IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-4991

Summary Calendar

Rosalind Walton Russell,

Plaintiff-Appellant,

versus

University of Texas Health Center at Tyler, Pattie Choice Harris, George Hurst, and Oran Ferrell,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(6:91CV687)

May 25, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Plaintiff Rosalind Walton Russell was discharged by the University of Texas Health Center at Tyler in 1988. She filed this employment discrimination suit in 1991 against the Health Center and former supervisors Pattie Choice Harris, George Hurst, and Oran Ferrell. The district court granted defendants' motion to dismiss

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

the complaint on grounds that Russell's Title VII and constitutional claims were time-barred. We affirm.

I.

Rosalind Russell began working as a social worker at the Health Center in 1982. The record indicates that Russell received consistently high marks from supervisors in her performance reviews during her first few years of employment. Sometime in 1984, the top post within her department, Director of Social Services, became available. When Russell applied for this position, however, she was allegedly informed by defendant Oran Ferrell that her application was futile because "there was no way she would get the job." In any event, Pattie Choice Harris, another black woman, was hired as Director of the department. Harris and Russell apparently began to experience "communication problems" almost immediately after Harris assumed her role as Russell's supervisor. These difficulties were reflected in a 1985 informal complaint of harassment lodged by Russell with the Health Center EEO office and in the performance evaluations received by Russell in 1985-87. While prior supervisors had given Russell very favorable reviews, she received below average scores from Harris in nearly all of the categories. This series of poor evaluations led the Health Center to suspend Russell in May 1988. She was then discharged on July 27, 1988.

Russell appears to have first challenged the Health Center's decision to terminate her employment during a grievance hearing in late 1988. She then filed a charge of racial discrimination with the EEOC on May 18, 1989. On August 2, 1990, the Commission found

that Russell had not established a statutory violation. This determination rested upon the following findings:

> The records show that [a Health Center] official discussed and documented [Russell's] problems involving her job performance: eight (8) times in 1985, ten (10) times in 1986, ten (10) times in 1987. On May 26, 1988, [Russell] was given a written warning and suspended. She was discharged for poor job performance on July 27, 1988.
>
> There is no evidence to support that another co-worker had similar problems under the same supervisor and was not discharged or discipline[d].
>
> There is evidence to show that [the Health Center] discharged 12 employees, 7 Whites, 4 Blacks, and 1 Hispanic. Three of the White[s] were discharged for poor job performance.
>
> The records also show that [Russell's] replacement was a Black female and the person who recommended [Russell's] discharge is also Black.
>
> There is no evidence to support that [Russell's] charge of being harassed or given unfair treatment because of her race, Black. There is testimonial evidence that [Russell] and [the Health Center] official did have conflicts and were not able to get along with each other.

This determination that Russell's charge did not establish a violation of Title VII was upheld on review and the EEOC issued a right to sue letter on July 22, 1992. Included with this letter was the standard notice instructing Russell that her right to sue would be lost if she failed to file a complaint in a U.S. District Court within ninety days. The notice also advised Russell that "[a] request for representation does not relieve you of the obligation to file a lawsuit within this 90-day period."

On August 26, 1991, Russell filed a motion for leave to proceed in forma pauperis and for appointment of counsel in U.S. District Court for the Eastern District of Texas. The district

court adopted the magistrate's recommendation and denied this motion on December 5, 1991. On December 16, Russell filed a complaint in the district court, naming the Health Center and Pattie Choice Harris, her former supervisor, as defendants. Russell subsequently moved to add two additional Health Center employees, George Hurst and Oran Ferrell, as defendants on February 19, 1992. On August 27, 1992, the district court granted defendants' motion to dismiss the complaint, holding that Russell had not filed her suit within the ninety-day limitations period applicable to Title VII claims or the two-year period governing constitutional claims. Russell then filed this appeal.

II.

A.

Upon receipt of a right to sue letter from the EEOC, would-be Title VII plaintiffs have ninety days in which to bring "a civil action . . . against the respondent named in the charge." 42 U.S.C. § 2000e-5(f)(1). "A civil action is commenced by filing a complaint with the court," Fed.R.Civ.P. 3, that is, "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). Russell received her right to sue letter on July 27, 1992, but did not file a complaint in the district court until December 16, 1992, some 142 days later. The district court therefore dismissed Russell's Title VII claim on grounds that she had failed to comply with the ninety-day statute of limitations.

