IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3653
Summary Calendar

DOLORES T. SMITH,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF THE NAVY,
Sean O'Keafe, Secretary

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
91 CV 3973 A 4

(March 9, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[*]

Dolores Smith appeals from the district court's dismissal of her multi-faceted civil rights action against the Secretary of the Navy. Finding no error, we affirm.

I.

On June 29, 1984, Dolores Smith, a black female, filed an Equal Employment Opportunity (EEO) complaint against her

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

employer, the United States Navy, alleging discrimination on the basis of Smith's race, color, and gender. A settlement agreement was signed on August 1, 1984, providing, inter alia, the following relief: (i) Smith would be temporarily promoted to a higher secretarial position; (ii) Smith would be given "due consideration" for permanent placement in that level of position if such a position became available; and iii) Smith would be permitted to reopen her complaint if she was not in fact given "due consideration" for such a promotion. In 1989, Smith filed another EEO complaint, claiming that her employer failed to give her "due consideration" for two available positions. An Equal Opportunity Employment Commission (EEOC) administrative law judge (ALJ) subsequently conducted a hearing and ruled against Smith on July 4, 1990. Smith appealed the ALJ's decision to the full EEOC, which affirmed the decision of the ALJ on May 17, 1991. On June 25, 1991, Smith filed a petition to reopen the case; the EEOC denied this request on September 13, 1991. The EEOC's notice of this denial was delivered to Smith's attorney's office on September 18, 1991.

Smith initiated this lawsuit thirty-seven days later, on October 25, 1991. In her federal district court complaint, Smith alleged not only discrimination based on race, color, and gender -- a Title VII action[2] -- but also discrimination based on age and national origin. Although the allegation of discrimination based on national origin came within the ambit of Title VII, the

[2] 42 U.S.C. § 2000-e et seq.

age discrimination claim was filed under the Age Discrimination in Employment Act (ADEA).[3] These latter two claims of discrimination were not raised in Smith's administrative complaint.[4] On June 19, 1992, the district court dismissed Smith's lawsuit. With respect to Smith's discrimination claims based on her race, color, and gender, the court held that Smith's complaint was untimely under Title VII's 30-day requirement for filing complaints in federal court following denial of relief by the EEOC. With respect to Smith's discrimination claim based on age and national origin, the district court held that Smith had failed to exhaust her administrative remedies, a prerequisite for filing a complaint in federal court. Smith filed a timely notice of appeal to this court.

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[3] 29 U.S.C. § 621 et seq.

[4] Smith also based her various claims of discrimination under "the Fifth, Thirteenth, and Eighteenth [sic; Fourteenth?] Amendments to the United States Constitution," the 1866 Civil Rights Act, and "all applicable statutes of the State Louisiana." We agree with the district court that these claims were not properly raised in Smith's federal petition. As the district court held, the ADEA and Title VII are the exclusive remedies for the types of employment discrimination alleged by Smith, a federal employee. See, e.g. Brown v. General Services Administration, 425 U.S. 820 (1976) (Title VII); Paterson v. Weinberger, 644 F.2d 521, 524-25 (5th Cir. 1981) (ADEA). Although there has recently been debate over whether § 101 of the 1991 Civil Rights statutorily repealed Brown, see Johnson v. Uncle Ben's, Inc., 965 F.2d 1363, 1372 (5th Cir. 1992), this court has held that § 101 should not be applied retroactively to pending cases such as Smith's, id. We will not clutter our discussion of Smith's Title VII and ADEA claims with any further discussion of these additional claims.

II.

Two main issues are raised on this appeal. First, we must determine whether the district court erred by dismissing Smith's Title VII complaint based on alleged race, color, and gender discrimination as a result of her failure to file her lawsuit within thirty days of her attorney's notice of the EEOC's final action denying relief. In particular, we are faced with the district court's refusal both to apply the 1991 amendments to Title VII retroactively and to apply the doctrine of "equitable tolling" to Smith's case. Second, we must determine whether the district court erred by dismissing Smith's Title VII complaint based on alleged national origin discrimination and Smith's ADEA claim for failure to exhaust administrative remedies.

A. Failure to Comply with the Thirty-Day Filing Requirement:

i) Does the "Equitable Tolling" Doctrine Apply?

