

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2757

SHARON H. KOUDELKA, ET AL.,
Plaintiffs,
SHARON H. KOUDELKA,
Plaintiff-Appellant,
versus
PRAIRIE PRODUCING COMPANY, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-90-1865)

(March 22, 1994)

Before REAVLEY, GARWOOD, and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:*

I.

From October, 1981, until October, 1990, Sharon Koudelka worked for Prairie Producing Company as a Supervisor of Production Records. In 1981, Prairie instituted the Incentive Compensation Plan for Key Employees (alternatively "ICP" or "Plan"), a compensation plan designed to provide an incentive for those

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

directly involved in finding and producing oil and gas. The ICP allocated to participating employees a fraction of the revenues generated from oil and gas wells owned by Prairie. These employees received monthly payments from the Plan which were treated as regular wages.

Initially, the only employees participating in the ICP were geologists, geophysicists, landmen, and petroleum engineers. Later, several production superintendents and drilling superintendents were included in the ICP. In 1988 and 1989, Prairie added to the ICP its assistant treasurer, a personnel manager, and the manager of information systems. As of June, 1990, 37 employees were participating in the ICP. However, neither Koudelka nor her co-plaintiffs, Howard Laughlin, Jr. and Connie Romero, were ever included in the Plan.

Arguing that Prairie's failure to include her in the ICP constituted discrimination based on her gender and age, Koudelka filed a charge of employment discrimination with the Equal Employment Opportunity Commission. Koudelka requested and received a right-to-sue letter from the EEOC and on June 11, 1990, Koudelka and her co-plaintiffs filed a complaint against Prairie¹ in the federal district court for the Southern District of Texas. The plaintiffs' suit alleged violations of Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Employee Retirement Insurance Security Act, based on

¹ In addition to Prairie, the plaintiffs also included several individual defendants, who were later dismissed on motion of the plaintiffs and are not a subject of this appeal.

Prairie's failure to include the plaintiffs in the ICP. Koudelka and Laughlin alleged that they were wrongfully excluded from the ICP based upon their age, in violation of the ADEA; Koudelka and Romero alleged that they were wrongfully excluded from the ICP based upon their sex, in violation of Title VII. The plaintiffs also contended that Prairie's failure to include them in the ICP violated ERISA.

On November 2, 1990, Prairie filed a motion for summary judgment, which the plaintiffs opposed. On January 21, 1992, the district court granted summary judgment in favor of Prairie and dismissed the plaintiffs' suit. Only Koudelka's appeal is before us.

II.

In reaching its decision, the court characterized the gender discrimination claim by Koudelka and Romero as one for "unequal pay for equal work based on sex" and concluded that the standards of the Equal Pay Act were applicable to their claim as well as to the ADEA claims asserted by Laughlin and Koudelka. To establish a *prima facie* case under the EPA, a plaintiff must show that "she performs in a position requiring skill, effort, and responsibility equal to that performed by the male comparators." Applying the EPA standard to "the defendants uncontroverted summary judgment evidence establish[ing] the nature of the work plaintiffs performed,"² the court concluded that the plaintiffs "did not

² Although it is not entirely clear from the district court's Memorandum Order, it appears that the court relied heavily on the job descriptions of the employees which were

perform substantially the same work as any participant in the ICP, nor did their jobs have the same common core of duties as any of the ICP positions."

On February 17, 1992, the plaintiffs filed a motion for reconsideration. The district court denied the motion on June 23, 1992. Thereafter, Koudelka timely filed a notice of appeal with this court. Laughlin and Romero do not appeal the district court's order.³

III.

Koudelka's argument that the district court erred in applying the Equal Pay Act has merit. The difficulty is that Koudelka has no claim under Title VII. Koudelka failed to produce summary judgment evidence from which a trier of the fact could conclude that defendant excluded her from the extra compensation fund because she was female. Specifically, defendants have offered non-discriminatory reasons for not including her in the compensation program. Koudelka offered no summary judgment evidence that these reasons were pretextual. The district court did not err in granting summary judgment to defendants although it did so for the wrong reasons.

submitted along with the affidavit of Prairie's President and CEO, L. B. Forney.

³ Koudelka filed the notice of appeal *pro se* on behalf of the other plaintiffs, who did not sign the document. Because the failure of a *pro se* litigant to sign the notice of appeal is a jurisdictional defect which could only be cured within the time for filing the notice of appeal, the other plaintiffs were dismissed by this court. *Koudelka v. Prairie Producing Co.*, No 92-2757 (5th Cir. June 8, 1993) (unpublished).

AFFIRMED.