IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2038

Summary Calendar

EDDIE LEE ANDREWS,

Plaintiff-Appellant,

versus

ROADWAY EXPRESS, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-92-1974)

(January 18, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Eddie Lee Andrews (Andrews) filed a complaint alleging that he was discharged because of his race and in retaliation for filing previous charges of discrimination and for his involvement in class action discrimination litigation against Roadway

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Express, Inc. (Roadway). The district court entered judgment against Andrews. Andrews appeals. We affirm.

I. FACTS AND PROCEDURAL HISTORY

In September of 1971, a group of African- and Mexican-American employees filed a Title VII and § 1981 class action suit against Roadway and Teamster Unions in federal district court. The Judicial Panel on Multi-District Litigation consolidated the class action suit with other similar pending actions on November 6, 1974 (the Salinas suit). In Salinas, the plaintiffs alleged (1) that the dual or separate seniority systems for city and road drivers under the collective bargaining agreements with the Teamsters Unions were unlawful and (2) that Roadway was discriminatorily denying over-the-road positions to African- and Mexican-Americans. Andrews was a named plaintiff in the Salinas suit.

Before the Salinas suit was resolved, Roadway terminated Andrews on January 21, 1985, and his discharge was upheld under the established grievance procedure. Ultimately, the Salinas suit was resolved by a consent decree which was entered on November 4, 1985. The consent decree concluded all claims of race and/or national origin discrimination alleged to have occurred at any time prior to the final approval of the consent decree. Specifically, the consent decree provided that:

> This Decree is final and binding upon plaintiffs; plaintiffs' class collectively, and each and every member thereof individually . . . . Except as specifically set forth herein, this Decree extends to and finally concludes all claims of race and/or national origin discrimination alleged to have occurred at any time prior to the final

> approval of this Decree and/or the continuing effects of same that have been asserted or could have been asserted by the named plaintiffs for themselves and/or on behalf of the plaintiffs' class.

Andrews filed a written objection to the consent decree. In his objection to the consent decree, Andrews stated, "I further object to the consent decree because of the company's retaliation against me for appealing the law suit, according to information given me by the attorneys of the case." A group of objectors appealed the district court's approval of the consent decree, and we upheld the district court's decision. Salinas v. Roadway Express, Inc., 802 F.2d 787 (5th Cir. 1986), cert. denied, 479 U.S. 1103 (1987).

On February 15, 1985, another action was filed against Roadway (the Johnson suit). Andrews was listed as one of the plaintiffs in the action. The complaint alleged that Roadway had fired the plaintiffs because of their race and in retaliation for having filed the class action suit in violation of 28 U.S.C. §§ 1981, 1985. A magistrate recommended that the plaintiffs' claims for racial discrimination be dismissed under the doctrine of res judicata because of the consent decree. The district court adopted the recommendations of the magistrate and dismissed the plaintiffs' claims for racial discrimination. Johnson then attempted to appeal the district court's decision on behalf of all the named plaintiffs. However, this court dismissed the appeals of the other plaintiffs, including Andrews, because Johnson, as a nonlawyer, could not represent a third party. Johnson v. Roadway Express, Inc., No. 89-2274, slip op. at 5-6

(5th Cir. 1990) (unpublished opinion). We then went on to uphold the decision of the district court. Id. at 7-8. We concluded that Johnson's claims for racial discrimination were barred by the consent decree because the consent decree purported to finally conclude all claims of race and/or national origin discrimination alleged to have occurred any time before the final approval of the decree. Id. at 8. Therefore, we ruled in the Johnson suit that all of Johnson's discrimination claims were barred by the consent decree.

On July 6, 1992, Andrews filed suit pro se against Roadway. In this suit, Andrews alleged that Roadway fired him because of his race and/or in retaliation for his having brought an earlier suit against the company in violation of Title VII. Roadway filed a motion to dismiss or in the alternative a motion for summary judgment. The district court held a hearing concerning Roadway's motion and the court entered an order that Andrews take nothing from Roadway.

