UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8567
Summary Calendar

EDITH FONTENOT,

Plaintiff-Appellant,

versus

STATE OF TEXAS, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Texas
(A-91-CV-928 c/w A-92-CV-372)

(December 28, 1994)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Pro se plaintiff-appellant Edith Fontenot (Fontenot) filed this suit against the State of Texas (the State), the Texas Department of Human Services (TDHS), and five individual defendants, alleging racial discrimination and retaliation for claims of racial discrimination in defendants' failure to hire her.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

The district court granted summary judgment as to most of Fontenot's causes of action and as to all but three of the individual defendants. Fontenot's section 1981 claims against these three defendants proceeded to a trial before the court. At the close of Fontenot's evidence, the district court granted defendants' motion for judgment as a matter of law. It held that Fontenot had not established a *prima facie* case of discrimination or retaliation because she failed to prove that she was qualified for the positions for which she applied. We affirm.

Facts and Proceedings Below

Fontenot was employed by TDHS from 1968 until February 12, 1990, when she was terminated as part of an agency-wide reduction-in-force. At the time of this lay-off, Fontenot was employed as one of five section directors in the Mainframe Services Division at TDHS; immediately prior to her termination, Fontenot had been ranked last among these five by her supervisor, defendant Hank Atkinson (Atkinson), because her level of productivity was below that of her colleagues.

Fontenot, like other employees who were laid off in the reduction-in-force, was for some period of time after her termination kept abreast of new positions at TDHS as they became available. Fontenot applied for four of these positions. In October 1990, she applied for the position of Business Area Analyst IV. Defendant Diana Williamson (Williamson) was the person responsible for hiring for this position. In January 1991, Fontenot applied for the position of Director of ADP II, which defendant Rosemary Youngblood (Youngblood) was responsible for

filling. Fontenot applied in February 1991 for a Programmer Analyst I position. Defendant Merl Blair (Blair) was in charge of hiring for this position. Finally, also in February 1991, Fontenot applied for a position as Programmer Analyst II. Defendant Dale Petersen (Petersen) was responsible for hiring for this position. Fontenot was neither interviewed nor hired for any of these positions.

The present suit is a consolidated action incorporating two separate suits.[1] The first suit, filed November 29, 1991, was related to the events surrounding Fontenot's attempts to seek re-employment with TDHS, whereas the second, filed June 17, 1992, involved the events surrounding Fontenot's termination. In both cases, Fontenot sued the State, TDHS, and the individual defendants, alleging causes of action under the Thirteenth and Fourteenth Amendments and 42 U.S.C. §§ 1981, 1983, and 1985 for racial discrimination and retaliation. She alleged that TDHS maintains a discriminatory hiring policy that has a disparate impact on blacks. She also alleged that her initial termination and her failure to be rehired were in retaliation for her filing of various unspecified complaints against TDHS.[2] At all times,

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[1] It also appears from the record that Fontenot filed a similar suit in federal district court in 1987. It is not clear from the record whether or how that case has been resolved. It is not part of the consolidated suit that the district court considered, which is the subject of this appeal.

[2] It is not entirely clear from the record what these complaints were. In her deposition, Fontenot testified that "I'm speaking of complaints that I filed within the Civil Rights Division. I'm speaking of complaints that I've filed with the Federal EEOC. I'm speaking of complaints that I filed with the federal courts." Fontenot subsequently admitted, however, that

Fontenot has represented herself *pro se* in these actions.

After the cases were consolidated, the defendants, on December 10, 1992, moved for summary judgment on all claims. Although on January 4, 1993, Fontenot was granted an extension of time until January 22, 1993, to respond, she never filed a response to the summary judgment motion. On January 26, 1993, she did file a motion to vacate the January 4 order; this motion was overruled March 29, 1993.

