

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 93-7283
Summary Calendar
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GILBERT GONZALES, ET AL.,

Plaintiffs,

GILBERT GONZALES,

Plaintiff-Appellant,

versus

CITY OF LAKE JACKSON, ET AL.,

Defendants,

CITY OF LAKE JACKSON,

Defendant-Appellee.

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Appeal from the United States District Court for the
Southern District of Texas
(CA-G91-465)

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(December 30, 1993)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.*

PER CURIAM:

Plaintiff-appellant Gilbert Gonzales (Gonzales), a police

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

officer employed by defendant-appellee City of Lake Jackson, Texas (City), brought this suit against the City and several individual defendants who were the City's employees, under Title VII and 42 U.S.C. §§ 1981 and 1983, complaining of denial of promotions and hostile work environment on the basis of national origin, and retaliation for complaining about this and filing complaints with the EEOC. The claims under sections 1981 and 1983, and all claims against the individual defendants, were dismissed prior to trial. A bench trial was thereafter held on the Title VII claims against the City. The district judge entered findings and conclusions favorable to the City, and "[i]n accordance with" such findings and conclusions entered judgment, dismissing the "cause of action." Gonzales appeals. We affirm.

Facts and Proceedings Below

Gonzales' original complaint was filed on December 18, 1991, and sought recovery from the defendants under Title VII and sections 1981 and 1983. The City filed its original answer January 8, 1992. The individual defendants on the same day filed a motion to dismiss under FED. R. CIV. P. 12(b)(6) or, alternatively, for a more definite statement. On April 2, 1992, a pretrial conference was held before Judge Kent. At this time, Judge Kent dismissed the section 1981 claims in their entirety, and dismissed the Title VII claim against the individual defendants. He ordered that the motion to dismiss the section 1983 claims be stayed and that Gonzales was directed to file an amended section 1983 claim by June 9, 1992. On June 5, 1992, Gonzales filed his amended complaint.

This complaint asserted claims under Title VII and under section 1983, but it did not assert any claims under section 1981.¹ The amended complaint also contained a demand for a jury trial. No jury trial had been demanded in the original complaint, nor had demand for a jury trial otherwise been made by Gonzales prior to that time; and at no time did any of the other parties demand a jury. Gonzales never filed a motion for jury trial under FED. R. Civ. P. 39(b). On June 30, 1992, all defendants filed a supplemental motion to dismiss under Rule 12(b)(6) or, alternatively, for more definite statement, directed to Gonzales' section 1983 claims in the amended complaint.

On July 23, 1992, Judge Kent entered an order, agreed to by all parties, dismissing all claims against all the individual defendants with prejudice.

On July 30, 1992, the district court, Judge Kent, entered an order sustaining the defendants' motion to dismiss, and dismissing Gonzales' suit because his amended complaint did not meet the heightened pleading requirements of *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985), for section 1983 actions. The same day, Judge Kent also issued a separate document final judgment dismissing Gonzales' suit. On August 7, 1992, Judge Kent issued an order modifying the July 30 judgment so that it did not dismiss Gonzales' Title VII claims against the City.

On December 30, 1992, the City filed a motion to strike

¹ In the original complaint, Gonzales' wife was named a party plaintiff in addition to Gonzales. However, the amended complaint did not include Gonzales' wife as a party.

Gonzales' jury demand on the grounds, among others, that it was late. See FED. R. CIV. P. 38(b) & (d).

On January 4, 1993, the case was transferred from Judge Kent to Judge Gibson. On January 5, 1993, the magistrate judge granted the City's motion to strike Gonzales' jury demand in his amended complaint, noting that a jury was not authorized for Title VII cases. The order did not address the question of timeliness.

Gonzales' Title VII claim was tried in a bench trial before Judge Gibson on January 25-28, 1993, and on February 18, 1993, Judge Gibson entered extensive findings of fact and conclusions of law on the Title VII claim, finding that Gonzales had not been discriminated against or retaliated against and that he was not entitled to relief under Title VII. On the same day, Judge Gibson entered in a separate document a final judgment reciting that the case had been tried on January 25-28, and that "[i]n accordance with" the findings and conclusions of the court, Gonzales' "cause of action" was dismissed and it was decreed that he "take nothing."

On March 1, 1993, Gonzales filed a motion for new trial, directed only to the Title VII action and complaining only of the findings of fact and conclusions of law entered February 18, 1993. On March 16, 1993, Judge Gibson entered an order denying the motion for new trial. No reasons were stated.

On April 5, 1993, Gonzales filed a motion for relief from judgment under FED. R. CIV. P. 60(b). This motion was directed only to Judge Kent's July 30, 1992, order dismissing Gonzales' section 1983 claims. The motion urged that that order was erroneous

because it applied heightened pleading requirements, and the Supreme Court in *Leatherman v. Tarrant County*, 113 S.Ct. 1160 (March 3, 1993), held that such was improper. The motion also asserted that the determination of the relevant facts in the Title VII bench trial did not bar Gonzales from pursuing his section 1983 claims on the same factual basis, because he was entitled to a jury trial on the section 1983 claims, relying on *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545 (1990).

