IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1191

Summary Calendar

AL G. FROST, JR.,

Plaintiff-Appellant,

v.

FORT WORTH INDEPENDENT SCHOOL DISTRICT, ET AL.,

Defendants,

FORT WORTH INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(4:92-CV-031-A)

(September 22, 1993)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

Appellant Al G. Frost, Jr., appeals the district court's order dismissing with prejudice his claims against Fort Worth Independent School District, et al. After a careful review of the record, we affirm the judgment of the district court.

---

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

On January 14, 1992, Frost filed a complaint under 42 U.S.C. §§ 1981, 1983, and 1985 against the Fort Worth Independent School District (FWISD), various FWISD officials, the Internal Revenue Service, The Fort Worth Star Telegram, and two Star Telegram employees in the United States District Court for the Northern District of Texas. Frost alleged that he had been wrongfully suspended and subsequently discharged from his position as a school administrator and had been denied a "name clearing" to which he was entitled. Frost maintained that his suspension and subsequent termination violated his rights under the First, Third, Ninth, and Fourteenth Amendments--including his rights of equal protection and due process.[1]

The district court dismissed Frost's claims against FWISD officials because they had been sued only in their official capacities. The court also dismissed Frost's claims brought under the Third and Ninth Amendments and under §§ 1981 and 1985, pursuant to Federal Rule of Civil Procedure 12(b)(6). Frost does not appeal these dismissals.

Frost then filed an amended complaint against FWISD and the other original defendants on April 24, 1992, alleging that his suspension and termination violated his rights of free speech, privacy, and due process and that he was entitled to damages

[1] Frost also alleged that his termination created various state law claims arising out of breach of his employment contract. Finding that Frost had failed to exhaust administrative remedies, the district court dismissed these claims. Frost does not appeal this dismissal.

under § 1983. The district court first dismissed all of Frost's claims against the Internal Revenue Service, the Star Telegram, and the named defendant employees of the Star Telegram for want of prosecution because of Frost's failure to appear at a properly-noticed hearing on these defendants' motions to dismiss. FWISD then filed a motion for sanctions and to strike Frost's pleadings as to all of his claims against FWISD because of Frost's failure to attend a properly-noticed deposition. After a hearing on August 28, 1992, on Frost's motion to reinstate his claims and FWISD's motion for sanctions, the district court found that Frost's failure to attend the deposition was not justified.[2] The court then ordered, as sanctions authorized by Federal Rule of Civil Procedure 37, that (1) Frost pay FWISD $3,345 for deposition expenses on or before September 28, 1992, (2) all of Frost's claims be dismissed against FWISD, except for his due process claims related to his suspension and termination, and (3) his discovery on that issue be limited. The court signed a final judgment as to Frost's dismissed claims against FWISD on September 1, 1992.

[2] Frost admitted that he had received a notice of intent to take oral videotape deposition and subpoena duces tecum prior to August 13, 1992, the date on which the deposition had been scheduled. Frost also sent a letter to FWISD's attorneys two or three days before the scheduled deposition stating that he had not agreed to the date and time set for this deposition and that he could not attend because he would be out of town. Frost did not, however, file a motion with the district court asking the court to release him from his obligation to appear at the deposition.

When Frost failed to pay the sanction as required by court order, FWISD filed a motion to dismiss Frost's claims pursuant to Federal Rule of Civil Procedure 41(b). Frost then filed an unverified memorandum in opposition to FWISD's motion to dismiss and a motion to quash the court's order for sanctions in which he alleged that because of economic hardship--i.e., he had to file bankruptcy and to accept employment for $5 per hour because of FWISD's actions, he was requesting relief from the court order to pay the deposition expenses. He also alleged that FWISD had willfully failed to respond to his request for interrogatories and production of documents.

The court subsequently ordered that FWISD's motion be held in abeyance and that Frost file (1) a document setting forth facts pertinent to his allegations and (2) copies of pertinent documents as exhibits supporting those facts. Frost did then file an unverified document along with an uncertified copy of his discharge received from the bankruptcy court. Frost also eventually filed a motion for summary judgment, and the court--while awaiting for Frost to comply with its order to pay monetary sanctions--granted FWISD extensions of time to reply to that motion.

The district court then scheduled a hearing on FWISD's motion to dismiss on December 3, 1992. During this hearing, Frost testified that (1) he had made no effort to pay the sanction or to work out a payment plan, (2) he owned a one-third interest in an unencumbered duplex in Minneapolis, Minnesota,

which he had inherited from his mother, and (3) he had not attempted to borrow against his interest in this duplex to pay the sanction. Frost had not previously disclosed his interest in the duplex in his motion to quash the court's order for sanctions or his claim against FWISD as an asset in his personal bankruptcy proceeding.

