

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2118
Summary Calendar

ALVIN J. BRINAC,

Plaintiff-Appellant,

versus

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Texas
(CA-H-92-2305)

(June 15, 1993)

Before POLITZ, Chief Judge, KING and BARKSDALE, Circuit Judges.

PER CURIAM:*

Alvin J. Brinac appeals the dismissal of his suit against the Equal Employment Opportunity Commission for failure to prosecute. Finding subject matter jurisdiction lacking, we affirm the dismissal.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

Brinac filed a discrimination complaint against the Houston Light & Power Company. After an initial investigation the EEOC found "no cause" for pursuing discrimination charges and sent Brinac notice of his right to sue. Brinac then filed similar charges with the EEOC stemming from his apparent employment with three other companies. Brinac voluntarily withdrew one of the complaints and the other two ended as had the complaint against Houston Light & Power with a "no cause" finding followed by notice of right to sue. Brinac attempted to pursue a claim against at least one of these former employers.

In August 1992, Brinac turned his retributive attention to the EEOC, filing the instant suit against it. He complains that he was discriminated against as a result of his race and prior filings with the EEOC, that the EEOC has not satisfactorily handled his complaint, and that his private attorney has proven ineffective. He seeks (1) an injunction requiring investigation of his blacklisting claim, (2) monetary damages, and (3) court- or EEOC-appointed counsel. Notably, Brinac has never served the EEOC with a summons or copy of his complaint.

Analysis

Federal Rule of Civil Procedure 4(j) provides: "If a service of the summons and complaint is not made upon a defendant within 120 days after . . . filing . . . and the [plaintiff] cannot show good cause [for the failure to serve the defendant] the action

shall be dismissed as to that defendant without prejudice." The docket sheet indicates that a summons was prepared but reflects no return of service. Brinac concedes that he made no effort to perfect service. The district court dismissed for lack of prosecution. Absent a showing of good cause for his failure to serve the EEOC, dismissal pursuant to Rule 4(j) was appropriate.¹

The EEOC asks that we move further and dismiss this cause for prejudice, arguing that the district court and this court lack jurisdiction. Clearly, Brinac has no cause of action against the EEOC for its alleged mishandling of his complaint.² The question is whether his inability to achieve relief with this suit may be deemed a jurisdictional defect such that we may consider it on appeal. In a similar setting, our Tenth Circuit colleagues invoked Rule 12(b)(6) *sua sponte*, viewing the result as appropriate "in those rare instances in which a plaintiff cannot recover on the complaint because of a dispositive issue of law."³ Rather than presupposing jurisdiction and evaluating the complaint's merits under Rule 12(b)(6), we focus on the jurisdictional question and

¹ **Kersh v. Derozier**, 851 F.2d 1509, 1512 (5th Cir. 1988) (Ignorance of the service requirement does not constitute "good cause.").

² **Gibson v. Missouri P. Ry. Co.**, 579 F.2d 890, 891 (5th Cir. 1978), cert. denied, 440 U.S. 968 (1979).

³ See **Gregory v. United States/United States Bankruptcy Court**, 942 F.2d 1498, 1500-01 (10th Cir. 1991), cert. denied, 112 S.Ct. 2276 (1992).

Rule 12(b)(1).⁴

The EEOC advances two theories in support of its argument that the district court lacked jurisdiction. The first is based on the failure of Title VII to afford an express or implied private cause of action.⁵ The second is based on its immunity to suit.⁶ Because the former overstates the breadth of the initial jurisdictional inquiry we do not reach it.⁷ Rather, with respect to the EEOC's contention that it is immune from suit, we agree.

"[T]he United States is a sovereign, and, as such, is immune

⁴ **Sarmiento v. Texas Bd. of Vet. Med. Exam'rs**, 939 F.2d 1242, 1245 (5th Cir. 1991) (this court may and, in fact, must address jurisdictional defects even if not considered below).

⁵ See **Ward v. EEOC**, 719 F.2d 311 (9th Cir. 1983), cert. denied, 466 U.S. 953 (1984).

⁶ **United States v. Mitchell**, 463 U.S. 206, 212 (1983).

⁷ The question is whether the claim purports to state a claim under federal law, not whether that claim is well founded. **Wheeldin v. Wheeler**, 373 U.S. 647 (1963). We have held that "where the defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper course of action for the district court . . . is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case." **Williamson v. Tucker**, 645 F.2d 404, 415 (5th Cir.) (on petition for rehearing), cert. denied, 454 U.S. 897 (1981). There is a possible exception to this rule where the federal claim is offered as a basis for joining others and is clearly immaterial, or where the claim is wholly insubstantial and frivolous. See **Bell v. Hood**, 327 U.S. 678, 682 (1946). This exception appears sparsely developed and to the extent it has been applied, that application has been quite narrow. See **Bray v. Alexandria Women's Health Clinic**, 113 S.Ct. 753, 768 (1993); **Hagans v. Lavine**, 415 U.S. 528, 542 & n.10 (1974). Because we find jurisdiction lacking for another reason, we need not address whether Brinac's claim is "wholly insubstantial and frivolous."

from suit unless it has expressly waived such immunity and consented to be sued."⁸ Accordingly, we have held "[a] court is without jurisdiction over a suit brought against the United States unless there exists specific statutory consent to such suit."⁹ Brinac's claims are based on supposed violation by the EEOC of Title VII. That Title contains no express waiver of the government's immunity from suit.¹⁰ Accordingly, the district court lacked jurisdiction.

Conclusion

Because this court and the district court lack subject matter jurisdiction we AFFIRM the dismissal.

⁸ **Gilbert v. Da Grossa**, 756 F.2d 1455, 1458 (9th Cir. 1985).

⁹ **Smith v. Booth**, 823 F.2d 94, 96 (5th Cir. 1987).

¹⁰ **Gibson**.