IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-3092
Summary Calendar

JOHNNY DRUMMOND, ET AL.,

Plaintiffs-Appellants,

v.

M.P.W. STONE, Secretary of the United States Army,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
CA 91 2719 N

October 6, 1993

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Seventeen named plaintiffs brought a class action lawsuit on behalf of all black employees of the New Orleans District, United States Army Corps of Engineers ("the Corps") pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16(c). The district court granted summary judgment in favor of the Corps. We affirm.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

The appellants in this case are all present or former employees of the New Orleans District of the Corps. On August 15, 1990, the appellants filed an informal complaint with the Equal Employment Manager of the Corps alleging numerous racially discriminatory acts and practices. The informal complaint listed twelve complainants and their phone numbers. Appellant Johnny B. Drummond was the first complainant listed, and he signed the complaint as "Agent of the Class." The complaint was filed "[o]n behalf of all black employees of the New Orleans District Corps of Engineers."

In response to the complaint, the Corps appointed Julio Garcia to conduct precomplaint screening as required by 29 C.F.R. § 1613.602. Garcia was the Equal Employment Opportunity Manager for the Seattle District of the Corps, and he was experienced in handling precomplaint counseling in administrative class action complaints. Garcia contacted Drummond on September 4, 1990, advising Drummond that he (Garcia) had been assigned to handle the complaint. Because Equal Employment Opportunity complaints must be timely filed, Garcia asked Drummond to provide specific allegations of discriminatory acts that had affected him during the thirty-day period preceding August 15, 1990. Garcia did not contact any of the other complainants listed in the complaint.

By letter dated September 5, 1990, Drummond responded to Garcia's request and made additional allegations of racial discrimination. He alleged that he personally had been affected

by a "hostile work environment," by "an environment that has continuous and on-going Systemic Discrimination," and by being "blacklisted" from receiving any cash awards for job performance while all other employees in his section received such awards. He specifically alleged that a hangman's noose had been placed in a Corps work area by white employees and that the Corps did not identify or discipline those responsible. Drummond did not personally see the noose but heard about it some two weeks after it was found. Drummond referred to himself as "the agent" in the letter and signed the letter as "Agent of the Class."

Garcia proceeded by sending Drummond a note suggesting that Drummond talk to the class as "their agent" and asking him to consider informal resolution of the complaint. Garcia then visited the New Orleans District work site from September 23-27, 1990, to investigate the allegations in the informal complaint. He met with Drummond on September 24, 1990, and explained the precomplaint processing procedures. Garcia reviewed agency records and interviewed several members of the class. Drummond insisted on being present at all such interviews. At the end of the thirty-day counseling period, Garcia prepared a report for the New Orleans District Corps Commander. The report concluded that the informal complaint was not timely filed by Drummond, that the allegations made were not sufficiently specific to be proved or disproved, and that in his opinion Drummond was not capable of fairly or adequately protecting the interests of the class.

Garcia advised Drummond that the class had the right to file a formal complaint. The formal class complaint was filed on October 26, 1990, and it expanded the class to include black applicants and black former employees of the Corps. Sixteen named complainants were listed in the formal complaint, with Drummond listed as the "Agent of the Class." Only Drummond signed the complaint. On November 8, 1990, in accordance with 29 C.F.R. § 1613.604, the Corps forwarded the formal class complaint to the Equal Employment Opportunity Commission ("EEOC") for a recommendation as to whether the Corps should accept or reject the complaint as a class complaint. On July 24, 1991, after 180 days had passed without a final agency decision on the formal complaint, the plaintiffs filed the instant suit.

The Corps filed a motion to dismiss, or, in the alternative, for summary judgment, on March 2, 1992. The motion was based on the failure of Drummond and the other class members to exhaust administrative remedies in a timely and proper manner. The matter was referred to a magistrate judge, who found that Garcia failed to investigate fully the allegations of the class representatives besides Drummond. The magistrate judge recommended denial of the Corps's motion and remand so that the plaintiffs could exhaust their administrative remedies. Both the class and the Corps filed timely objections to the magistrate judge's report and recommendations.