The district court on July 8, 1993, granted summary judgment on all but Fontenot's section 1981 claims against Williamson, Youngblood, and Petersen. It held that the State and TDHS were immune from suit under the Eleventh Amendment. As to the individual defendants, the district court found that the suit was brought against them in their official capacities. It therefore held that the Eleventh Amendment also protected the individual defendants insofar as they were sued in their official capacities for retrospective relief and granted summary judgment as to those aspects of Fontenot's claims. Although noting that individual officials are not immune from suit in their individual capacities if they have violated federal constitutional or statutory rights, the district court found that Fontenot had not shown sufficient facts to establish a conspiracy under section 1985(3), a violation of the Thirteenth Amendment, or a violation of section 1981 as to defendants Atkinson and Blair. With respect to the section 1981 claims against Williamson, Youngblood, and Petersen, however, the

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none of the individual defendants was the subject of or otherwise was directly involved in any of these complaints.

district court found that Fontenot had alleged sufficient facts to withstand summary judgment.

Finding that Fontenot had failed to make a proper demand for a jury, the district court held a bench trial on the section 1981 claims. At trial, Fontenot called several of her own witnesses, none of whom was willing to agree with her that either TDHS's or her department's minority hiring patterns were discriminatory. She also called the three defendants to the stand. Each testified that Fontenot was not hired because she was not the best qualified candidate for those positions. In addition, although the defendants admitted that they had some general knowledge that Fontenot had filed complaints against TDHS in the past, none of them knew anything specific about those complaints. Fontenot herself elected not to testify, even though the district court suggested that it would be prudent for her to do so. She did make an unsworn statement to the court in which she stressed that she believed that she was in fact qualified for the positions.

At the close of Fontenot's evidence, the district court granted defendants' motion for judgment as a matter of law. It held that Fontenot had failed to make out a *prima facie* case of either discrimination or retaliation because she had neither proved that she was qualified for the positions for which she applied nor disproved defendants' assertions that they believed she was not qualified. Fontenot now appeals that decision, as well as the district court's order granting summary judgment as to the remainder of her claims.

Discussion

I. Claims Decided on Summary Judgment

A. Standard of Review

We review a grant of summary judgment *de novo*, using the same standards as the district court. *Hansen v. Continental Insurance Co.*, 940 F.2d 971, 975 (5th Cir. 1991). Summary judgment is appropriate when the record reflects that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party bears the initial burden of showing that there is no genuine issue for trial; where, as here, the nonmoving party would bear the burden of proof at trial, the moving party may satisfy its summary judgment burden by pointing out "`the absence of evidence supporting the nonmoving party's case.'" *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 913 (5th Cir.), *cert. denied*, 113 S.Ct. 98 (1992) (citation omitted). If the moving party meets this burden, the nonmoving party must come forward with evidence to prove the existence of a genuine issue. *Celotex Corp v. Catrett*, 106 S.Ct. 2548, 2552 (1986). Although we consider all evidence in the light most favorable to the nonmoving party, *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 178 (5th Cir. 1990), *cert. denied*, 114 S.Ct. 171 (1993), conclusory allegations unsupported by concrete and particular facts will not prevent an award of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986).

B. Eleventh Amendment Immunity

The district court held that Fontenot's claims against the State and TDHS were barred by the Eleventh Amendment, as were all claims for money damages against TDHS employees in their official capacities. We affirm this holding in both respects.

It is clear that the Eleventh Amendment prohibits suits against the state and its agencies and departments regardless of the type of relief sought.[3] *Pennhurst State School & Hospital v. Halderman*, 104 S.Ct. 900, 908 (1984); *Cronen v. Texas Department of Human Services*, 977 F.2d 934, 937 (5th Cir. 1992). Of course, Congress or the state may waive this immunity, *see Port Authority Trans-Hudson Corp. v. Feeney*, 110 S.Ct. 1868, 1872 (1990), but only if the intent to do so is unmistakably clear.[4] *Atascadero State*

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[3] Fontenot's argument that summary judgment was improper because she had not yet completed discovery is therefore unavailing, because no discovery was necessary on this issue. The Eleventh Amendment provides not merely a defense to liability but an absolute immunity from suit. *See Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 113 S.Ct. 684, 688 (1993).

