UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-8062
Summary Calendar

DAVID A. CHARLES,

Plaintiff-Appellant,

VERSUS

DONALD B. RICE, Secretary,
of the Air Force,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(SA-90-CA-859)

(August 6, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

I.

Statement of the Case

Charles filed his complaint, pro se, on July 18, 1990, in the United States District Court for the Western District of Texas against Donald B. Rice, Secretary of the Department of the Air Force, alleging that he was terminated from employment as a boiler equipment mechanic at the San Antonio

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Real Property Maintenance Agency at Wainwright Station, San Antonio, Texas, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-16(c). The substantive controversy underlying this appeal for a new trial is whether Charles was fired because of his Hispanic origin or because of his unauthorized absence of more than ten calendar days. The conflict began on January 30, 1989, when Charles requested a 30-day unpaid leave, for the purpose of taking care of his sick wife. The request was denied, but Charles left and never returned to work. Finally, on May 5, 1989, Charles was officially removed from his position.

Charles appealed his removal to the Merit Systems Protection Board (MSPB) alleging discrimination and retaliation for whistle-blowing activities. A fully litigated hearing was held before the MSPB administrative judge at which Charles was represented by counsel. The judge found that Charles had failed to establish a prima facie case of either discrimination or reprisal; that is, he failed to prove that it was more likely than not that similarly situated non-Hispanic employees were treated more advantageously. He also failed to prove that he ever filed a whistle-blowing report accusing his supervisor of waste or that the deciding official for his removal even knew that Charles had filed such a complaint.

On October 17, 1989, Charles submitted, through counsel, a petition for review before the full MSPB, which denied the petition and adopted the administrative judge's initial decision as the final MSPB decision in the matter.

Charles, still represented by counsel, appealed the final MSPB decision to the Equal Employment Opportunity Commission (EEOC). He submitted time sheets to prove that appellee did not have a manning shortage and that its explanation for removal was pretextual. After a review of this evidence, the EEOC also came to the conclusion that Charles had failed to establish a prima facie case. Charles's complaint to the district court followed the EEOC decision. The district court determined that the MSPB findings were founded on substantial evidence and affirmed them.

II.

District Court Proceedings

The district court entered a scheduling order on November 26, 1990, setting the deadline for submission of a joint pretrial order on July 1, 1991, and setting a non-jury trial date of November 12, 1991. On July 3, 1991, the court granted the parties' joint motion to extend the deadline to file the pre-trial order, with the expectation that Charles would be able to retain counsel in the intervening time.

By order dated November 7, 1991, the court required the parties to file status reports on or before November 22, 1991. Charles filed his report, pro se, on November 21, 1991, advising the court that the case was not ready for trial as his attorney was still ill. Appellee was ready for trial at this time.

The case was reassigned to another judge's docket on October 13, 1992, and the court issued a notice of docket call on October 16, 1992, setting the trial date for November 9, 1992. On October 29, 1992, Charles, pro se, and appellee filed a joint motion for continuance of the trial. Counsel for appellee advised the court of prior scheduling conflicts, and Charles advised the court that he was still making efforts to retain new counsel as his original attorney no longer represented him. The court denied the motion by order dated October 30, 1992.

The court called the docket on November 9, 1992, and Charles again advised the court that, still being unrepresented by counsel, he was not ready for trial. Appellee announced that he would be ready for trial anytime after November 11, 1992. The judge set the case for trial on November 12, 1992. When the trial convened on that day, Charles testified on his own behalf and was cross-examined by counsel for the appellee. Appellee immediately moved for judgment pursuant to Federal Rule of Civil Procedure 52(c). The court granted the motion and entered judgment for appellee on November 16, 1992.

Charles served his Rule 59 motion for a new trial on November 30, 1992, which was denied by order dated December 4, 1992. On January 14, 1993, Charles served notice of appeal from the judgment entered on November 18 [sic], 1992.[1]

III.