On April 15, 1993, Gonzales filed his notice of appeal.

On April 19, 1993, the City filed a response to Gonzales' Rule 60(b) motion contending, among other things, that Gonzales had waived any right to trial by jury on the section 1983 claims, that the findings of fact and conclusions of law in the Title VII bench trial bound Gonzales and precluded him from section 1983 relief on the same complaints, that the evidence at the bench trial demonstrated as a matter of law that Gonzales was not entitled to section 1983 relief from the City, and that if the court should determine to open the judgment on the section 1983 claims, it should grant the City summary judgment thereon on the basis of the bench trial evidence.

On April 30, 1993, the district court, Judge Gibson, entered an order denying Gonzales' Rule 60(b) motion. The district court did not pass upon the question whether Gonzales had waived his right to trial by jury on the section 1983 claims, or on whether those claims had been properly dismissed by Judge Kent on July 30, 1992. Rather, Judge Gibson concluded that the bench trial evidence

on the Title VII claims established as a matter of law that Gonzales had not been discriminated against.

No notice of appeal has been filed from the April 30, 1993, order.

Discussion

Gonzales raises only two contentions on appeal.

Gonzales' first contention is that Judge Kent's July 30, 1992, order dismissing his section 1983 claims is erroneous, because it is based on the application of an erroneous "heightened pleading" requirement for section 1983 actions, a requirement that the United States Supreme Court subsequently rejected in the *Leatherman* case.²

The City responds to this on several bases, the first of which is that Gonzales' only notice of appeal, that of April 15, 1993, was insufficient to bring up anything but the Title VII claims.³

² Gonzales further contends that there is no collateral estoppel against his section 1983 claims by virtue of the findings and conclusions in the Title VII bench trial because he was entitled to a jury trial on the section 1983 claims, and hence the bench trial findings cannot estop him in respect to the section 1983 claims, citing *Lytle*. We do not reach this contention. Gonzales' brief in this Court expressly states that he "does not dispute that he had no right to a jury trial on his Title VII claim." All the complained of conduct occurred prior to enactment of the Civil Rights Act of 1991.

³ Gonzales has not filed a reply brief in this Court and has not responded to this or any other of the City's contentions. The City also contends that the findings and conclusions in the bench trial do estop Gonzales from seeking section 1983 relief for the same matters because Gonzales waived his right to a jury trial on the section 1983 claims by not making timely demand therefor (and not requesting relief from waiver by motion under FED. R. CIV. P. 39(b)), and because, in any event, the evidence at the bench trial shows that as a matter of law Gonzales' section 1983 claims against the City are without merit, so that the City would have been entitled to an instructed verdict, or summary judgment, thereon in any event, and thus denial of a jury trial thereon, even if

The entire text of Gonzales' notice of appeal is as follows:

"Notice is hereby given that Gilbert Gonzales, Plaintiff in the above-entitled action, hereby appeals to the United States Court of Appeals for the Fifth Circuit from *that portion* of the final judgment and findings of fact and conclusions of law, entered in this action on the 18th day of February, 1993, and on which Plaintiff's Motion for New Trial was denied on March 16, 1993, in which the trial court concluded that Plaintiff was not the victim of national origin discrimination in his employment and that he had not suffered retaliation in violation of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. §2000e *et seq.*" (Emphasis added).

Under the circumstances, we think it clear that this notice of appeal does not suffice to bring up any complaint respecting the section 1983 claims. See, e.g., *Pope v. MCI Telecommunications Corp.*, 937 F.2d 258, 266-67 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1956 (1992); *Ingraham v. United States*, 808 F.2d 1075, 1080 (5th Cir. 1987); *C.A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049, 1056 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981); *Cole v. Tuttle*, 540 F.2d 206 (5th Cir. 1976). Accordingly, we reject Gonzales' complaints concerning his section 1983 claims, as none of those are before us, the appeal having been limited to the Title VII claims.

Gonzales' remaining contention on appeal is that the district court's findings on the Title VII claims, particularly those concerning retaliation, are clearly erroneous. We reject this contention. The evidence is amply sufficient to support the district court's findings, and it is evident, considering the

theoretically improper, was not prejudicial. While there appears to be at least arguable merit in these contentions, we are not ultimately required to pass on them, and do not.

record as a whole, that they are not clearly erroneous in any of the complained of respects. The district court thoroughly and carefully considered the case, and on the record as a whole its findings are supported by the evidence and we are not left with any feeling whatever that a mistake has been made. We reject Gonzales' claim that the bench trial findings and conclusions are clearly erroneous.

Conclusion

Having rejected all of Gonzales' complaints on appeal, the judgment below is accordingly

AFFIRMED.