[4] Title VII of the Civil Rights Act of 1964 contains just such a waiver of the states' Eleventh Amendment immunity. *Fitzpatrick v. Bitzer*, 96 S.Ct. 2666, 2671 (1976); *Clark v. Tarrant County, Texas*, 798 F.2d 736, 743 (5th Cir. 1986). On appeal, Fontenot argues, evidently for the first time, that she has a Title VII claim. Although the district court evidently informed Fontenot that her pleadings could be construed to state a cause of action under Title VII, it expressly stated in its order granting defendants' motion for summary judgment that Fontenot had not alleged a violation of Title VII. In addition, although Fontenot claims that she was issued right to sue letters for both causes of action in the consolidated suit, these letters are not part of the record before us.

Moreover, as discussed below, we agree with the district court that Fontenot failed to prove that she was qualified for the positions for which she applied. Given that qualification is also an essential element of the *prima facie* case under Title VII, *see McDonnell Douglas Corp. v. Green*, 93 S.Ct. 1817, 1824

Hospital v. Scanlon, 105 S.Ct. 3142, 3147 (1985); *Edelman v. Jordan*, 94 S.Ct. 1347, 1360-61 (1974). There has been no such waiver with respect to any of Fontenot's claims.[5] Summary judgment was therefore properly granted.

Summary judgment was also proper as to the individual defendants (other than the section 1981-racial discrimination claims against Williamson, Youngblood, and Petersen) in their individual capacities. For the reasons set forth below, Fontenot did not make a sufficient showing to withstand summary judgment on any such claims.

C. Thirteenth Amendment

"[I]n order to prove a violation of the thirteenth amendment the [plaintiff] must show he was subjected to involuntary servitude or slavery." *Watson v. Graves*, 909 F.2d 1549, 1552 (5th Cir. 1990). Fontenot neither alleged nor demonstrated that any of the defendants subjected her to involuntary servitude or slavery. *See Wong v. Stripling*, 881 F.2d 200, 203 (5th Cir. 1989) ("[A]n allegation of racial discrimination alone [is not] sufficient to invoke the thirteenth amendment."). The district court did not err in granting summary judgment as to this claim.

(1973), we are convinced that if there was any error in failing to consider a Title VII claim in this suit it was harmless. Finally, we note that the individual defendants would not have Title VII liability in their individual capacities. *See Grant v. Lone Star Co.*, 21 F.3d 649 (5th Cir. 1994).

[5] In addition, as the district court correctly noted, neither the State nor TDHS is considered a "person" for purposes of section 1983. *Will v. Michigan Department of State Police*, 109 S.Ct. 2304, 2312 (1989).

D. Section 1985(3)

Section 1985(3) provides a cause of action against those who conspire to deprive "any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." 42 U.S.C. § 1985(3). Fontenot alleges that "[s]he is suffering and will continue to suffer irreparable injury because of . . . conspiracy of defendants." In addition, in the paragraph of her complaint in which she alleges that "defendant, Dale Petersen willingly failed and refused to hire plaintiff," Fontenot claims that she suffered damages "[a]s a direct and proximate result of this conspiracy to deny plaintiff her rights."

We agree with the district court that these allegations are too conclusory to support a cause of action for conspiracy under section 1985(3). "Plaintiffs who assert conspiracy claims under civil rights statutes must plead the operative facts upon which their claim is based. Bald allegations that a conspiracy existed are insufficient." *Lynch v. Cannatella*, 810 F.2d 1363, 1369-70 (5th Cir. 1987) (footnote omitted). Fontenot has offered no specific facts that would tend to establish that a conspiracy existed.[6] *See Wong*, 881 F.2d at 202 (plaintiff must prove, *inter alia*, an overt act in furtherance of the alleged conspiracy to state a cause of action under section 1985(3)). In addition, a state agency and its officials represent a single entity; as a

[6] The allegations against Petersen do not state a cause of action at all. A conspiracy under section 1985(3) requires an agreement between "two or more persons," 42 U.S.C. § 1985(3), but Petersen is the only party identified to the conspiracy Fontenot alleges.

matter of law state officials of a single agency generally cannot conspire with their employer agency or with one another in the carrying out of their official duties as agency employees. *Chambliss v. Foote*, 421 F.Supp. 12, 15 (E.D. La. 1976), *aff'd*, 562 F.2d 1015 (5th Cir. 1977), *cert. denied*, 99 S.Ct. 127 (1978). Summary judgment was properly granted.