Jurisdiction

This court may determine, *sua sponte*, whether it has jurisdiction over plaintiff's appeal. Turnbull v. United States of America, 929 F.2d 173, 176 (5th Cir. 1991). The threshold question is whether Charles's appeal from the final judgment, rather than from the district court's denial of his motion for a new trial, rendered his appeal jurisdictionally defective under Federal Rule of Appellate Procedure 3(c), which demands that a notice of appeal "shall designate the judgment, order or part thereof appealed from." It is clear from both Charles's and appellee's briefs that Charles does not request review of the underlying merits of his claim but of the denial of the parties' joint motion of continuance (which is the basis of the court's denial of the motion for a new trial). But a "mere technicality" will not prevent Charles from bringing his appeal. Foman v. Davis, 371 U.S. 178, 181-82 (1962). This court has rendered numerous decisions following Foman that have held that as long as the failure to designate the judgment or order appealed from does not mislead or prejudice the responding party, the Charles does not forfeit his right to appeal. 929 F.2d at 177. In the instant case it is clear from both parties' briefs that the order understood to be at issue is the denial of the motion for a new trial.

The next question is whether Charles satisfied procedural requirements by timely serving notice of appeal pursuant to Federal Rule of Appellate Procedure 4(a)(1), which requires that in cases involving the United States as a party, notice must be given within 60 days after entry of the judgment

[1]In determining timeliness, the proper procedure is to count days from the entry or docketing date of the judgment, not from the date the judgment is filed. Tijerina v. Plentl, 984 F.2d 148, 150 (5th Cir. 1993). The correct date for measuring the timeliness of the motion is the date it was served, not the date it was filed. Id.

or order appealed from. It is clear that the appeal served on January 14, 1993, met the time limitations set by Rule 4(a)(1) for an appeal from the order dated December 4, 1992.

The 59(e) motion itself, however, served November 30, 1992, did not meet Rule 59(b)'s 10-day limitation since the judgment was entered on November 16. It may nevertheless be considered a motion for relief under Rule 60(b). Federal Trade Commission v. Hughes, 891 F.2d 589, 590 (5th Cir. 1990). This court may review the ruling denying the new trial only for abuse of discretion; an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review (consistent with the issues addressed by the parties' briefs). Eleby v. American Medical Systems, Inc., 795 F.2d 411, 413 (5th Cir. 1986). The same standard governs review of a grant or denial of a continuance. The decision rests within the sound discretion of the trial judge, and the ruling will not be disturbed on appeal unless abuse of discretion is shown. United States v. Uptain, 531 F.2d 1281, 1285 (5th Cir. 1976).

IV.

Abuse of Discretion

This court has suggested that abuse will be found where the denial of a motion for continuance "severely prejudiced" the party requesting it and where, "on balance, the interests in favor of a fair trial heavily outweighed the interests in favor of an immediate trial." Smith-Weik Machinery Corp. v. Murdock Machine and Engineering Co., 423 F.2d 842, 844 (5th Cir. 1970). In Smith-Weik, the court remanded the case for retrial, noting that there were serious factual disputes and a number of legal questions that had to be properly applied before making a ruling. Id. Unlike that case, the one at bar does not require the application of a complex legal test or standard; nor does it involve an intricate factual web that necessitates an extended trial to unravel. The parties provided the district court with the administrative record, time sheets, and policy statements. These documents constitute ample evidence on which to base a decision regarding the merits of Charles's claim. It would not seem, then, that Charles was severely prejudiced by being denied a continuance.

Charles would further argue that however simple the issues might have been, denial of a continuance constituted a due process violation under the fifth amendment. While it is true that a civil litigant's right to counsel is of constitutional importance, this court has noted the distinctions between a criminal defendant's sixth-amendment right to counsel and a civil litigant's right under the due process clause of the fifth amendment. Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1118 (5th Cir. 1980), *cert. denied,* 449 U.S. 820 (1980). Because of those differences, "the law affords greater protection to the criminal defendant's rights." Id. But even within the criminal context, a defendant's right to counsel has its limits. This court in United States v. Gates, 557 F.2d 1086, 1088 (5th Cir. 1977), *cert. denied,* 434 U.S. 1017 (1980) (citing United States v. Arlen, 252 F.2d 491, 494 (2d Cir. 1958)), said that a defendant may not indefinitely postpone trial by continued requests for more time to retain counsel. The defendant's failure to retain counsel in that case was considered a waiver of his sixth-amendment right when he did not show cause for his failure, even though the failure resulted in a pro se defense. Id. And again in United States v. Fowler, 605 F.2d 181, 183 (5th Cir. 1979), *cert. denied,* 445 U.S. 950 (1980), also involving a criminal defendant, this court noted that the "right to assistance of counsel, cherished and fundamental though it be, may not be put to service as a means of delaying or trifling with the court."

