

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-5767  
Summary Calendar

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WALTER R. HULL,

Plaintiff-Appellant,

versus

SEARS, ROEBUCK, & CO.,

Defendant-Appellee.

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Appeal from the United States District Court for the  
Western District of Texas  
SA 92 CV 256

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( June 23, 1993 )

Before JOLLY, BARKSDALE, and E. GARZA, Circuit Judges.

PER CURIAM:\*

Walter Hull was employed by Sears, Roebuck & Co. After working for Sears for twenty-four years, Hull's employment was terminated. Hull, who was 48 years old at the time of his discharge, filed suit against Sears pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 et seq. The district court granted Sears summary judgment because Hull had

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

failed to file a complaint with the Equal Employment Opportunity Commission (EEOC) within the statutorily required time period. Hull appeals. We find that no circumstances present in this case require equitable tolling of the time period, and we therefore affirm.

I

Hull was employed by Sears, Roebuck & Company, Inc., on July 19, 1966. In June of 1990, Hull was told that profits in his management area were down and further action would be taken if they did not increase. The next month, Sears offered Hull a demotion, but Hull declined because it would have resulted in a decrease in pay. On September 8, 1990, Hull's employment was terminated. Hull was 48 years old at this time, and he was replaced by an individual in his early 30's.

One to two weeks after being discharged, Hull attempted to file a complaint with the EEOC. An EEOC representative advised Hull to wait and file the complaint after he had settled his vacation and other payments with Sears; the representative, however, also told Hull that he must come back to the EEOC and refile the complaint within 300 days of his discharge.<sup>1</sup> Hull then consulted an attorney concerning a workers' compensation claim

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<sup>1</sup>The Age Discrimination in Employment Act (ADEA) requires a plaintiff to file a charge with the EEOC within 180 days after the alleged unlawful practice occurred. 29 U.S.C. § 626(d)(1). If a state has an agency to deal with age discrimination complaints, such as Texas, potential plaintiffs have a 300-day filing period. 29 U.S.C. § 626(d)(2).

and an age discrimination claim. When Hull asked this attorney about filing the EEOC complaint, the attorney told him not to worry about filing it because they were going a different route and Hull would not need to file with the EEOC. In July of 1991, Hull received a letter from this attorney stating that he was not interested in Hull's case and Hull would have to seek another attorney if he wanted to pursue the matter further. Hull consulted another attorney two months later and filed a charge of discrimination with the EEOC; however, by this time, some 386 days had passed since the date of his discharge.

## II

Hull filed suit against Sears in federal district court alleging that his termination from employment was a result of unlawful age discrimination in violation of the Age Discrimination in Employment Act (ADEA). Hull also included pendent state law claims for intentional and negligent infliction of emotional distress. In its answer, Sears affirmatively asserted that Hull had failed to file a timely charge of discrimination with the EEOC and was thus precluded from bringing his action under the ADEA.

Sears moved for summary judgment based on Hull's failure to file a charge within 300 days of the alleged act of discrimination. Sears asserted that Hull's delay was not excused by any facts that would support an equitable tolling of the filing period. The district court found that Hull had not presented any evidence that

might suggest equitable tolling was appropriate and granted summary judgment to Sears on all claims. Hull appeals.

### III

On appeal, Hull argues that the district court failed to take into account evidence that he was instructed by an EEOC employee and an attorney not to file a claim. Hull argues that these representations should equitably toll the filing period. On the other hand, Sears argues that Hull has failed to present facts to excuse his failure timely to file a charge of discrimination.

### IV

#### A

We review the district court's granting of summary judgment de novo and affirm if the nonmoving party--in this case Hull--failed to present sufficient evidence to create a genuine issue. Ugalde v. W.A. McKenzie Asphalt Co., 990 F.2d 239, 241 (5th Cir. 1993). Summary judgment is appropriate if Sears establishes that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Id.

#### B

The timely filing of a complaint with the EEOC is not a jurisdictional requirement, but instead the limitation statute is subject to equitable tolling. Conaway v. Control Data Corp., 955 F.2d 358, 362 (5th Cir. 1992). If, however, the complaint is not filed within 300 days, "the plaintiff has the burden of demonstrating a factual basis to toll the period." Id.

As bases for tolling the time period, Hull argues that (1) an EEOC employee instructed him to wait before filing his complaint and (2) his first attorney told him that he did not need to file a complaint with the EEOC. As to his first argument, Hull admits that the EEOC employee advised him that he should file his complaint within 300 days of his discharge. This court has previously held that allowing a plaintiff equitably to toll a time limitation based on incomplete information by an EEOC employee would "create a great potential for abuse" and would not support equitable tolling. Id. at 363. If incomplete information provided by an EEOC employee will not support equitable tolling, it is impossible to conclude that complete and accurate information can toll the time limitation. The EEOC employee properly advised Hull, and Hull was told that his complaint had to be filed within the 300 day time limit. Accordingly, Hull's first argument is completely without merit.

Hull next argues that the time period should be tolled because his first attorney told him he did not need to file a complaint. We have previously recognized three situations when equitable tolling is appropriate: (1) during the pendency of an action before a state court which was the wrong forum; (2) when the claimant did not know or could not have known the facts which gave rise to the claim; and (3) when the EEOC misleads a complainant about the nature of his rights. Chappell v. Emco Machine Works Co., 601 F.2d 1295, 1302-03 (5th Cir. 1979). While "Chappell does

not hold that these three are the only bases for tolling," see Blumberg v. HCA Management Co., Inc., 848 F.2d 642, 644 (5th Cir. 1988), the circumstances of this case do not provide another basis.

In Edwards v. Kaiser Aluminum & Chemical Sales, Inc., 515 F.2d 1195 (5th Cir. 1975), we noted that

[w]hile it may be inequitable to allow an employer to benefit from his own wrong, it would be at least equally unfair to then hold that the employer is estopped from raising the [300] day bar where the injured employee consulted an attorney who either slept on his client's rights or did not believe he had any under the statute.

Id. at 1200 n.8. Such is the situation here. Hull was informed by an EEOC employee that he had a 300-day time limit in which to file his complaint. The fact that Hull then chose to consult an attorney who provided him with erroneous information does not support Hull's claim that the time period should be tolled for equitable reasons. The timely filing requirement is "designed to protect employers from stale claims." Chappell, 601 F.2d at 1303 (emphasis added). Sears was not put on notice of Hull's complaint until 386 days after Hull's employment was terminated--a full 86 days after the time period expired. Hull cannot ask that this delay be excused simply because the attorney he consulted misguided him.

V

In summary, Hull has not met his burden of proving that any circumstances exist which would require that the 300 day time limit

be tolled.<sup>2</sup> Accordingly, the district court did not err in granting summary judgment to Sears. The judgment of the district court is therefore

A F F I R M E D.

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<sup>2</sup>Hull also summarily argues that the imposition of a 300-day filing deadline "removes from any plaintiff in an ADEA action the flexibility in which to file a suit within the time frames as set out by Congress." Hull has failed to provide any support for his argument or, for that matter, any persuasive reasoning. We therefore find Hull's argument to be without merit.