Frost's testimony also confirmed that he had engaged in a pattern of filing documents with the court but not mailing copies of those documents to FWISD until later. Additionally, Frost had subpoenaed two FWISD employees to appear at the hearing so that he could, in effect, depose them in contravention of the court's order limiting Frost's discovery.

At the conclusion of the hearing, the district court found that Frost had filed a false declaration of his assets in response to a court order and that he had filed a false declaration in bankruptcy court. In its order issued on December 4, 1992, however, the court did give Frost one more chance to pay the imposed sanction and ordered Frost to do so within ten days. The court also ordered Frost to file a certified copy of his mother's will and a list of assets or inventory of his mother's estate, certified by the probate court in Minnesota or verified by himself and his two sisters.[3] The court's order further stated that should Frost fail to pay the imposed sanction by

[3] In testifying at the hearing on the previous day, Frost gave no indication that he would have any difficulty complying with this order.

December 14, 1992, Frost's claims against FWISD would be dismissed.

On December 11, 1992, Frost filed an unverified memorandum in reply to the court's December 4 order stating that he was unable to file with the court certified copies of his mother's will and an inventory of her estate. He explained that one of his sisters refused to cooperate with his request for a copy of the will and that she told him the only document left by his mother was "a living will stipulating that as long as a heir resides on her premises no loans are to be taken against unless all heirs approve." He also stated that he could not contact his other sister and that there was considerable disharmony between him and his sisters.

On December 14, 1992, Frost filed an unverified motion in opposition to the court's December 4 order, stating that the sanction imposed by the court was extreme, harsh, and unwarranted and that payment of this sanction would be an "admission of guilt." Frost further stated that because a "living will" was the only document his mother had left, he was unable to obtain a certified copy. He also emphasized that his earlier bankruptcy filings and his mother's will were "not of judicial concern" and that the court's order to file a certified copy of that will "can be taken as an unreasonable, unexpected and unwarranted invasion of personal privacy."

FWISD then filed a motion to dismiss Frost's claims with prejudice, pursuant to Federal Rule of Civil Procedure 41(b), for

Frost's failure to comply with court orders. The district court granted this motion on February 4, 1993. In its order, the district court found that (1) Frost had repeatedly defied the authority of the court, (2) demonstrated disregard for his obligations as a litigant, and (3) caused FWISD to be burdened by delays and additional attorneys' fees in responding to Frost's vexatious filings and in attending hearings made necessary by Frost's conduct. The court then entered final judgment dismissing Frost's claims with prejudice and awarding FWISD its costs. This appeal ensued.

II.

Frost first contends that the district court erred in limiting his discovery, assessing him deposition costs, and striking portions of his pleadings pursuant to Federal Rule of Civil Procedure 37(d). Frost argues that these sanctions were too harsh and extreme. We disagree.

This court reviews the district court's application of such sanctions under an abuse of discretion standard. See Shipes v. Trinity Indus., 987 F.2d 311, 323 (5th Cir. 1993); Lamar Fin. Corp. v. Adams, 918 F.2d 564, 566 (5th Cir. 1990). Although the district court has broad discretion under Rule 37(d) to fashion a sanction that is suitable to the misconduct at issue, we have usually required a finding of bad faith or willful misconduct to support the severest of sanctions--striking pleadings or dismissing a case. See Pressey v. Patterson, 898 F.2d 1018, 1021

(5th Cir. 1990); Truck Treads, Inc. v. Armstrong Rubber, 818 F.2d 427, 429 (5th Cir. 1987). If a district court employs either of these "death penalty" sanctions, we may also consider whether a less severe remedy would be more tailored to the specific misconduct at issue. See Pressey, 898 F.2d at 1021.

Rule 37(d) provides in pertinent part:

> If a party . . . fails . . . to appear before the officer who is to take the deposition, after being served with a proper notice, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. . . . In lieu of any order or in addition thereto, the court shall require the party failing to act . . . to pay reasonable expenses . . . caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award unjust.

Actions authorized under subdivision (b)(2) include limiting the scope of a party's discovery, striking a party's pleadings or parts thereof, or dismissing any or all of a party's claims. See FED. R. CIV. P. 37(b)(2)(B), (C).

