

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-8702
(Summary Calendar)

FRANCES V. REDD

Plaintiff-Appellant,

versus

FISHER CONTROLS

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(A-91-CA-691)

(August 29, 1994)

Before DUHE', WIENER, and STEWART, Circuit Judges.

PER CURIAM:¹

Frances V. Redd appeals judgments of the district court dismissing her complaints alleging gender, race, and age discrimination against her employer. In two different summary judgments, the district court found that the complaint was not timely filed. For the following reasons, we affirm the judgments of the district court.

FACTS AND PROCEDURAL HISTORY

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Frances V. Redd, a white female in her forties, was employed by Fisher Controls International Inc. ("Fisher") as a senior secretary. In late 1987, Redd sought a promotion but it was denied. She later learned that the position was filled by a younger woman who, according to Redd, had less experience and less service at Fisher. On October 6, 1987, Redd filed a grievance with the company's human resources department.

On October 9, 1987, Redd was terminated from her position as secretary allegedly because she had included in the grievance a confidential review of another Fisher employee. After her termination, Redd made several requests to be rehired for her former position. In January 1988, she was told that any application for re-employment made by her would not be viewed favorably.

In a complaint filed on October 19, 1988 with the state human rights commission, Redd alleged Fisher discriminated against her by failing to promote her on the basis of age, and by firing her on the basis of gender and age. Redd also alleged that Fisher discriminated against her on the basis of race when it failed to rehire her and instead hired a younger, black female. The Equal Employment Opportunity Commission found that the complaint had not been timely filed and dismissed it.

On September 4, 1991, Redd filed a pro se complaint in federal district court. In the complaint, she alleged that Fisher had failed to promote her and that she was fired because of her sex, age, and/or race. She also alleged that Fisher had failed to rehire her for the same reasons. Fisher filed a motion for summary

judgment on Redd's promotion and termination claims, arguing that the charges had not been filed within 300 days of her termination as required by Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967. The same day, Fisher filed a second motion for summary judgment on the failure to rehire claim, arguing that the failure to rehire claim was really a part of the discharge claim and thus it was also untimely. Fisher also filed another summary judgment motion in which it argued that it would never have hired Redd because she falsified her job application. The district court granted all three summary judgments. Redd appeals the judgments of the trial court.

STANDARD OF REVIEW

This court reviews a district court's grant of summary judgment de novo. Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir. 1992), cert. denied, 113 S.Ct. 82 (1992). Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits filed in support of the motion, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 91 L.Ed.2d 265 (1986). If the moving party meets the initial burden of showing that there is no genuine issue, the burden shifts to the non-moving party to produce evidence or set forth specific facts showing the existence of a genuine issue for trial. Id. at 322-24; Fed. R. Civ. P. 56(e). The mere allegation of a factual dispute between the parties will

not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

DISCUSSION

Redd contends that the district court erred in concluding that she failed to file her complaint timely. A claimant under Title VII of the Civil Rights Act of 1964 ("Title VII"), 41 U.S.C. § 2000e, et seq. and the Age Discrimination in Employment Act of 1967 ("ADEA") may not take legal action before she has filed an administrative charge. See Anson v. University of Texas Health Science Center at Houston, 962 F.2d 539, 540 (5th Cir. 1992); Hoffman v. Boeing, 596 F.2d 683, 685 (5th Cir. 1979). In those states where a person aggrieved has initially instituted proceedings with a state or local agency, to be filed timely, a complaint of unlawful employment discrimination under Title VII and the ADEA must be filed with the Equal Employment Opportunity Commission ("EEOC") within 300 days after the last act of discrimination. 42 U.S.C. § 2000e-5(e)(1); 29 U.S.C. § 626(d)(2).

Redd was fired from her job with Fisher on October 9, 1987. She did not file a formal charge with the Austin Human Rights Commission and the EEOC until October 19, 1988. This gap in time is more than 300 days after her termination. Therefore, this complaint was not filed within the prescribed time limits.² The

²In her brief, Redd also asserts claims of sexual harassment by Fisher. These claims arose before she was fired. Thus, they are barred by the same time restrictions that apply to her wrongful termination claim.

several attempts Redd made to convince Fisher to rehire her did not extend the time restrictions. See Delaware State College v. Ricks, 449 U.S. 250, 261, 101 S.Ct. 498, 506 n.15, 66 L.Ed.2d 751 (1980) (holding that mere attempts to be rehired were not sufficient to toll the time period to file a complaint); Charlier v. S.C. Johnson & Son, Inc., 556 F.2d 761, 766 (5th Cir. 1976) (holding that a failure to reinstate does not constitute a continuing pattern of discrimination which tolls the time period to file a complaint.)

