

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2858
Conference Calendar

ESTELLA SILVA,

Plaintiff-Appellant,

versus

HARRIS COUNTY AUDITOR'S
OFFICE ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court
for the Southern District of Texas
USDC No. CA-H-91-2558

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(May 18, 1994)

Before HIGGINBOTHAM, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.

BY THE COURT:

Estella Silva moves to proceed in forma pauperis on appeal from an order of the district court denying her Fed. R. Civ. P. 60(b) motion to vacate an order granting summary judgment in favor of the defendants in this employment discrimination action.

The district court's denial of a Rule 60(b) motion is reviewed for abuse of discretion. "It is not enough that the grant of the motion might have been permissible, or even warranted; rather, the decision to deny the motion must have been sufficiently unwarranted as to amount to an abuse of discretion." Pease v. Pakhoed Corp., 980 F.2d 995, 998 (5th Cir. 1993). Newly discovered evidence justifies Rule 60(b) relief only if the evidence is material and controlling and clearly would have

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produced a different result if presented before entry of judgment. Brown v. Petrolite Corp., 965 F.2d 38, 50 (5th Cir. 1992). The district court did not abuse its discretion by denying the Rule 60(b) motion. The belated affidavit evidence does not mandate a different result. Moreover, the evidence existed during the pendency of the case and easily could have been discovered prior to entry of judgment.

Silva has not presented a legal issue of arguable merit. Her motion for leave to proceed on appeal IFP is DENIED and the appeal is DISMISSED. See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983); Fifth Circuit R. 42.2.