The trial court found that Frost's failure to appear for his deposition was a flagrant violation of his obligation. Frost testified at the August 28 hearing that he had received the deposition notice but went out of town instead of appearing at the deposition or even requesting that the court relieve him of his obligation to appear. The district court's finding that Frost's failure to appear at the deposition was a flagrant violation of his obligation, and thus in "bad faith" if not willful, is evidenced by the record. The district court also

found that $3,345 was the reasonable deposition expense created by Frost's failure to appear at that deposition[4] and that no other circumstances existed to make such an award of expenses unjust.[5] Those findings support the district court's decision to impose the sanctions it did pursuant to Rule 37. Furthermore, the district court fashioned its sanctions to permit Frost to continue pursuit of his due process claim, the claim which formed the basis of Frost's complaint. The district court did not, therefore, abuse its discretion in imposing sanctions.

III.

Frost also contends that the district court erred in dismissing his claims pursuant to Federal Rule of Civil Procedure 41(b).[6] Again, we disagree.

We review the district court's dismissal of Frost's claims under an abuse of discretion standard. See National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 642 (1976); Day v. Allstate Ins. Co., 788 F.2d 1110, 1113 (5th Cir. 1986). This

---

[4] FWISD attorneys presented this amount to the court as a reasonable assessment of fees. Frost presented no evidence to the contrary and refused to cross-examine counsel for FWISD about that amount.

[5] The district court reviewed Frost's memorandum in opposition to FWISD's motion for sanctions in its determination that no circumstances existed to warrant an award of expenses against Frost as being unjust.

[6] Rule 41(b) provides that a defendant may move for dismissal of an action or of any claim against the defendant for failure of the plaintiff to comply with court orders. See FED. R. CIV. P. 41(b).

court has, however, made it clear that such a dismissal must be used with caution, for it is "an extreme sanction which is warranted only where 'a clear record of delay or contumacious conduct'" by the party so sanctioned exists. Day, 788 F.2d at 1113 (quoting Anthony v. Marion County Gen. Hosp., 617 F.2d 1164, 1167 (5th Cir. 1980)); see Silas v. Sears, Roebuck & Co., 586 F.2d 382, 385 (5th Cir. 1978). "Absent such a showing, the trial court's discretion is limited to the application of lesser sanctions designed to achieve compliance with court orders and expedite proceedings." Silas, 586 F.2d at 385.

Frost repeatedly failed to comply with the district court's directives and orders, specifically those orders issued on August 31, 1992, and December 4, 1992. He failed to demonstrate a true inability to pay the monetary sanctions imposed or to offer to pay in part or over time. Instead of attempting to comply with these orders, Frost asserted that the court's assessment of monetary sanctions against him was improper, chastised the court for inquiring into matters such as his earlier bankruptcy filings and his mother's will, and suggested that the court lacked the authority to require of Frost what it had. Frost also asserted that the court had availed itself of the opportunity to conspire with FWISD to attack his credibility by demanding the production of his mother's will and an inventory of her estate.

Furthermore, in its memorandum opinion and order of February 4, 1993, the court clearly showed that it had considered the adequacy of less dramatic sanctions and the impact "death

penalty" sanctions would have. The court recognized that its previous imposition of sanctions, including dismissal of Frost's claims against other defendants, had virtually no effect on Frost's behavior. The court also noted that it had allowed Frost "one more chance" to make payment of his sanctions and had specifically warned Frost that failure to pay would result in dismissal of his action.

Thus, the record clearly reflects a pattern of Frost's "contumacious conduct." The district court did not, therefore, abuse its discretion in dismissing Frost's claims.

IV.

Additionally, Frost alleges that the district court should not have "used" Frost's twelve-year-old felony conviction and that such "proceedings" were not admissible pursuant to Federal Rule of Evidence 609. Frost thus claims that the district court erred in denying his motion to vacate, set aside or stay the imposition of monetary sanctions, citing Federal Rule of Criminal Procedure 38(c) as applicable.

We note that the district court never "admitted" such evidence but that Frost described in detail his felony conviction in his original complaint.[7] We further note that Federal Rule of

[7] In its brief, FWISD asserts that during the August 28, 1992 hearing, the court stated that evidence of a felony conviction is relevant to the issue of a witness' credibility, but that the weight to be given to such evidence would depend upon the nature of the offense and the length of time between the hearing date and the date of the offense. However, a thorough review of the record indicates that Frost's felony conviction

Criminal Procedure 38(c) deals with the stay of a *sentence* to pay a fine pending an appeal and is thus clearly inapplicable in Frost's case. Frost's claim is therefore without merit.

V.

Frost further contends that the district court erred by dismissing his claims pursuant to Federal Rule of Civil Procedure 41(b) before FWISD's response to Frost's motion for summary judgment was due. We disagree.