The district court denied the Corps's motion to dismiss but granted its motion for summary judgment on January 19, 1993. The

district judge found that Drummond was the only agent of the class and that Drummond failed to consult an EEOC counselor within thirty days of any act of discrimination except the noose incident. The court held that all allegations except the allegations regarding the noose incident were time-barred and that the noose incident standing alone was not sufficient to give rise to a hostile work environment claim. Because a Title VII class action lawsuit of this variety stands or falls with the complaint of the class agent, the court reasoned that the failure of Drummond's complaint defeated the entire suit. The plaintiffs filed this appeal.

II.

This court reviews the grant of summary judgment de novo, using the same criteria used by the district court in the first instance. Fraire v. City of Arlington, 957 F.2d 1268, 1273 (5th Cir.), cert. denied, 113 S. Ct. 462 (1992). We review the evidence and inferences to be drawn therefrom in the light most favorable to the non-moving party. Id. Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, 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. Fed. R. Civ. P. 56(c).

III.

It is well-settled that government employees must exhaust all administrative remedies before bringing a Title VII class

action against their employer. 42 U.S.C. § 2000e-16(c) describes the exhaustion requirement:

> Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section . . . or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title . . . .

Thus, plaintiffs must have properly exhausted their administrative remedies before they may bring suit in federal court. Munoz v. Aldridge, 894 F.2d 1489, 1493 (5th Cir. 1990) (citing Brown v. General Servs. Admin., 425 U.S. 820, 833 (1976)).

The legal definitions and administrative procedures relevant to class complaints of discrimination are set out in 29 C.F.R. §§ 1613.601 through .643. To be a class complaint, the complaint must allege essentially the same elements as are required for a class action under Federal Rule of Civil Procedure 23(a): (1) the class is so numerous that a consolidated complaint is impracticable, (2) there are common questions of fact, (3) the claims of the agent of the class are typical of those of the class, and (4) the agent of the class or his representative will fairly and adequately protect the interests of the class. 29 C.F.R. § 1613.601(b). The class agent is "a class member who acts for the class during the processing of the class complaint."

Id. § 1613.601(c). The limitations period relied upon by the district court in granting summary judgment states that

> [a]n employee or applicant who wishes to be an agent and who believes he/she has been discriminated against shall consult with an Equal Employment Opportunity Counselor within 30 calendar days of the matter giving rise to the allegation of individual discrimination, the effective date of a personnel action, or the date the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action.

Id. § 1613.602(a).

After consultation and precomplaint processing by a counselor, the class may file a class complaint. Id. § 1613.602(c). The class complaint, in addition to meeting the requirements of 29 C.F.R. § 1613.601(b), must be submitted by the agent or his representative in writing and signed by the agent. Id. § 1613.603(a). The complaint must set forth "specifically and in detail" not only a description of the policy or practice complained of but also a description of the resulting action or matter adversely affecting the agent. Id. § 1613.603(b). The agent is authorized to file a civil action in federal district court after 180 days have passed from the date the claim was filed if no final decision has been made at that time. Id. § 1613.641(a)(2).

With these administrative exhaustion requirements in mind, we turn to the arguments presented by the appellants. The appellants do not attack the district court's holding that the claims raised by Drummond were time-barred or, in the case of the noose incident, insufficient to raise a genuine issue of material fact. The appellants' argument focuses instead on the holding

that the other plaintiffs besides Drummond could not proceed in federal court because, even if they were class agents, they did not exhaust their administrative remedies as required by 29 C.F.R. § 1613.602(a).

Were the "other complainants" class agents?

Appellants argue that the district court's conclusion that Drummond was the only class agent was not supported by the record. They argue that the other named complainants were also class agents, and that their failure to exhaust administrative remedies should be excused because Garcia did not conduct his investigation properly. Wade v. Secretary of the Army, 796 F.2d 1369, 1378 (11th Cir. 1986) (holding that administrative remedies should be considered exhausted if the plaintiffs have either complied with the regulations or were prevented by the agency from doing so). We must disagree with the appellants' assessment of the record.

