IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8206
Summary Calendar

EDITH FONTENOT,

Plaintiff-Appellant,

v.

STATE OF TEXAS, ET AL.

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(A 87 CA 749 JN)

September 1, 1993

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Edith Fontenot sued the State of Texas, the Texas Department of Human Services (DHS), and DHS supervisors Herbert Kneisley, Dave England and Judy Van Hooser in federal district court alleging that the defendants had discriminated against her on the basis of her race in violation of 42 U.S.C. §§ 1981, 1983, and 1985. The State of Texas in DHS were dismissed early on, a

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

decision which we affirmed in an earlier appeal. Ultimately, the district court granted summary judgment in favor of Kneisley, England and Van Hooser. Fontenot appeals, and we affirm.

I. Background

Fontenot was hired by DHS in January of 1968 to work as a key punch operator. She was employed there in various capacities until February of 1990. During her tenure at DHS, Fontenot twice applied for supervisory positions: once in October of 1985, and again in May of 1988. In both instances, a white employee succeeded in receiving the position. As a result of the 1985 incident, Fontenot filed a complaint in district court in November of 1987. She alleged that although she was fully qualified for the position, she had not even been interviewed for it because of her race. She asserted that five white applicants with lesser qualifications were interviewed instead. She further alleged that from December of 1974 to the time of filing, she had not received the same treatment as the white employees at DHS.

The defendants at the time (the State of Texas, DHS, Kneisley and England) moved to have the case dismissed. They asserted in part that the Eleventh Amendment barred the suit against the State and DHS, and that qualified immunity protected Kneisley and England from the action. Fontenot did not respond to the motion for dismissal, which the district court granted. Fontenot then moved to have the case reinstated. She asserted that she had not responded to the motion for dismissal because she had believed it appropriate to wait until the district court had ruled on it.

The district court granted her motion to reinstate and gave her fifteen days to respond to the defendants' motion to dismiss. After considering her response, the district court again dismissed the case, on Eleventh Amendment and qualified immunity grounds.

Fontenot appealed the dismissal of her complaint to this court on October 11, 1989. We upheld the dismissal of her claims against the State and DHS. However, we held that the district court should have instructed Fontenot to submit a detailed complaint alleging with particularity the facts she would use to demonstrate that Kneisley and England had acted outside the scope of their immunity. We accordingly remanded the claims against the individual defendants for further proceedings in accordance with our decision.

On remand, the district court instructed Fontenot to file additional pleadings specifying the actions of Kneisley and England which fell outside the scope of their immunity. In her first and second amended complaints, Fontenot added Van Hooser to her list of defendants. She alleged that Van Hooser refused to promote her in May of 1988 because of her race and because she had filed previous complaints of discrimination. In support of her allegation that the refusal to promote her was race-based, Fontenot claimed that in the 1970's, Van Hooser had refused to give her a federal publication on policies relevant to her work that had been distributed to other employees. Van Hooser also allegedly refused to assign Fontenot to a position for which she

had applied in 1981 and refused to post as available another position to which she promoted another employee. Finally, Fontenot asserted as proof of racial discrimination the fact that Van Hooser did not attend the dinner given for Fontenot when she was eventually promoted to section director.

With regard to Kneisley, Fontenot alleged that he had refused to promote her in October of 1985 because of her race and because she had earlier filed complaints within DHS. In support of her allegation that the refusal to promote her was race-based, Fontenot asserted that in early 1974, after she allegedly became the only black programmer trainee at DHS, Kneisley refused to delegate projects to her, in spite of her repeated requests for assignments. She asserted generally that she worked with little or no supervision, while white programmers were directed by a project leader and a section director or project manager. Against England, Fontenot argued that he approved Kneisley's refusal even to interview her for the October, 1985 position.

After Fontenot filed her amended pleadings, the defendants moved for summary judgment. They asserted that all claims against England and Kneisley which arose before November 6, 1985, as well as all claims against Van Hooser which arose prior to June 8, 1988, were time-barred. In addition, they argued in part that Fontenot had not met her burden of establishing a genuine issue of material fact with regard to her claims against any of the defendants.

The district court granted summary judgment in favor of the

defendants. It found that despite the reopening of discovery, Fontenot had shown no evidence supporting the allegations of her pleadings and had accordingly failed to establish a genuine issue for trial. Fontenot filed a motion to vacate the grant of summary judgment on the grounds that the district court had not informed her that she needed to come forward with her supporting evidence at the time of the summary judgment hearing. The district court denied her motion. Fontenot appeals from the grant of summary judgment and the denial of her motion to vacate.

