UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2820
Summary Calendar

NORA GUTIERREZ,

Plaintiff-Appellant,

VERSUS

H & C COMMUNICATIONS, INC.,
d/b/a Channel Two Television Co.
and ROB MIDDLETON,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-91-6)

(June 8, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Nora Gutierrez appeals an adverse summary judgment. We **AFFIRM**.

I.

Gutierrez was dismissed from her employment on May 4, 1989. On May 25 or 26,[2] accompanied by a member of her lawyer's staff,[3]

---

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 Pursuant to that rule, the court has determined that this opinion should not be published.

[2] Gutierrez's affidavit states that this visit occurred on May 26, but the intake questionnaire she completed, discussed *infra*, is

Gutierrez met with investigators at the Houston office of the Equal Employment Opportunity Commission (EEOC), completed an intake questionnaire, and asked that she be issued a charge of discrimination.[4] Instead, the investigators asked that she first prepare a "report". And, in her affidavit, filed with her opposition to summary judgment, Gutierrez states that she understood a charge of discrimination would be issued only after the EEOC received that report. Furthermore, Gutierrez admitted in her deposition that she knew she must file a charge within 300 days of her termination.

It was not until almost eight months later, on January 19, 1990, that Gutierrez completed the report and delivered two copies (one each for her lawyer and the EEOC) to her lawyer. And, when she visited her lawyer's office on February 12, Gutierrez noticed that both copies of the report were still there. She did not mail the EEOC copy herself, however, but rather checked back with her lawyer on February 19 to make sure it had been mailed. She was told that the report had been sent by certified mail and the EEOC's filing deadline had been met.[5]

---

dated May 25.

[3] Gutierrez had retained a lawyer that February, three months before her termination, "because of the problems [she] had experienced at work".

[4] Gutierrez alleged that retaliatory action was taken against her and that she was otherwise discriminated against because of her race, sex, national origin and color.

[5] Because Texas is a deferral state, Gutierrez had 300 days from the allegedly discriminatory act to file her charge with the EEOC. 42 U.S.C. § 2000e-5(e).

Gutierrez states that from February to May she continuously tried to monitor the progress of her charge: her lawyer told her that no further information had been received from the EEOC; and the EEOC told her that she would have to consult her lawyer. On May 14, approximately 375 days after her discharge, Gutierrez went to the EEOC office. No record of her questionnaire or charge could be found, and the investigator suggested that she acquire a copy of the return receipt from her lawyer. Gutierrez's lawyer gave her a copy of the letter allegedly sent to the EEOC, dated January 11, 1990 (which is several days before she claims to have even delivered the requisite report to her lawyer), but could not produce any proof of the date it was mailed.

Gutierrez returned to the EEOC office on May 22, a charge of discrimination was issued that day,[6] and the defendant/appellants received notice of the charge the next day. Gutierrez filed this Title VII action on January 2, 1991;[7] and the defendants moved for summary judgment, asserting, *inter alia*, Gutierrez's failure to file a charge of discrimination within the statutory 300-day period. In response, Gutierrez filed copies of the intake

---

[6] In her affidavit, Gutierrez stated that by May 22, the EEOC had located her earlier-filed intake questionnaire and labelled it "EEOC Error". She also stated that she was assured her charge would relate back to the date of the intake questionnaire and would therefore be considered filed in a timely manner. The district court held that those statements were inadmissible hearsay and struck them. Gutierrez does not challenge that ruling.

[7] She contends that she received the requisite right to sue letter and timely filed this suit. Although the letter is not in the record, the appellees do not challenge this contention. We therefore assume those facts.

questionnaire, the charge of discrimination, assorted correspondence and her own affidavit. The district court held that no timely charge had been filed and granted the motion.

II.