The district court found that Smith, through her counsel of record, failed to file Smith's Title VII complaint within the thirty day period required by the version of the statute then in effect. 42 U.S.C. § 2000e-16(c) (1990). Although this court at one time rigidly treated compliance with this filing stricture as an absolute prerequisite to federal court jurisdiction, see Irwin v. Veterans Administration, 874 F.2d at 1093, the Supreme Court has since held that § 2000e-16(c) should not be read so rigidly, see Irwin v. Veterans Administration, 111 S.Ct. 453 (1990) (holding "equitable tolling" doctrine, as a general rule,

applicable to § 2000e-16(c)). See generally Ynclan v. Department of the Air Force, 943 F.2d 1388 (5th Cir. 1991). Nevertheless, the Supreme Court has not prevented this court from dismissing an untimely Title VII action when a tardy Title VII plaintiff is, as a matter of equity, unworthy of being forgiven.

In Irwin, the Supreme Court held that in order to reap the benefits of the equitable tolling doctrine, a party must offer an extraordinary reason for his tardiness. Such a valid excuse would include a party's good faith error in pleading or some bad faith action by the party's adversary that caused a delay in filing. Irwin, 111 S. Ct. at 457-58. In Smith's case, the district court found that Smith's lawyer simply failed to file the complaint on time.[5] As the Supreme Court explicitly stated, "[w]e have generally been much less forgiving in receiving late filings when the claimant failed to use due diligence in

[5] Smith claims that his law office did not receive the EEOC's final order denying relief until October 1, 1991, which, he argues, should have extended the filing deadline until October 31, 1991. The district court found that an agent in Smith's office received the order on September 18, 1991. The district court based its finding primarily on a certified mail return receipt indicating that an agent of Smith's counsel received the order on September 18, 1991. Although we note that the mailing address on the return receipt is different from the address listed on Smith's counsel's district and appellate court pleadings, Smith counsel has not specifically argued that the address on the return receipt was not in fact an address at which his law office or residence was located as of September 18, 1991. Rather, in his brief on appeal he cryptically claims that the order was delivered to "a law office" on September 18, 1991, without stating whether he had any affiliation with that office. Absent any more specific proof that the order was mistakenly delivered to an office or residence other than Smith's or Smith's counsel's, we must accept the district court's fact-finding. See Fed. R. Civ. P. 52.

preserving his legal rights." Id. at 458. Smith has offered no proof that he acted with due diligence. Accordingly, because we believe that Smith's case is not an appropriate one in which to apply the equitable tolling doctrine, we hold that, under the version of §2000e-16(c) in effect at the time that Smith filed suit, her Title VII claims based on alleged race, color, and gender discrimination were properly dismissed as untimely.

B. Do the 1991 Amendments to § 2000e-16(c) Apply Retroactively?

Smith also argues that, even if she did file her Title VII complaint seven days after the thirty-day deadline, we should nevertheless apply the 1991 amendment to § 2000e-16(c) -- which extended the filing period from thirty to ninety days[6] -- retroactively. With respect to other provisions of the 1991 Civil Rights Act, this court has refused to apply them retroactively in cases pending at the time that the Title VII amendments took effect, i.e., on November 21, 1991. See, e.g., Johnson v. Uncle Ben's, Inc., 965 F.2d 1363 (5th Cir. 1992); Landgraf v. USI Film Products, 968 F.2d 427 (5th Cir. 1992), cert. granted, ___ S. Ct. ___ (February 22, 1993).[7] These

[6] See Rowe v. Sullivan, 967 F.2d 186, 192 (5th Cir. 1992) (discussing § 114(1) of the 1991 Act).

[7] Although the Supreme Court has granted certiorari to decide, apparently as a general matter, whether the 1991 amendments apply retroactively, we continue to adhere to this circuit's precedents until the Court says otherwise. See W.O. Akin v. Q.L. Investments, Inc., 959 F.2d 521, 534 (5th Cir. 1992) ("Until the Supreme Court speaks, we will continue to apply [the law of this circuit.]").

decisions have concerned provisions of the 1991 Civil Rights Act that have altered significant remedial and substantive provisions of Title VII. See, e.g., USI Film Products, 968 F.2d at 432 (refusing to apply amendment permitting punitive and compensatory damages and amendment providing for jury trials retroactively).