On appeal, Russell contends that her claim should not have been dismissed because she filed a motion for leave to proceed in forma pauperis and for appointment of counsel on August 26, 1992, well within the ninety-day limitations period. We disagree. "A complaint, not a request for a lawyer, begins the action." McNeil v. United States, 964 F.2d 647, 649 (7th Cir. 1992) (citing Baldwin County Welcome Center v. Brown, 104 S.Ct. 1723 (1984)), cert. granted, 113 S.Ct. 1036 (1993). As we stated in Antoine v. United States Postal Service, 781 F.2d 433 (5th Cir. 1986), "the central thrust of the Supreme Court's decision in Brown is that the filings, whatever their composition, must meet the requirements of Rules 3 and 8 of the Federal Rules of Civil Procedure." Id. at 438. Brown is not satisfied "unless the request for appointment of counsel contains a 'short and plain statement' of the basis for relief, as required by Rule 8 (a) (2)." Id. Our review of Russell's motion for leave to proceed in forma pauperis and for appointment of counsel and the accompanying affidavit, the only documents filed by her prior to the expiration of the statute of limitations on October 25, 1992, discloses that she has not met this standard.

Russell contends that we should overlook a layperson's failure to comply with these detailed procedural requirements. We disagree. While the ninety-day limitations period governing Title VII claims is subject to equitable tolling, Irwin v. Veterans Administration, 111 S.Ct. 453, 457 (1990), the court's power to grant such relief is to be used "only sparingly," and does not

"extend to what is at best a garden variety claim of excusable neglect." Id. at 457-58. This court has accordingly excused late filings only in certain instances, such as where the plaintiff has submitted the complaint to the court within the limitations period, but the district court clerk fails to file it at the time it is received. See Ynclan v. Department of Air Force, 943 F.2d 1388, 1392-93 (5th Cir. 1991); Hernandez v. Aldridge, 902 F.2d 386, 388 (5th Cir. 1990), cert. denied, 111 S.Ct. 962 (1991); Martin v. Demma, 831 F.2d 69, 71 (5th Cir. 1987). This case does not present analogous circumstances. Russell maintains that she did not file her complaint until some 124 days after receiving her right to sue letter because she thought her motion for appointment of counsel was sufficient to commence the action. She received two express reminders to the contrary, however, first from the EEOC, which informed her that "[a] request for representation does not relieve you of the obligation to file a lawsuit within this 90-day period," and then from the motion for appointment of counsel form itself, which indicated that a complaint should be attached to her motion. The district court thus did not err in dismissing Russell's Title VII claim as time-barred.

B.

The district court held that Russell's constitutional claims were barred by the statute of limitations as well. Russell challenges this dismissal and contends, for the first time on appeal, that defendants' alleged discriminatory conduct implicates the protections provided by 42 U.S.C. § 1981, § 1983, Tex. Rev.

Civ. Stat. Ann. art. 5221k, and the Hazel Roy consent decree. As a general matter, this court will not consider claims that were not advanced in the district court below, see, e.g., Hulsey v. State, 929 F.2d 168, 172 (5th Cir. 1991); Masat v. United States, 745 F.2d 985, 988 (5th Cir. 1984), even where the appellant proceeds pro se. See, e.g., Beck v. Lynaugh, 842 F.2d 759, 762 (5th Cir. 1988); Gabel v. Lynaugh, 835 F.2d 124, 125 (5th Cir. 1988); Emory v. Texas State Bd. of Medical Examiners, 748 F.2d 1023, 1027 n.* (5th Cir. 1984). Accordingly, we will reach the merits of issues raised for the first time on appeal only "when our failure to do so would lead to a grave injustice." Masat, 745 F.2d at 988.

We do not believe that this stringent standard is met here, for all of Russell's new claims would also appear to be time-barred. Because Congress did not establish a statute of limitations for alleged constitutional deprivations, a federal court borrows the forum state's general personal injury limitations period. Owens v. Okure, 109 S.Ct. 573, 581-82 (1989) (§ 1983); Gartrell v. Gaylor, 981 F.2d 254, 256 (5th Cir. 1993) (same); Goodman v. Lukens Steel Co., 107 S.Ct. 2617, 2620 (1987) (§ 1981); Hickey v. Irving Indep. School Dist., 976 F.2d 980, 983 & n.7 (5th Cir. 1992) (same). The applicable statute of limitations under Texas law is two years. Tex. Civ. Prac. & Rem. Code § 16.003 (a). Federal law provides that a cause of action accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action. Gartrell, 981 F.2d at 257 (citing Lavellee v.

Listi, 611 F.2d 1129, 1131 (5th Cir. 1980)). All of Russell's claims relate to conduct which could not have occurred after July 27, 1988, the day she was discharged by the Health Center. She did not file suit, however, until December 16, 1991, over three years later and well outside the two-year limitations period. Russell's federal claims brought under § 1983 and § 1981 would therefore be barred.[1]

III.

For the foregoing reasons, the district court's judgment is AFFIRMED.

[1] Assuming that the merits of Russell's claims based on the Commission on Human Rights Act and the Hazel Roy consent decree could be addressed by this court, we note that these claims would in all likelihood be time-barred as well. See Schroeder v. Texas Iron Works, Inc., 813 S.W.2d 483 (Tex. 1991) (discussing limitations period applicable to article 5221k); Smith v. City of Chicago, 769 F.2d 408 (7th Cir. 1985) (discussing limitations period applicable to claims brought under consent decrees).