Frost filed his motion for summary judgment on November 19, 1992. At that time, Frost was in violation of the court's order which imposed monetary sanctions on Frost for his failure to appear at a deposition. The court had extended FWISD's time for responding to Frost's motion for summary judgment pending a ruling on FWISD's motion to dismiss and had set a hearing on FWISD's motion to dismiss for December 3, 1992. After that hearing, the court issued an order on December 4, 1992, in which it gave Frost ten more days in which to pay his monetary sanctions and directed that at the same time he file a certified copy of his mother's will and an inventory of her estate with the court. In that same order, the court warned Frost that failure to comply with its order would result in dismissal of his claims, and the court granted another motion by FWISD to extend the deadline for its response to Frost's motion for summary judgment.

---

never played a role in the instant proceedings and was not a factor in the court's decision to dismiss Frost's claims against FWISD.

After Frost failed to obey the court's December 4 order, the court eventually dismissed Frost's claims against FWISD before their response to Frost's motion for summary judgment was due.

We point out that Frost was well aware that his case could be dismissed for his failure to obey the court's order. We also find no authority for Frost's proposition that the district court was *required* to rule on his motion for summary judgment even though he remained in violation of the court's orders. Furthermore, Local Rule of the United States District Court for the Northern District of Texas 1.1 provides that a presiding judge has the power to proceed in any manner that he deems "just and expeditious in a particular case." Frost's claim, therefore, is without merit.

VI.

Frost also maintains that the district court erred in denying his motion for recusal. Again, we disagree.

We review the district court's denial of Frost's motion under an abuse of discretion standard. See United States v. M.M.R. Corp., 954 F.2d 1040, 1045 (5th Cir. 1992); United States v. Merkt, 794 F.2d 950, 960 (5th Cir. 1986), cert. denied, 480 U.S. 946 (1987). We also note that as a general rule, grounds for recusal exist if the alleged conduct of the judge is extra-judicial in nature, see M.M.R. Corp., 954 F.2d at 1045, or if the judge has shown personal--rather than judicial--bias or

prejudice, see United States v. Devine, 934 F.2d 1325, 1348 (5th Cir. 1991), cert. denied, 112 S. Ct. 954 (1992).

Frost filed his motion for recusal on December 14, 1992. In that motion he alleges that at an early status, joint settlement conference, at which the district judge was not present, counsel for FWISD told Frost that the district judge "would love to see your face."[8] He thus contends that this remark indicated racial bias on behalf of FWISD counsel and the district court itself.

Both 28 U.S.C. § 144 and 28 U.S.C. § 455(a) govern requests that the trial judge recuse himself. Section 144 provides in pertinent part that

> whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time.

Section 455(a) provides that "any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The analysis to be made in evaluating the merits of motions made pursuant to § 144 or § 455(a) are "quite similar, if not identical." United States v. York, 888 F.2d 1050, 1053 (5th Cir.

[8] Counsel for FWISD categorically denied making such a remark or any similar remark.

1989) (quoting Chitimacha Tribe of Louisiana v. Harry L. Laws Co., 690 F.2d 1157, 1165 (5th Cir. 1982), cert. denied, 464 U.S. 814 (1983)).

If Frost had intended to invoke § 144, he has failed to meet that statute's requirements. His request for recusal was not accompanied by an affidavit setting forth facts and reasons for his belief that the district judge was biased or prejudiced. Frost thus failed to invoke the provisions of § 144.

Frost has also failed to meet the requirements of § 455(a). A party filing a motion for recusal under § 455(a) "must show that, if a reasonable man knew all of the circumstances, he would harbor doubts about the judge's impartiality." Chitimacha Tribe of Louisiana v. Harry L. Laws Co., 690 F.2d 1157, 1165 (5th Cir. 1982), cert. denied, 464 U.S. 814 (1983). Furthermore, such a motion must state the facts upon which it is based with particularity because attenuated and weak inferences are insufficient to establish bias. See M.M.R. Corp., 954 F.2d at 1045. In his motion, Frost does not point to any behavior of the district judge and instead relies on an alleged comment made by FWISD's counsel to indicate that the judge was biased and should have recused himself. The judge was not present when the alleged comment was made and would not have known of the comment except for Frost's assertion. Thus, because the situation which Frost describes does not involve any circumstance which might create an appearance of impropriety by the district judge, the inferences we are asked to draw are much too attenuated to establish bias.

Because Frost has therefore failed to meet the requirements of either § 144 or § 455(a), the district court did not abuse its discretion in denying Frost's motion for recusal.

VII.

For the foregoing reasons, we AFFIRM the judgment of the district court.