E. Section 1981 and Racial Discrimination

In her pleadings, Fontenot does not allege that defendant Blair discriminated against her on the basis of her race.[7] She does not allege *any* cause of action against defendant Atkinson; he appears in her complaint only as a name in the caption. Although a *pro se* plaintiff's pleadings are to be liberally construed, a district court cannot pursue causes of action that are not even implicated by the complaint. *See Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993). Summary judgment as to Atkinson and Blair was therefore proper.

II. Claims Decided at Trial

A. Plaintiff's Jury Demand

The district court found that Fontenot had failed to make a proper jury demand. A jury demand must be filed with the court and served on the opposing party; otherwise it is waived. FED. R. CIV.

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[7] Fontenot *did* allege that Blair retaliated against her for filing previous complaints of discrimination against TDHS. Although the district court granted summary judgment as to Blair without considering this aspect of Fontenot's complaint, we do not think this omission requires reversal. Blair's affidavit stated unequivocally that he had no first-hand knowledge of those complaints and that he did not retaliate against Fontenot because of them. As this evidence was unrebutted, any error in failing to consider the retaliation claim against Blair was harmless.

P. 38(b) & (d). The words "Jury Demand" are handwritten in the margin on both of Fontenot's original complaints. Because the Rules permit a demand to be "indorsed upon a pleading of the party," FED. R. CIV. P. 38(b), we believe that Fontenot's jury demand was properly filed. Moreover, although defendants argue that the copies of Fontenot's complaints that they received did not include the jury demand, we have no way of ascertaining the truth of their assertion from the record. We will therefore assume that the jury demand was properly served as well and that therefore Fontenot was entitled to a jury trial.

Nevertheless, "[i]n a case in which the plaintiff's case `would not have survived a motion for a directed verdict,' the denial of a jury trial is harmless error." *Bowles v. United States Army Corps of Engineers*, 841 F.2d 112, 117 (5th Cir.), *cert. denied*, 109 S.Ct. 33 (1988) (citation omitted). Because, as discussed below, we find that Fontenot's case would not have survived a motion for directed verdict, the denial of her jury demand was harmless error.

B. Section 1981[8]

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[8] Fontenot's complaint also alleged a cause of action under section 1983. Section 1983, however, does not create any rights in a plaintiff; it simply provides a vehicle for the enforcement of other federal constitutional or statutory rights. *San Jacinto Savings & Loan v. Kacal*, 928 F.2d 697, 700 (5th Cir. 1991). Therefore, to the extent that Fontenot has failed to prove a violation of her rights pursuant to her substantive claims, the failure to consider her section 1983 claim was harmless error.

In addition, although the district court did not directly address Fontenot's Fourteenth Amendment claim, its correct determination that Fontenot had "failed to prove Defendants intentionally discriminated against her because of her race or because she had filed discrimination complaints in the past" (and our holding that the individual defendants would have been

Section 1981 provides all persons with "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a). Fontenot claims that defendants Williamson, Youngblood, and Petersen violated her rights under this section by refusing to interview or hire her on the basis of her race and because she had filed past claims of racial discrimination. We address each of these claims in turn.