The necessary determination to make, then, is the point at which a party's failure to exercise his right to counsel constitutes a waiver. This court has held that so short a time as twenty days is a reasonable time, even in a criminal case, in which to retain counsel, and that failure to do so operates as a waiver. United States v. Casey, 480 F.2d 151 (5th Cir. 1973), *cert. denied,* 414 U.S. 1045 (1973). There is no constitutionally mandated time period during which a court may not consider delay a waiver of the right to counsel. United States v. Sahley, 526 F.2d 913, 918 (5th Cir. 1976). Whether denial of a continuance is so arbitrary as to violate due process depends on the circumstances of each case, "particularly in the reasons presented to the trial judge at the time the request is denied." Ungar v. Sarafite, 376 U.S. 575, 589 (1963).

In the instant case, appellant filed his original complaint on July 18, 1990, and the bench trial began more than two years later on November 12, 1992. If twenty days in a criminal case is a reasonable time to retain counsel, certainly allowing two years to retain counsel for a civil trial is reasonable on the part of the district court. Charles already had delayed the proceedings on two prior occasions and on his third attempt provided the court with no additional or new reasons for further delay. The district court did not abuse its discretion in denying Charles's request for a continuance.

V.

Suggested Alternative Analysis

Charles further contends that the district court should have considered the four factors that the Ninth and Eleventh Circuits employ in reviewing whether there has been abuse of discretion in the denial of a motion for continuance: (1) diligence of the requesting party to ready the case prior to the date set for hearing; (2) likeliness that the need for continuance could have been met if the continuance had been granted; (3) extent to which granting the continuance would have inconvenienced the court and opposing party, including its witnesses; and (4) extent to which Charles might have suffered harm as a result of the denial. United States v. 2.61 Acres, 791 F.2d 666, 671 (9th Cir. 1985) and Fowler v. Jones, 899 F.2d 1088, 1094 (11th Cir. 1990). None of the individual factors is dispositive; rather, each should be evaluated and weighed to determine whether the denial of continuance was arbitrary or unreasonable. 791 F.2d at 671. Only if Charles makes a showing of prejudice, however, will the ruling below be disturbed. Id.

This four-factor analysis does not seem to differ from the substance of the standards enunciated by this court. Notwithstanding that observation, however, we reach the same conclusion under the alternative formulation. First, Charles concedes in his motion for a new trial that it was only after he received notice that his case was set for docket call that he "rekindled his efforts to retain counsel." He gave no reasons why he failed to make such attempts before that late date. In fact, his reasons for requesting a continuance had not changed; no new circumstances presented themselves to necessitate further delay.

With regard to the second factor, Charles argues that on October 28, 1992, a James Kosub "indicated" that he would agree to represent Charles. Charles concedes, however, that they had not reached a formal agreement prior to docket call on November 9, 1992. Given that Charles had made prior representations that he would soon successfully retain counsel, there was little basis to believe that this instance would see a different result. Even if the district court gave Charles the benefit of the doubt, the other factors militated against granting Charles' request, regardless of the weight this one factor alone might carry.

Third, the inconvenience created for all parties involved by the continual delays over more than a two-year period is obvious. Even if another delay were not an insurmountable burden, denial of a continuance serves as justifiable admonition for plaintiff's lack of diligence.

Lastly, this Court does not find that Charles was prejudiced by the denial of a continuance. His claim had been heard before the MSPB, he then appealed his case within that same administrative body, and had appealed again to the EEOC. Each time it was decided that Charles had failed to establish a prima facie case of discrimination. And each time Charles was represented by counsel. The district court had the record of those proceedings before it; and enough facts were available to that court for it to assess whether there was risk of prejudice to Charles by not granting a further continuance. In Ungar the Supreme Court said that "it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel." 376 U.S. at 849. Furthermore, the fact that his claim had been litigated before several times indicates that by the time the bench trial was conducted, Charles should have been familiar with both the merits of his own case and the need for whatever documents and witnesses supported his case. It is not likely that the presence of counsel would have produced a different result.

We find that the district court did not err in denying appellant a continuance of the trial; and therefore AFFIRM the judgment of the district court.