The crux of the matter is the legal definition of "class agent" as "a class member who acts for the class during the processing of the class complaint." 29 C.F.R. § 1613.601(c). The district court held that only Drummond acted as a class agent throughout the administrative process. The appellants point to the following facts as demonstrating the error in this holding: the informal complaint clearly stated that there were twelve class representatives; the telephone number of each of the twelve representatives was listed in the complaint; and Drummond alone

clearly could not meet the commonality and typicality requirements of 29 C.F.R. § 1613.601(b).

These facts fail to raise a genuine fact issue. The defining feature of a "class agent" is that he acts for the class. It is the responsibility of the class agent to consult with an Equal Employment Opportunity Counselor within thirty days after he becomes aware of the discriminatory event or action. 29 C.F.R. § 1613.602(a). After his assignment as counselor, Garcia immediately focused his investigation on Drummond as the lone class agent. Drummond carried on all correspondence with Garcia and signed all correspondence as "Agent of the Class." Drummond also insisted on being present during all of Garcia's interviews with other complainants. Drummond also presented Garcia with a proposed "Informal Alternate Resolution" and upon receiving Garcia's negative response terminated informal settlement negotiations. No other class member played any identifiable role in the administrative process beyond being listed as a "class member." Additionally, 29 C.F.R. § 1613.603(a) clearly requires the class agent to sign the formal class complaint. Only Drummond signed the formal class complaint.

We are convinced that the Corps satisfied its burden of proving that Drummond was the class agent to the extent that there was no genuine issue of material fact on the point. The fact that the names and telephone numbers of other class members were listed in the complaints is not probative of their status as

class agents. Nor do we believe that the fact that Drummond alone could not satisfy the class complaint requirements of typicality and commonality raises any genuine issue requiring a trial. His inability to fulfill the requirements of a class agent does not somehow elevate the other class members to that status. No plaintiff other than Drummond remotely attempted to act as a class agent. Because there was no evidence from which a reasonable jury could find otherwise, summary judgment on this issue was proper. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986).

Were the "other complainants" prevented from exhausting administrative remedies?

The appellants also argue that the manner in which Garcia conducted his investigation precluded them from exhausting their administrative remedies. By focusing on Drummond's claims, the appellants contend, Garcia failed to carry his burden to "develop the record at the administrative level." Thus, the appellants argue, they should not be penalized for Garcia's failure to conduct his investigation properly.

The appellants misconceive the relative duties of the complainants and the counselor. When a class complaint of discrimination is made, it is the duty of the employee wishing to act as class agent to come forward and consult with the Equal Employment Opportunity Counselor. 29 C.F.R. § 1613.602. Only then can the counselor reasonably be expected to "make whatever inquiry is believed necessary." Id. § 1613.602(b)(2). The evidence shows that the appellants never came forward to consult

with Garcia, but relied on Drummond as their class agent. Thus, the appellants' failure to comply with the regulations was not a direct and proximate result of the manner in which Garcia conducted the investigation, as they assert. Rather, their failure to comply with the regulation was the cause of Garcia's investigation strategy.

Because the appellants did not comply with the regulations, and because there was no evidence that the EEOC prevented them from doing so, the exception to the administrative exhaustion requirement described in Wade, 796 F.2d at 1378, is not available to the appellants in this case. "[U]ncooperative plaintiffs can fail to exhaust their administrative remedies by simply not participating in the administrative proceedings." Munoz, 894 F.2d at 1493 (citations omitted).

Summary and Conclusion

The appellants do not appeal the district court's holding that if Drummond was the sole class agent, then summary judgment was proper. They argue that there was some evidence from which a reasonable fact-finder could find that they were also class agents and that they were excused from exhausting administrative remedies because of the inadequate investigation by the Equal Employment Opportunity Counselor. As the review of the evidence has shown, no reasonable fact-finder could so find.

IV.

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