Summary judgment is appropriate if 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). Here, the basic facts relevant to timeliness are uncontested.[8] Gutierrez concedes that she was required to file her charge of discrimination within 300 days of her discharge, and that she failed to do so. She contends, however, that the May 22 charge was timely because it related back to the date of her intake questionnaire. Thus, the defendants were not entitled to judgment as a matter of law on the issue of timeliness.[9]

A plaintiff cannot bring a Title VII action unless she has filed a timely charge with the EEOC and been granted a notice of

---

[8] Gutierrez continues to assert that her charge was timely because the EEOC promised her it would be so considered. This is a factual issue for which she would carry the ultimate burden of proof at trial. Therefore, once the defendants moved for summary judgment, she was required to point to specific facts supporting the existence of a triable fact issue. ***Celotex Corp. v. Catrett***, 477 U.S. 317 (1986). She failed to do so. As proof of such a promise, Gutierrez offered only her own affidavit. As discussed in note 6, the district court struck those portions describing the statements of EEOC officials, holding them to be inadmissible hearsay. Because Gutierrez offered no affidavits from the EEOC officials who allegedly made the promises, this left the record devoid of any evidence of such assurances.

[9] Gutierrez further contends that there are genuine issues of material fact as to her substantive claims. Because the district court correctly found the charge untimely, we need not reach this issue.

right to sue. ***Price v. Southwestern Bell Telephone Co.***, 687 F.2d 74, 77 (5th Cir. 1982). The charge "shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires". 42 U.S.C. § 2000e-5(b).

First, the intake questionnaire was not under oath. Second, the "form" required by the Commission in this case was EEOC Form 5, entitled "Charge of Discrimination". It was not filed until May 22, 1990. Gutierrez contends that the filing of Form 5 should relate back a year earlier, to the date her intake questionnaire was filed, not because an intake questionnaire is, in all cases, an adequate charge,[10] but because, in this case, the "information contained in the intake questionnaire is sufficient to constitute a charge"[11] and "the plaintiff made it clear that [she] intended to activate the Act's machinery with the filing of the intake questionnaire". ***Steffen v. Meridian Life Ins. Co.***, 859 F.2d 534, 542 (7th Cir. 1988), *cert. denied*, 491 U.S. 907 (1989). Thus,

---

[10] Indeed, Gutierrez states that "[s]uch a ruling would render the EEOC's distinction between intake questionnaires and charges `meaningless'".

[11] The intake questionnaire, completed on May 25, 1989, contains most of the information included in the charge (Form 5). That questionnaire, EEOC Form 283, has been described by this court as a "preliminary charge form", ***Galvan v. Bexar County***, 785 F.2d 1298, 1301 (5th Cir. 1986), and does not call for specific dates of the discriminatory acts as reflected in Form 5. However, the Commission's regulations state that, notwithstanding the specifics called for in the charging instrument, "a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of". 29 C.F.R. § 1601.12(5)(b).

Gutierrez maintains that the filing of Form 5 constituted an amendment to a previously-filed charge.

This second prong of the ***Steffen*** test and the Commission's own regulation, *see* 29 C.F.R. § 1601.12(b), seem to ask the same question: Did the plaintiff believe that the intake questionnaire was sufficient to constitute a charge? In short, if the plaintiff believed she had done all that was required of her, Title VII will not be construed in such a "hypertechnical manner", ***Steffen***, 839 F.2d at 543, as to deem an instrument including all of the necessary information insufficient.

But Gutierrez was never told, and could not have believed, that she had done all that was required of her. Even under the analysis she advocates, her intake questionnaire was not sufficient to constitute a charge. It was not under oath, as required. And, Gutierrez concedes that EEOC investigators told her in May 1989 that a Charge of Discrimination would be filed **only after** she completed an additional "report". She knew that the report must reach the EEOC by a certain date in order for a timely charge to be filed. As noted, it took her almost eight months to complete the report. She did not deliver it to the EEOC herself, but rather entrusted her lawyer to do so. And, when she realized that her lawyer had not done so, the 300-day mark was only two weeks away. However, again, she chose not to deliver the report herself, trusting her lawyer to take care of it. Needless to say, that the lawyer did not do so does not absolve Gutierrez of her obligation to file a charge within the statutory period.

In sum, after Gutierrez completed her intake questionnaire, she knew that she must take further action before a charge would be filed. Moreover, she knew that such action must be taken within a certain period of time, and she simply failed to complete the task assigned her. Such a mistake does not operate to transform the intake questionnaire into a charge.

III.

Accordingly, the judgment is

AFFIRMED.