UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-7732
Summary Calendar

REVES BLACK,

Plaintiff-Appellant,

VERSUS

MISSISSIPPI STATE DEPARTMENT OF HEALTH, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
CA J91 0289 B

May 25, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

BACKGROUND

Appellant Reves Black sued the Appellees Mississippi State Department of Health and the Mississippi State Personnel Board in June 1992, alleging racial discrimination in promotion and retaliation for filing a prior charge of discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

VII).[2] Appellees filed their Answer in August. On October 10, 1991, the district court clerk issued an Order to Show Cause based on the fact that no Scheduling Order had been entered as required by Local Rule 6(d).[3] The parties were directed to file a scheduling order within ten days or show just cause why they had not complied with Rule 6(d). The scheduling order was not filed until November 25, 1991.

On December 5, 1991, Appellees sent Appellant their first set of interrogatories. Appellant never responded. On August 7, 1992, the district court directed Appellant to show cause within fourteen days why the case should not be dismissed for failure to prosecute under Fed.R.Civ.P. 41(b). When Appellant failed to respond within the fourteen day period allotted by the district court and the three additional days permitted by Fed.R.Civ.P. 6(e),[4] the court dismissed the case without prejudice on August 25, 1992, pursuant to Fed.R.Civ.P. 41(b). Appellant filed a Motion in Arrest of Judgment on August 28, 1992, and attached to it his response to the

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[2] 42 U.S.C. §§ 2000e to 2000e-17.

[3] Uniform Mississippi District Court Rule 6(d) provides in part:

> Pursuant to Rule 16(b), FRCP, within thirty (30) days after issue is joined in a case, but no later than 120 days after the complaint is filed, counsel are required to present the Magistrate Judge a proposed order setting forth deadlines for the joining of other parties and amending the pleadings; service of motions, and the completion of discovery.

[4] Fed.R.Civ.P. 6(e) provides:

> Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period.

show cause order. On October 13, 1992, the district court denied the motion and entered final judgment. Appellant appeals.

DISCUSSION

Black filed his racial discrimination claim pursuant to Title VII. An individual seeking to bring a suit under Title VII has ninety days to do so after receiving a right to sue letter from the Equal Employment Opportunity Commission.[5] 42 U.S.C. § 2000e-5(f); Berry v. Cigna/RSI-Cigna, 975 F.2d 1188, 1191 (5th Cir. 1992) (citing Price v. Digital Equip. Corp., 846 F.2d 1026, 1027 (5th Cir. 1988)). The timely filing of a complaint does not toll the ninety-day filing period, and if a complaint is later dismissed after the ninety-days have elapsed, the plaintiff is time barred from refiling his claim. Berry, 975 F.2d at 1191. Furthermore, we have held that "[w]here further litigation of [a] claim will be time-barred, a dismissal without prejudice is no less severe a sanction than a dismissal with prejudice, and the same standard of review is used." Id. at 1191 (quoting McGowan v. Faulkner Concrete Pipe Co., 659 F.2d 554, 556 (5th Cir. 1981)).

A dismissal with prejudice is reviewed for abuse of discretion. Berry, 975 F.2d at 1191. Because dismissal with prejudice is such a harsh sanction, we will affirm only when (1)

[5] Although the record is devoid of any evidence that Appellant filed a timely charge of discrimination with the Equal Employment Opportunity Commission and received a right to sue letter (the two jurisdictional prerequisites to filing a Title VII claim in federal court), we recognize that Appellant may have produced such evidence if the case had progressed further. Therefore, and for Appellant's benefit, we analyze this case as if such evidence is part of the record.

there is a clear record of delay or "contumacious conduct" by the plaintiff, and (2) the district court has expressly determined that "lesser sanctions would not prompt diligent prosecution, or the record shows that the district court employed lesser sanctions that proved to be futile." Id. "Moreover, because of our reluctance to visit such a harsh sanction upon a party solely because of the sins of his counsel, in close cases we have often looked for proof of one of the following 'aggravating factors'--(1) the plaintiff's personal contribution to the delay, (2) the defendant's actual prejudice because of the delay, and (3) delay that can be characterized as intentional." McNeal v. Papasan, 842 F.2d 787, 791 (5th Cir. 1988) (citing Sturgeon v. Airborne Freight Corp., 778 F.2d 1154, 1159 (5th Cir. 1985)).

We are very sympathetic to the district court's frustration in dealing with plaintiff's attorney, and we too are unimpressed by counsel's level of performance. Furthermore, we recognize the court's 41(b) power to sua sponte dismiss a plaintiff's case for failure to prosecute. We must note, however, that the plaintiff in this case failed to emphasize to the court that his claim would be time-barred if dismissed, and for this reason the court may not have realized that its dismissal without prejudice would operate as a dismissal with prejudice. For the same reason, the court did not make factual findings regarding counsel's continuous delays, whether lesser sanctions would prompt diligent prosecution, or whether any of the aggravating factors set forth in McNeal were present.

Because such findings will aid this Court in reviewing the district court's dismissal, we REVERSE and REMAND for the court to reconsider in light of the rules applicable to dismissal with prejudice.

REVERSED and REMANDED.