In Rowe v. Sullivan, 967 F.2d 186 (5th Cir. 1992), however, this court in dicta noted one possible exception to our general rule that the 1991 amendments to Title VII do not apply retroactively to pending cases. In that case, as in the present case, we were asked to apply the 1991 amendment's sixty-day extension of Title VI's thirty-day filing requirement to a case that was filed before the effective date of the 1991 amendments.[8] In Rowe, we recognized that simple "procedural" amendments to Title VII might apply retroactively to pending cases. Id. at 193, citing Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929, 933-34 (7th Cir. 1992) (dicta). We also stated that a time requirement such as § 2000e-16(c) appeared to be "procedural" in most cases. Rowe, 967 F.2d at 194.

Nonetheless, we never actually decided whether simple "procedural" changes were exempt from the general rule of non-retroactivity because we held that the new ninety-day filing

[8] Actually, Rowe is technically distinguishable from the present case in that the Title VII complainant in Rowe asked us to apply the new ninety-day filing requirement for judicial actions analogously in the context of motions for reconsideration filed with the EEOC. See 967 F.2d at 192. An administrative regulation provided for a thirty-day filing requirement for such motions. See 29 C.F.R. § 1613.235(b). Nevertheless, this court addressed whether the 1991 statutory amendments to § 2000e-16(c) applied retroactively.

period, if applied to the Title VII complainant in Rowe, would have "substantive attributes."[9] We then pointed to a December 27, 1991 EEOC policy statement in which the EEOC announced that it would not seek to apply the 1991 Civil Rights Act to claims arising before the effective date of the statute. Thus, following the lead of the Sixth Circuit, we deferred to the agency that was charged by Congress with administering the statute in the case of an "arguably substantive amendment," at least as applied to the facts of Rowe. Id. at 194, citing Vogel v. City of Cincinnati, 959 F.2d 594, 598 (6th Cir. 1992).

The instant case cannot be distinguished from Rowe. Under the pre-1991 version of § 2000e-16(c), Smith had until October 18, 1991, to file a timely Title VII complaint in federal court. Yet she failed to file until October 25, 1991. The 1991 amendments took effect on November 21, 1991. Thus, if we were to apply the ninety-day provision in her case, that provision would have "substantive attributes." Just like the Rowe court, we see no need to reach the question of whether there is a "procedural"

[9] As we explained, because the Title VII complainant in Rowe had filed her federal lawsuit before the effective date of the 1991 amendments to Title VII, applying the new ninety-day filing provision would be "reviv[ing] a right" that otherwise would "have been extinguished under the law at the time" that suit was filed. Rowe, 967 F.2d at 194. Hence, application of the ninety-day provision would have "substantive attributes." Yet the new provision would "certainly" be procedural, we opined, "if the Act had been signed into law during [or before] the 30 day period in which Rowe could have timely filed a request for reconsideration." Id.

exception to our jurisprudence regarding the non-retroactivity of the 1991 amendments to Title VII.[10]

B. Smith's Failure to Exhaust Her National Origin and Age Discrimination Claims[11]

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[10] Smith makes one final attempt to avoid the harsh consequences of her untimely filing. Citing Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), Smith also contends that we should apply the "continuing violation" doctrine to save her otherwise untimely claim. Although her counsel's brief is poorly written, Smith apparently argues that a Title VII complainant who suffers continuing employment discrimination should not should not be bound by a filing deadline. We first observe that Havens was a housing discrimination case and applied the "continuing violation" doctrine to the 180-day statute of limitations which otherwise would have barred the plaintiff's housing discrimination complaint. The Court held that the limitation period did not bar a lawsuit based on a continuing pattern of discriminatory incidents, some of which occurred outside of the 180-day limitations period, so long as other incidents occurred within the 180 days prior to the time suit was filed. Id. at 380-82.

