UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10049
Summary Calendar

VERNA MAE THOMAS-MELTON,

Plaintiff-Appellant,

versus

DALLAS COUNTY SHERIFF'S DEPT.,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Texas
(3:91-CV-2645-G)

(October 25, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Plaintiff-appellant Verna Thomas-Melton (Thomas-Melton) brought this Title VII action against defendant-appellee the Dallas County Sheriff's Department (the Department). She argues that the district court's denial of her motion for leave to amend her complaint to name Dallas CountySQthe proper party defendant in this

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

casesQwas an abuse of discretion. Under all the circumstances here, we are unable to conclude that the district court abused its discretion. We therefore affirm.

Facts and Proceedings Below

Thomas-Melton was a Detention Services Officer with the Department. On January 11, 1989, Thomas-Melton left work in the afternoon to testify before a grand jury and did not return to work that day. The following day, the Department requested Thomas-Melton to provide an explanation of her failure to return to work after testifying; Thomas-Melton submitted a memorandum on January 16. Thomas-Melton was notified on February 8, 1989 that she would be recommended for termination for being absent without leave, filing a false report, and being untruthful to the Internal Affairs officers investigating the incident. That recommendation was upheld at a disciplinary hearing on February 27, and Thomas-Melton was discharged.

Having been issued a letter of determination by the Equal Opportunity Employment Commission, Thomas-Melton, proceeding *pro se*, filed this suit in the district court below against the Department on December 6, 1991. She sought injunctive relief and a declaratory judgment under Title VII and monetary damages for intentional infliction of emotional distress. By its timely answer filed February 26, 1992, the Department alleged, *inter alia*, that it was not "a legal entity subject to suit, separate and apart from Dallas County."[1] On April 1, 1992, the district court entered a

[1] The Department also stated in its answer that there had not been proper service in the case. The Federal Rules provide that,

scheduling order in the case requiring the parties to make all amendments to their pleadings before October 2, 1992. On July 21, the case was referred to a magistrate judge. On August 7, 1992, Thomas-Melton's recently retained counsel entered her appearance in the case. On August 28, 1992, the magistrate judge issued a new scheduling order requiring that all discovery and motions for summary judgment be filed on or before February 26, 1993.

On February 26, 1993, the Department filed a motion to dismiss for failure to sue the proper party in interest and failure to state a claim or, in the alternative, for summary judgment. The magistrate judge granted Thomas-Melton leave to delay her response to this motion in order to complete discovery. She filed her response on July 30, 1993. To it, she attached an alternative motion for leave to amend her complaint to add Dallas County as a defendant. Contrary to local rules of court, however, no copy of the proposed amended petition was submitted with the motion (or otherwise filed or tendered). The Department pointed out this deficiency in its reply brief of August 12, 1993. In addition, the Department's reply brief cited this Court's decision in *Alcala v. Dallas County Sheriff's Department*, No. 92-1853 (5th Cir. March 12, 1993) (unpublished), which held specifically that the Dallas County Sheriff's Department was not a suable entity.

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with respect to local governments, service is to be accomplished "in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant." FED. R. CIV. P. 4(j)(2). Under Texas law, a Texas county is served by delivering the summons and complaint to the county judge. *See* TEX. CIV. PRAC. & REM. CODE § 17.024(a). No such service has been made in this case.

The magistrate judge issued his recommendations on November 30, 1993. He recommended that the suit be dismissed because the Department was not a suable entity and that the motion to amend be denied as belated and not in compliance with local rules. Thomas-Melton filed her objections to the report on December 13. With this filing she included a renewed motion for leave to amend, to which was attached a copy of the proposed amended complaint. On December 14, 1993, the district court accepted the magistrate judge's recommendation, overruled the objections, denied the motion for leave to amend, and granted summary judgment for the Department. Judgment was entered December 16, 1993.

On December 30, Thomas-Melton filed and served a motion, purportedly under FEDERAL RULE OF CIVIL PROCEDURE 60(b), for reconsideration of the district court's order. The district court overruled the Rule 60(b) motion on February 15, 1994.

Thomas-Melton now appeals to this Court. She argues that the district court abused its discretion both in refusing to grant her leave to amend her complaint to name Dallas County as a party and in denying her Rule 60(b) motion for reconsideration. Although she filed a notice of appeal from the order granting summary judgment on January 12, 1994, Thomas-Melton has filed no notice of appeal from the order denying Rule 60(b) reconsideration.

Discussion

I. Denial of Leave to Amend

The decision whether to grant leave to amend a complaint is committed to the sound discretion of the district court. *Zenith Radio Corp. v. Hazeltine Research Inc.*, 91 S.Ct. 795, 802 (1971);

Davis v. United States, 961 F.2d 53, 57 (5th Cir. 1991). Thus, although "leave shall be freely given when justice so requires," FED. R. CIV. P. 15(a), a grant of leave to amend is not automatic. *Davis*, 961 F.2d at 57. In deciding whether to grant leave to amend, the district court "considers a variety of factors, such as undue delay, bad faith, undue prejudice to the opposing party by allowing the amendment, and futility of the amendment." *Id.*

Although this is indeed a close case, we are unable to conclude, given all the facts, that the district court abused its discretion in denying leave to amend. Although Thomas-Melton had numerous opportunities during the over two and one-half years that this litigation has been pending to amend her complaint to name the proper party in interest, she failed to do so until this case was on the brink of dismissal. Such undue delay was a proper consideration in denying leave to amend.