II. STANDARD OF REVIEW

Because the district court considered summary judgment evidence in deciding the motion to dismiss or, in the alternative, motion for summary judgment, we must treat the decision as one for summary judgment. Fraire v. City of Arlington, 957 F.2d 1268, 1273 (5th Cir.), cert. denied, 113 S. Ct. 462 (1992). We review the granting of summary judgment de novo, applying the criteria which the district court used in the first instance. Federal Deposit Ins. Corp. v. Dawson, 4 F.3d

1303, 1306 (5th Cir. 1993); Fraire v. City of Arlington, 957 F.2d 1268, 1273 (5th Cir.), cert. denied, 113 S. Ct. 462 (1992). That is, we review the evidence and inferences to be drawn therefrom in the light most favorable to the non-moving party. Dawson, 4 F.3d at 1306. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c).

III. DISCUSSION

The district court dismissed Andrews' suit because it believed that the Salinas suit and/or the Johnson suit barred Andrews' claims. Res judicata is proper only if four requirements are met: (1) the parties must be identical in the two actions; (2) the prior judgment must have been rendered by a court of competent jurisdiction; (3) there must be a final judgment on the merits; (4) the same cause of action must be involved in both cases. Eubanks v. F.D.I.C., 977 F.2d 166, 169 (5th Cir. 1992); Howell Hydrocarbons, Inc. v. Adams, 897 F.2d 183, 188 (5th Cir. 1990).

We note that Andrews does not argue that if he was a party to the Johnson suit the present action would not be barred by res judicata. Rather, Andrews argues that even though he was a named party in the suit, he was added to the Johnson suit without his knowledge or permission. Therefore, Andrews is arguing that the first requirement of res judicata has not been met.

At the hearing on Roadway's motion to dismiss, the district court questioned Andrews concerning his involvement in the Johnson case. The following exchange between the district court and Andrews supports the district court's decision.

> MR. PADGETT: He was involved in that. I think he is distinguishing between the appeal being a separate suit
> THE COURT: All right.
> Back when there was a piece of paper filed against Roadway Express and the teamsters, Johnson, Andrews, Sewell and Wilks.
> MR. ANDREWS: Yes.
> THE COURT: And you knew about that lawsuit?
> MR. ANDREWS: Yes, sir.
> THE COURT: I don't know who got it first, but apparently Judge Lake ended up with it.
> MR. ANDREWS: Roadway's attorney started depositions, and they broke off in the middle of the deposition. The attorney that's here now, he said it would take five days for me to finish my deposition.
> I never did hear back from them anymore concerning this case.
> THE COURT: Who is Elliot Klein?
> MR. ANDREWS: Elliot Klein was the attorney that started taking the deposition. He backed out of the case.
> THE COURT: Have you ever met Mr. Klein?
> MR. ANDREWS: Oh, yes, sir.
> THE COURT: And was he your lawyer?
> MR. ANDREWS: At the time, yes, and he backed out of the case said he would no longer handle the case.
> THE COURT: But when the first amended complaint was filed in March of '86 that is 22 pages long, it included you, and you were represented by Elliot Klein, who was your lawyer?
> MR. ANDREWS: Yes, sir.

Andrews only argument on appeal is that the history of his retaliation claim proves that he was not a party to the Johnson suit. At the time that the Johnson suit was filed, he was still involved in the company's grievance procedure. Andrews asserts that it wouldn't make sense for him to file a suit when he would be able to get his job back if he was successful in the grievance procedures. Andrews does not, however, discuss his responses to

the district court's questioning at the hearing on Roadway's motion to dismiss.

However, even assuming that Andrews' responses at the hearing in the district court reflect confusion on his part concerning the questions that the court was asking him, we must still conclude that his claims are barred by the doctrine of res judicata because of the consent decree. Andrews asserts that the consent decree does not bar his claim for retaliatory discharge because the Salinas suit did not involve an action for retaliatory discharge. However, in the Johnson suit, this court held that Johnson's claim for retaliatory discharge was barred by the consent decree entered in the Salinas case because the racially discriminatory actions alleged by Johnson occurred prior to the district court's approval of the consent decree.

In the present case, Andrews filed a proof of claim and is therefore both entitled to relief under the consent decree and bound by its terms. The consent decree specifically "extends to and finally concludes all claims of race and/or national origin discrimination alleged to have occurred at any time prior to the final approval of [the] Decree." The racially discriminatory actions alleged by Johnson occurred in January of 1985, prior to the district court's final approval of the consent decree on November 4, 1985. Therefore, Andrews' claims are barred by the consent decree.

IV.

For the foregoing reasons, we AFFIRM the district court's dismissal of Andrews' suit.