Although Smith cites no other authority, we recognize that the "continuing violation" doctrine has been applied in the Title VII context. See Hendrix v. City of Yazoo City, 911 F.2d 1102, 1103-04 n.10 (5th Cir. 1990) (citing cases). We do not believe, however, that this doctrine applies to Smith's failure to comply with § 2000e-16(c). Smith is not invoking the doctrine in the attempt to avoid the consequences of failing to timely file an original EEOC complaint -- i.e., within the statute of limitations for administrative complaints -- which is the typical Title VII scenario in which the "continuing violation" doctrine properly applies. See, e.g., Hall v. Ledex, Inc., 669 F.2d 397, 398-99 (6th Cir. 1982) (citing cases). Rather, she is trying to use the doctrine to avoid the consequences of failing to timely file a judicial complaint after being denied administrative relief. To permit Smith to use the doctrine in this manner would in effect permit her to avoid the administrative exhaustion requirement, discussed infra with respect to Smith's ADEA and Title VII national origin claims.

[11] Although Smith's appellate briefs make no specific reference to it, Smith apparently also raised, for the first time in federal district court, a new allegation of the same variety of discrimination that she had previously raised in her EEOC complaint. Apparently, this alleged act of discrimination occurred in late 1991 -- which was after the EEOC investigatory

The district court dismissed Smith's Title VII national origin discrimination claim and her ADEA claim on the ground that Smith failed to exhaust her administrative remedies. Smith does not dispute the general rule that the federal courts cannot entertain Title VII or ADEA claims unless a claimant first fully exhausts his administrative remedies. See, e.g., Brown, 425 U.S. at 832-33; Tolbert v. United States, 916 F.2d 245, 247 (5th Cir. 1990).[12] Rather, Smith argues that in her case, a common-law exception to the exhaustion doctrine exists: the "natural outgrowth" exception. We agree with the district court that this exception does not apply in Smith's case.

In numerous cases, this court has discussed the "natural outgrowth" exception to the exhaustion requirement. See, e.g., Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th Cir. 1970); Ray v. Freeman, 626 F.2d 439, 442-43 (5th Cir. 1980). We have consistently held that a Title VII complainant may not raise, for the first time in a federal district court complaint,

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proceedings had been closed. Because Smith fails to brief this particular issue regarding her failure to exhaust her administrative remedies, we refuse to address this claim on appeal. See United States v. Beaumont, 972 F.2d 553, 563 (5th Cir. 1992) ("Failure of an appellant to properly argue or present issues in an appellate brief renders those issues abandoned.").

[12] There is a special statutory exception to the exhaustion doctrine for ADEA claims filed by federal employees such as Smith: "the employee may proceed directly to federal court . . . no later than 180 days from the alleged discriminatory act, and providing that he or she first has filed a notice of intent to sue within 30 days prior to commencing suit." Castro v. United States, 775 F.2d 399, 403 (1st Cir. 1985) (citing 29 U.S.C. § 633a(d)). It is undisputed that this special exception does not apply in Smith's case.

new acts of employment discrimination unless those new acts were "reasonably related" to the acts raised previously during the administrative proceedings. Ray, 626 F.2d at 443. Although there may be cases where it is a close question regarding whether a new act of discrimination raised for the first time in federal court is reasonably related to acts raised earlier in an administrative proceeding, suffice it to say that this is not such a case. Smith raises age and national origin discrimination claims, which are different species from race, color, and gender claims.[13] Thus, we agree with the district court that these claims cannot yet be heard in federal court because of Smith's failure to exhaust them administratively.

III.

For the foregoing reasons, we AFFIRM the judgment of the district court.

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[13] See, e.g., Shah v. Mt. Zion Hospital & Medical Center, 642 F.2d 268 (9th Cir. 1981) (gender and national origin discrimination complaint not related to race, color, and religious discrimination complaint); Castro v. United States, 584 F. Supp. 252, 258-59 (D. Puerto Rico 1984), aff'd, 775 F.2d 399 (1st Cir. 1985) (national origin claim not related to age discrimination complaint); Schaffrath v. Akron/Summit/Medina Private Indus. Council, 674 F. Supp. 1308 (N.D. Ohio 1987) (national origin discrimination complaint not natural outgrowth of EEOC age, gender, and race discrimination complaint); Abdulrahim v. Gene B. Glick Co. 612 F. Supp. 256, 261 (N.D. Ind. 1985) (race and color claims not outgrowths of national origin claims).