Thomas-Melton filed her complaint in December 1991. At that time, she was on notice of this Court's decision in *Darby v. Pasadena Police Department*, in which we held that "unless the true political entity has taken explicit steps to grant the servient agency with jural authority, the agency cannot engage in any litigation except in concert with the government itself." 939 F.2d 311, 313 (5th Cir. 1991). Because the plaintiff in *Darby* failed to show that the police department "has been granted the capacity `to sue or be sued,'" we found that the police department was not a suable entity. *Id.* at 313 n.1 (citation omitted).

The Department timely raised the issue of its amenability to

suit in its answer.[2] Although we recognize that Thomas-Melton was *pro se* at the commencement of her suit, she acquired counsel in August 1992, two months before the district court's original scheduled deadline for amendments. Certainly counsel cannot claim to have been unaware of the potential significance of *Darby*. Even if Thomas-Melton believed *Darby* to be distinguishable from her case, all that was required was that she add Dallas County as a defendant and continue to pursue her claim that the Department was a suable entity.

Thomas-Melton argues, however, that the issue was not decisively resolved until this Court's decision in *Alcala v. Dallas County Sheriff's Department*. Even if we accept this position,[3] Thomas-Melton still waited until JulySQnearly five months after *Alcala* was decidedSQto seek leave to amend. We cannot agree with Thomas-Melton's argument that these five months cannot be counted towards any assessment of delay because she was pursuing further

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[2] We think this fact helps distinguish this case from our decisions in *Darby* and *Chancery Clerk of Chickasaw County, Mississippi v. Wallace*, 646 F.2d 151 (5th Cir. Unit A 1981). In *Wallace*, the defendant did not challenge its status as a suable entity until appeal; the defendant in *Darby* did not complain until the eve of trial. In both cases, we stated that "[t]o regard the plaintiffs' selection of the wrong governmental officials in mounting this suit as anything more than a remedial pleading defect . . . would be to elevate form over substance." *Wallace*, 646 F.2d at 160 (*quoted in Darby*, 939 F.2d at 315). That is the case here.

[3] The Court in *Alcala*, relying solely on the holding in *Darby* in concluding that the Department was not a suable entity, noted that its decision was to be unpublished because "`[t]he 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.'" *Alcala*, No. 92-1853 (5th Cir. March 12, 1993) at 1 n.* (emphasis added; citation omitted).

discovery, because discovery had nothing to do with this issue.

Moreover, once Thomas-Melton did seek leave to amend, her motion failed to comply with local rules requiring a copy of the proposed amended complaint to be attached to the motion, a defect that the Department noted in its August 12 reply brief.[4] Even then, it was not until December 13 that Thomas-Melton finally tendered an appropriate motion for leave to amend. At that point, the magistrate judge had already considered the matter and submitted a recommendation for dismissal.

Given the particular facts and procedural history of this case, therefore, we find no abuse of discretion in the district court's denial of the motion for leave to amend.

II. Motion for Reconsideration

The district court's December 14 judgment was entered on December 16, 1993. On December 30, Thomas-Melton served and filed a motion for reconsideration. The motion was thus timely for a motion under FEDERAL RULE OF CIVIL PROCEDURE 59(e).[5] *See Lavespere v. Niagra Machine & Tool Works, Inc.*, 910 F.2d 167, 173 (5th Cir. 1990), *cert. denied*, 114 S.Ct. 171 (1993).

However, Thomas-Melton has never filed a notice of appeal from

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[4] We have said that "[t]he district court [may] consider [the] failure to attach the proposed pleading as a factor in the determination of whether it should grant the motion [for leave to amend], but such a failure [is] not fatal." *Davis*, 961 F.2d at 57.

[5] The judgment was entered on December 16, 1993. Excluding that day, as well as intervening Saturdays, Sundays, and legal holidays, *see* FED. R. CIV. P. 6(a), the tenth day was December 31. The motion was filed and served on December 30.

the denial of this motion, nor has she amended her previously filed notice of appeal. Such action is a prerequisite to our jurisdiction over this aspect of her appeal. Recent amendments (effective December 1, 1993) to Rule 4(a)(4) toll the running of the appellate timetable in certain circumstances:

> "A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions [including a motion `for relief under Rule 60 if the motion is served within 10 days after the entry of judgment'] is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the date of the entry of the order disposing of the last such motion outstanding." FED. R. APP. P. 4(a)(4).

We cannot review such an order, however, unless the party seeking to complain on appeal "amend[s] a previously filed notice of appeal." *Id.* As no notice of appeal was ever filed with respect to the district court's ruling on Thomas-Melton's December 30 motion, we have no jurisdiction to consider that order. This issue is therefore not properly before us.[6]

III. Motion for Summary Judgment.

The magistrate recommended that Thomas-Melton's suit be dismissed solely on the basis of her failure to name a proper party defendant. The Department argues in the alternative that it was entitled to summary judgment on the merits because Thomas-Melton has failed to adduce evidence to support essential elements of her Title VII claims. Although we may decide this issue, *see Brown v. Southwestern Bell Telephone Co.*, 901 F.2d 1250, 1255 (5th Cir. 1990), we decline to do so here.

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[6] Even if it were, nothing in the December 30, 1993 motion would compel a different result.

Conclusion

The judgment of the district court is therefore

AFFIRMED.