgment. We do not view it as a dismissal pursuant to Rule 12(b)(6), because the court considered material outside the pleadings in deciding the motion. ***Triplett v. Heckler***, 767 F.2d 210, 212 (5th Cir. 1985), *cert. denied*, ***Triplett v. Bowen***, 474 U.S. 1104 (1986).

[8] The court entered judgment on July 8. Vincent's notice of appeal from the "final order entered in this action on May 12, 1992", incorrectly states the entry date. Nonetheless, because it was timely filed on July 13, and because Vincent proceeds *pro se*, we consider the notice valid. *See* Fed. R. App. P. 3(a) ("[f]ailure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate"). Moreover, because Vincent's motion to vacate was filed on July 23, more than ten days after the court's judgment, it is treated as a Rule 60(b) motion, *See* ***United States v. Reyes***, 945 F.2d 862, 864 (5th Cir. 1991); therefore, Vincent was not required to file a new notice of appeal. *See* Fed. R. App. P. 4(a)(4).

II.

A.

Vincent maintains that he was not properly informed of the consequences of his failure to file a response to appellees' motion for summary judgment, in violation of his due process rights. Vincent's contention is foreclosed by ***Martin v. Harrison County Jail***, 975 F.2d 192 (5th Cir. 1992), in which this court held that a *pro se* prisoner is not entitled to specific instructions on summary judgment procedures:

> We adopt the rule ... that particularized additional notice of the potential consequences of a summary judgment motion and the right to submit opposing affidavits need not be afforded a pro se litigant. The notice afforded by the Rules of Civil Procedure and the local rules are, in our view, sufficient. To adopt any other rule would make it impossible to determine precisely what notice was adequate in a given case.

Id. at 193.

The appellees adhered to their duty to provide notice by serving the motion on May 12, 1992. The court satisfied the notice requirements of Fed. R. Civ. P. 56 by acting in accordance with local rules providing that all opposed motions "will be submitted to the judge twenty days from filing without notice from the clerk and without appearance by counsel". S.D. Texas Local R. 6D; *See* ***Rodriguez v. Pacificare of Texas, Inc.***, 980 F.2d 1014, 1020 (5th Cir. 1993) ("A court satisfies the notice requirements of Rule 56 if its local rules require that a response to a summary judgment

motion be filed within a specified period of time"). Accordingly, Vincent received sufficient notice.[9]

B.

Vincent next contends that a material fact issue precluded summary judgment. Based upon our *de novo* review of the record, we disagree. *See* ***Degan v. Ford Motor Co.***, 869 F.2d 889, 892 (5th Cir. 1989) (stating that this court reviews a summary judgment *de novo*). Section 2000e-16(c) provides that an employment discrimination complaint against the Federal Government under Title VII must be filed within 30 days of receipt of notice of final agency action; notice is received when delivered to the complainant or his representative, whichever comes first. ***Irwin***, 498 U.S. at ___, 111 S. Ct. at 455. We apply the Title VII limitations period because section 505(a)(1) of the Rehabilitation Act, 29 U.S.C. § 794a(a)(1), so provides; *See* ***Honeycutt v. Long***, 861 F.2d 1346, 1349 (5th Cir. 1988). Although the 30 day limitation period of § 2000e-16(c) is subject to equitable tolling, "[f]ederal courts have typically extended equitable relief only sparingly". ***Id.*** at 457. The plaintiff has an affirmative duty to notify the EEOC of any change in mailing address. ***Hunter v. Stephenson Roofing, Inc.***, 790 F.2d 472, 474 (6th Cir. 1986).

Vincent contends that he adhered to the limitations period by filing his complaint within 30 days of his receipt of the agency

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[9] It is apparent from the record that Vincent misconstrued appellees' motion and thus treated it as an order dismissing his case; however, our inquiry regarding notice is an objective one. Vincent received appellees' motion for summary judgment; his personal understanding of the motion is of no legal consequence.

decision. He maintains that, as noted, he notified the agency in May 1990 that Brown was no longer his agent and therefore Brown's receipt of the decision did not trigger the limitations period. He also asserts that because the agency ignored his letter notifying it of his address change and thus sent the decision to the wrong address, the limitations period should be equitably tolled.

The only item in the record to support the above contentions is the September 10 letter, accompanying Vincent's complaint.[10] We do not find this unsworn letter sufficient to withstand a summary judgment motion. *See* ***Thomas v. Price***, 975 F.2d 231, 235 (5th Cir. 1992)("Unsubstantiated assertions of an actual dispute will not suffice."). Accordingly, the court properly granted summary judgment.[11]

C.

Finally, Vincent maintains that the court abused its discretion in denying his motions for appointment of counsel. "There is no automatic right to the appointment of counsel." ***Gonzalez v. Carlin***, 907 F.2d 573, 579 (5th Cir. 1990). Title VII provides for the appointment of an attorney "in such circumstances

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[10] Vincent submits additional evidence that was not part of the record before the district court. Because we are a court of error, we do not consider evidence presented for the first time on appeal. Vincent's appropriate recourse was to file a Rule 60(b) motion in district court.

[11] We note that the record does not reflect the date Vincent's former attorney received the final decision and accompanying letter; however, Vincent does not contest the court's implicit finding that Brown received the agency documents shortly after issuance. Rather, on appeal, Vincent asserts that Brown received the decision and accompanying letter on June 25, 1990.

as the court may deem just". 42 U.S.C. § 2000e-5(f)(1). "[T]he decision whether to appoint counsel rests within the sound discretion of the trial court." ***Gonzalez***, 907 F.2d at 579. In exercising its discretion, the 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". ***Id.*** at 580 (citing ***Caston v. Sears, Roebuck & Co.***, 556 F.2d 1305, 1309 (5th Cir. 1977)).

We find this claim without merit for several reasons. For example, both the USPS and the EEOC rejected Vincent's claims of discrimination, and from our review of the administrative record, we similarly conclude that the claims have little merit, at best. Moreover, the record provides no indication that Vincent attempted to obtain counsel. Accordingly, the court did not abuse its discretion.

III.

For the foregoing reasons, the judgment of the district court and denial of the Rule 60 motion are

AFFIRMED.