Redd contends that she filed a complaint in February 1988, well within the 300-day time restriction. In support of this contention, she submitted to the court her affidavit and the affidavits of her husband and son. The affidavit of Redd's husband and her son do not state that a complaint was filed. Redd's own affidavit also does not state that a complaint was filed; it only states that she gave an investigator information about her case.

At best, this evidence submitted by Redd indicates that Redd might have visited the Austin Human Rights Commission Office. It does not raise a material issue of fact regarding whether a complaint was filed. Additionally, Fisher submitted an affidavit by an EEOC employee which states that a computer record would exist of any filed complaint and that there was no record that Redd had filed a complaint before October of 1988. All of this evidence supports the district court's judgment that Fisher had not filed a complaint within the 300-day time restriction.

Redd has submitted several documents on appeal that were not presented to the district court. This evidence includes an intake

questionnaire dated February 9, 1988. It also includes an affidavit from Redd's daughter stating that she was present in February when the complaint was filed. Although this Court reviews summary judgments de novo, its inquiry is limited to the summary judgment record before the trial court. The parties cannot add exhibits, depositions, or affidavits to support their positions on appeal. Topalian v. Ehrman, 954 F.2d 1125, 1131-32 n.10 (5th Cir. 1992), cert. denied, ___U.S.___, 113 S.Ct. 82 (1992). Thus, we do not consider this new evidence in our decision.

Redd contends that the district court erred by not conducting a hearing on her summary judgment motion. Local Rule CV-7(h) for the Western District of Texas provides that the allowance of an oral hearing is within the sole discretion of the judge to whom the motion is assigned. In this case, the issue was the timeliness of Redd's complaint, which is an issue of law. Any testimony that would have been heard at a hearing could have been made in affidavit or deposition form. The district court would have the same evidence before it with or without a hearing. We find no abuse of discretion in the district court's decision not to conduct a hearing.

Redd contends that her attorney mismanaged her case and thus she was deprived of the effective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2051, 80 L.Ed.2d 674 (1984). The ineffective assistance of counsel standard in Strickland is applicable only to criminal trials. The effectiveness of counsel in a civil case should be addressed in a

malpractice action against the attorney or a complaint before the disciplinary committee of the bar.

Redd has asserted two arguments for the first time in her reply brief: (1) Fisher has engaged in a continuing pattern of discrimination that continually interrupted the time period for filing a complaint; (2) Fisher is equitably estopped from asserting that her claim is time barred because she was told that she could not return to work while the investigation concerning her grievance was pending--implying that she could return to work after the grievance. However, it is impermissible to mention an issue for the first time in a reply brief, because the appellee then has no opportunity to respond. Knigheten v. C.I.R., 702 F.2d 59, 60 (5th Cir. 1983), cert. denied, 464 U.S. 897, 104 S.Ct. 249, 78 L.Ed.2d 237 (1983). We therefore do not discuss these contentions.

The EEOC, in its amicus brief, contends that Fisher's refusal to rehire Redd and its hiring of a younger replacement was a distinct discriminatory act which occurred less than 300 days before Redd filed her EEOC charge. Redd did not raise this issue in her original brief. Amicus curiae cannot expand the scope of an appeal to implicate issues not presented by the parties. See Resident Council of Allen Parkway Village v. U.S. Dep't of Housing & Urban Development, 980 F.2d 1043, 1049 (5th Cir. 1993), cert. denied, 114 S.Ct. 75, 126 L.Ed.2d 43 (1993). Thus, we do not consider the merits of this argument.

CONCLUSION

Because Redd presented no summary judgment evidence supporting

her contention that she did file an age, gender, and race discrimination complaint within the applicable 300-day time limitation, the two judgments of the district court are affirmed. Affirmance on these grounds pretermits any need for a discussion of the district court's grant of the third summary judgment.³

AFFIRMED.

³This includes issues raised in the amicus brief filed by the Equal Employment Advisory Council.