

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4651
Summary Calendar

VERONICA LYONS,
Plaintiff-Appellant,

v.

WAL-MART STORES, Inc.,
and DAVID MANUEL

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
(CA6:91-1313)

(November 19, 1992)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Veronica Lyons appeals from the district court's dismissal of her Title VII action based on her counsel's failure to serve the defendants with copies of the summons and complaint in a

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

timely manner. Finding that the court did not abuse its discretion, we affirm.

I.

On June 27, 1991, Lyons filed a Title VII complaint against her employer, Wal-Mart Stores, Inc., and her store's manager, David Manuel. It is undisputed that Lyon's counsel failed to serve the defendants with a copy of the complaint and summons within the 120-day period required by Federal Rule of Civil Procedure 4(j). On January 17, 1992, Lyons counsel, via certified mail, finally sent copies of the complaint and summons to the defendants -- 205 days after the suit had been filed. On January 22, the district court sua sponte dismissed Lyons' action without prejudice for failure to comply with Rule 4(j), although the court's order expressly gave Lyons thirty days to reinstate the action if good cause for failure to comply with Rule 4(j) could be shown.

On February 24, 1992 -- more than thirty days later -- Lyons filed a motion to reinstate the action. Lyons' counsel explained his failure to comply with Rule 4(j) as follows: "Counsel had filed suit and believed that a copy of the summons and complaint had been served upon defendants prior to the expiration of the 120 days. After reviewing the file it was determined that service had not been made." One day later, on February 25, the district court reinstated the action.

On February 28, the defendants filed a joint motion to vacate and set aside the court's order of reinstatement and, alternatively, to dismiss for failure to prosecute. This motion was unopposed by Lyons. On May 11, 1992, the district court granted the defendants' joint motion and again dismissed the case without prejudice. The court entered judgment on May 13, and Lyons filed a notice of appeal on June 12.

II.

We review the district court's dismissal based on Lyon's counsel's failure to comply with Rule 4(j) for an abuse of discretion. See, e.g., Fournier v. Textron, Inc., 776 F.2d 532, 534 (5th Cir. 1985). Likewise, we review the district court's alternative basis for dismissal -- Lyon's lack of prosecution -- under an abuse-of-discretion standard. See Link v. Wabash Railroad Co., 370 U.S. 626, 633 (1962).

By no means can we say that the district court abused its discretion by dismissing this action based on Lyon's counsel's failure to comply with Rule 4(j)'s 120-day service requirement. Neither at trial nor on appeal has Lyons' counsel shown good cause for failing to comply with Rule 4(j). Rather, her counsel simply claimed that he was negligent or inadvertent.² This Court repeatedly has held that counsel's negligence or inadvertence is

² We also note that counsel similarly did not offer good cause for failing to request reinstatement of the case within the thirty day period required by the district court's January 22, 1992 dismissal order.

not good cause for a Rule 4(j) violation. See, e.g., Winters v. Teledyne Movable Offshore, Inc., 776 F.2d 1304, 1304-06 (5th Cir. 1985). Without a showing of good cause, Rule 4(j) requires dismissal when a plaintiff fails to serve the summons and complaint with 120 days of filing suit. See Fed. R. Civ. P. 4(j) ("If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, . . . the action shall be dismissed . . . without prejudice . . .") (emphasis added); see also Norclock v. City of Garland, 768 F.2d 654, 657 (5th Cir. 1985).³

Because we affirm the district court's dismissal based Lyons' failure to comply with Rule 4(j), we need not reach the issue of whether the court abused its discretion by dismissing for Lyons' failure to prosecute. Had the district court dismissed with prejudice for Lyons' failure to prosecute, which it could have done, see Link v. Wabash Railroad, supra, we would be faced with a more difficult issue. But because the court dismissed without prejudice, we need not pass on the court's second ground for dismissal.⁴

³ We note that the district court's initial decision to reinstate the case on February 25, 1992, which came only one day after Lyons filed the motion to reinstate, was improper in that it failed to give Wal-Mart and Manuel a meaningful opportunity to oppose the motion to reinstate. Thus, the procedural posture of the dismissal -- granting the defendants' motion to vacate and set aside the reinstatement order -- does not require a standard of review different from an appeal of a simple dismissal based on a failure to comply with Rule 4(j).

⁴ We note that this is a classic example of a entirely unnecessary appeal, one which borders on frivolity. Not only was there no legal basis for this appeal, but Lyons' counsel also

III.

For the foregoing grounds, we AFFIRM the district court's dismissal without prejudice. Double costs shall be taxed against appellant.

failed to pursue the obvious method of recourse by simply re-filing the lawsuit, as the dismissal was without prejudice. Counsel has wasted the time and resources of his client, the defendants, and this Court.