II. Discussion

A. Standard of Review

We review the district court's grant of summary judgment de novo, applying the same standard as a district court. See Hanks v. Transcontinental Gas Pipe Line Corp., 953 F.2d 996, 997 (5th Cir. 1992). Summary judgment is proper only if the record discloses that there is no genuine issue as to material fact and that the moving party is entitled to judgment as a matter of law. See Harbor Insurance Co. v. Trammell Crow Co., 854 F.2d 94, 98 (5th Cir. 1988) (quoting FED. R. CIV. P. 56(c)), cert. denied, 489 U.S. 1054 (1989). To defeat a motion for summary judgment, the non-moving party must set forth specific facts sufficient to establish that there is a genuine issue for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); FED R. CIV. PROC. 56(e). A mere allegation of the existence of a dispute is insufficient to defeat a motion for summary judgment. Anderson, 477 U.S. at 247-48. Moreover, the absence of evidence to

establish an essential element of the non-moving party's case can support a summary judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In reviewing the record, this court is not bound to the grounds articulated by the district court and may affirm the grant of summary judgment on other appropriate grounds. See Harbor Insurance Co. v. Urban Construction Co., 990 F.2d 195, 199 (5th Cir. 1993); Coral Petroleum, Inc. v. Banque Paribas-London, 797 F.2d 1351, 1355 n.3 (5th Cir. 1986); Davis v. Liberty Mutual Insurance Co., 525 F.2d 1204, 1207 (5th Cir. 1976).

B. The Claims Against Kneisley and England

On appeal, the defendants renew their assertion that all claims against defendants Kneisley and England which arose prior to November 6, 1985 are barred by the statute of limitations. It is well established that § 1981 claims and § 1983 claims are essentially claims for personal injury and are accordingly subject to a two-year statute of limitations under Texas law. See Hickey v. Irving Independent School Dist., 976 F.2d 980, 982 (5th Cir. 1992); see also Gartrell v. Gaylor, 981 F.2d 254, 256 (5th Cir. 1993); Price v. Digital Equipment Corp., 846 F.2d 1026 (5th Cir. 1988). The statute of limitations for § 1985 actions under Texas law is also two years. See Helton v. Clements, 832 F.2d 332, 334 (5th Cir. 1987). Because Fontenot filed her original complaint against Kneisley and England on November 6, 1987, each of her claims that arose before November 6, 1985 is time-barred. A review of the record indicates that the last of

her claims against Kneisley and England arose in October of 1985, when they allegedly denied her a promotion.[1] Accordingly, her entire cause of action against them is time-barred, and summary judgment was properly granted in their favor.[2]

C. The Claims Against Van Hooser

Although the claims against Van Hooser are arguably not time-barred, she asserts that Fontenot failed to establish a genuine issue for trial and so the grant of summary judgment in her favor should be upheld. The Supreme Court has held that the moving party in a summary judgment proceeding need only "poin[t] out to the district court" that there is an absence of evidence to support the non-moving party's case. Celotex, 477 U.S. at 325. On the other hand, the non-moving party must "go beyond the pleadings and her own affidavits" and establish "specific facts showing that there is a genuine issue for trial" through such evidentiary materials as other affidavits, answers to interrogatories, and admissions. Id. at 324. In the case at hand, despite the reopening of discovery, Fontenot failed to

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[1] It might be argued that overt acts pursuant to the conspiracy claim under § 1985 were committed after November 6, 1985. However, this court has held that § 1985 conspiracies accrue "as soon as [the] plaintiff knew or should have known of the overt acts involved in the alleged conspiracy." Helton, 832 F.2d at 335. Given the centrality of the alleged October, 1985 hiring incident to Fontenot's action, her § 1985 claim accrued at that time, at the latest. Accordingly, her § 1985 claim against Kneisley and England is time-barred.

[2] Even if Fontenot's claims against Kneisley and England were not time-barred, they would fail because Fontenot provided no evidence beyond her pleadings that a genuine issue existed for trial. See infra, Part II.C.

assert any recognizable evidence in opposition to Van Hooser's motion for summary judgment. Instead, she relied entirely on her earlier pleadings. Accordingly summary judgment was properly granted in Van Hooser's favor.

Fontenot argues that the district court's grant of summary judgment should be vacated because the district court should have informed her that she needed to present all of her evidence at the summary judgment proceedings. We disagree. The defendants' motion for summary judgment explained in detail the standard for summary judgment proceedings. It gave Fontenot adequate notice that she would need to present evidence pursuant to Federal Rule of Civil Procedure 56(e) to sustain her cause of action. Moreover, the district court reopened discovery prior to the summary judgment hearing at Fontenot's request to ensure that she had a full and fair opportunity to gather evidence. Accordingly, her motion to vacate the grant of summary judgment was properly denied.

III. Conclusion

For the foregoing reasons, we AFFIRM the district court's judgment.