1. Discrimination claim.

Claims of discrimination in the making of employment contracts are analyzed under the same framework as Title VII claims. *Patterson v. McLean Credit Union*, 109 S.Ct. 2363, 2377-78 (1989).[9] That is, the plaintiff bears the initial burden of proving by a preponderance of the evidence that: (1) she applied for an available position; (2) she was qualified for that position; (3) she was rejected for that position; and (4) either the defendant continued to solicit for applications or the position was filled by a nonminority applicant. *Id.* at 2378. If the plaintiff offers sufficient proof of these elements, an inference of discrimination arises, and the burden then shifts to the defendant to provide a legitimate, nondiscriminatory explanation for its decision not to

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entitled to a directed verdict on that basis) is fatal to such a claim. Intentional discrimination is an essential element of a viable equal protection claim. *Lavernia v. Lynaugh*, 845 F.2d 493, 496 (5th Cir. 1988).

[9] Although *Patterson* has been abrogated by statute, The Civil Rights Act of 1991, Pub. L. No. 102-166, § 101(2)(b), 42 U.S.C. § 1981(b); *see Valdez v. San Antonio Chamber of Commerce*, 974 F.2d 592, 594 (5th Cir. 1992) (recognizing abrogation of *Patterson*), all the acts of which Fontenot complains in this case occurred before the effective date of the Act. The resolution of her claims, therefore, is still governed by *Patterson*.

hire the plaintiff. *Id.* Such an explanation will rebut the inference of discrimination, and the burden then shifts back to the plaintiff to establish intentional discrimination, for example, by showing that the proffered explanation is pretextual. *Id.*

Although Fontenot insists that she was qualified for the positions at issue in this case, the record is devoid of concrete evidence substantiating this assertion. Fontenot introduced into evidence her application for re-employment with TDHS, which included a description of her qualifications, but we can find nothing to demonstrate that these qualifications were appropriate for the positions she sought. Indeed, the unrebutted testimony of the three defendants was that she was *not* qualified for these positions.[10] We think the record clearly supports the district court's conclusion that Fontenot failed to bring forth any substantial evidence that she was qualified for the positions for which she applied. A directed verdict against Fontenot would hence have been proper.

2. Retaliation claim

In *Goff v. Continental Oil Co.*, this Court held that claims of

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[10] Yet even if we were to assume that Fontenot was minimally qualified for these positions, and therefore had established a *prima facie* case of discrimination, all three defendants testified that the candidate or candidates actually hired were better qualified than Fontenot. This testimony was sufficient to overcome the presumption of discrimination and return the burden of proof to Fontenot. *Patterson*, 109 S.Ct. at 2378 ("[R]espondent presented evidence that it gave the job to the white applicant because she was better qualified for the position, and therefore rebutted any presumption of discrimination that petitioner may have established."). Fontenot offered no evidence to prove that defendants' asserted reasons were pretextual. *See id.*

retaliation for complaints of racial discrimination were cognizable under section 1981. 678 F.2d 593, 598-99 (5th Cir. 1982). We have since recognized that *Goff* did not survive the Supreme Court's holding in *Patterson v. McLean Credit Union* insofar as retaliatory terminations are concerned. *Carter v. South Central Bell*, 912 F.2d 832, 840 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 2916 (1991), *and cert. denied*, 113 S.Ct. 1582 (1993); *see supra* note 9 (noting that this case is governed by *Patterson*). If the holding of *Carter* extends to retaliatory refusals to hire, Fontenot has no cognizable cause of action under section 1981 for retaliation.

We need not resolve this issue, however, because even if we assume *arguendo* that *Goff* continues to have some vitality as applied to retaliatory refusals to hire, we still do not think that Fontenot has sustained her burden of proof. Under *Goff*, a plaintiff proves a *prima facie* case of retaliation by showing: "(1) that he engaged in activity protected by § 1981; (2) that an adverse employment action followed; and (3) that there was a causal connection between the two." *Goff*, 678 F.2d at 599. Because Fontenot did not prove that she was qualified for the positions at issue in this case, she failed to satisfy the first prong of the *Goff* test. Therefore, a directed verdict against Fontenot would have been proper on this claim as well.

Conclusion

For these reasons, the district court's judgment is

AFFIRMED.