

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20520
Summary Calendar

IDA F. NAULS,

Plaintiff-Appellant,

v.

THE CLOROX COMPANY,

Defendant-Appellee.

Appeal From the United States District Court
for the Southern District of Texas
(CA-H-92-3983)

(May 12, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:¹

Appellant Ida F. Nauls (Nauls) appeals from the district court's order denying her motion for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure. Because the

¹Local 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

district court did not abuse its discretion in denying the motion, we affirm.

BACKGROUND

Nauls filed a civil complaint against The Clorox Company (Clorox), alleging age discrimination, workers' compensation retaliation, and intentional infliction of emotional distress. Clorox filed an answer denying Nauls's allegations, and on January 14, 1994 filed a motion for summary judgment with an accompanying memorandum.

Under Rule 6D of the local rules of the federal district court for the Southern District of Texas, a response to an opposed motion must be filed within 20 days from the date that the motion was filed. Because Clorox's motion was served by mail, three days are added to the time period under Rule 6(e) of the Federal Rules of Civil Procedure. Therefore, the deadline for filing a response to Clorox's motion for summary judgment was February 7, 1994. Nauls did not seek an extension of the response deadline and did not file a response to Clorox's motion until April 18, 1994. The district court issued an order and judgment granting Clorox's motion for summary judgment before Nauls filed her response. Nauls then filed a motion for "reconsideration" over ten days after the entry of the district court's judgment. The district court denied Nauls' motion. Nauls timely filed a notice of appeal from the denial of this motion.¹

¹ The appeal was dismissed by the Clerk of Court for want of prosecution for failure to pay the docketing fee and order the transcript within the time fixed by the rules. See Loose Papers.

DISCUSSION

Nauls contends that the district court erred in finding that there was no genuine issue of material fact and in granting a summary judgment in favor of Clorox. Nauls maintains that to defeat a motion for summary judgment a plaintiff need not present sufficient proof to meet the burden of persuasion, but is only required to present sufficient evidence to raise a genuine issue of fact. Nauls contends that summary judgment is inappropriate because she has presented evidence of discriminatory intent and a causal link between her discharge and her workers' compensation claim, and because Clorox cannot rebut her claim without raising genuine issues of material fact.

Nauls's postjudgment motion was filed over ten days after the entry of the district court's judgment. Therefore, it is treated as a motion for relief from the judgment under Rule 60(b) of the Federal Rules of Civil Procedure. See Ford v. Elsbury, 32 F.3d 931, 937 n.7 (5th Cir. 1994). Review is limited to whether the district court abused its discretion in denying the Rule 60(b) motion. Carimi v. Royal Caribbean Cruise Line, Inc., 959 F.2d 1344, 1345 (5th Cir. 1992). "It is not enough that the granting of relief might have been permissible, or even warranted -- denial must have been so *unwarranted* as to constitute an abuse of discretion." Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 402 (5th Cir. 1981).

However, the Clerk of Court subsequently granted Nauls's motion for reinstatement of the appeal. Id.

Generally, the denial of a Rule 60(b) motion does not bring up the underlying judgment for review. See Harrison v. Byrd, 765 F.2d 501, 503 (5th Cir. 1985). However, if the Rule 60(b) motion is filed within the appeal period and if the court in granting the earlier judgment "overlooked and failed to consider some controlling principle of law, the district court may abuse its discretion" by not providing Rule 60(b) relief even if the losing party did not file a timely motion for new trial or appeal. Id.

Under Rule 60(b), the district court may relieve a party from a final judgment for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, misrepresentation or other misconduct of the adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment on which it is based has been reversed or vacated; or (6) any other reason justifying relief from the operation of the judgment. Fed. R. Civ. P. 60(b). In considering a Rule 60(b) motion, the district court should consider the following factors: (1) final judgments should not be disturbed lightly; (2) a Rule 60(b) motion is not to be used as a substitute for appeal; (3) the rule should be interpreted liberally in order to do substantial justice; (4) whether the motion was made within a reasonable time; (5) if the judgment was a default or dismissal without consideration of the merits, whether the interest in deciding cases on the merits outweighs the interest in the finality

of judgments; (6) whether there are any intervening equities that would make it inequitable to grant relief; and (7) any other factors relevant to the justice of the judgment under attack. Edward H. Bohlin Co., Inc. v. Banning Co., Inc., 6 F.3d 350, 356 (5th Cir. 1993) (citing Seven Elves, Inc., 635 F.2d at 401). Relief is appropriate under Rule 60(b)(6) "only if extraordinary circumstances are present." American Totalisator Corp. v. Fair Grounds Corp., 3 F.3d 810, 815 (5th Cir. 1993).

The district court denied Nauls's "motion for reconsideration" of the summary judgment in favor of Clorox. The district court noted that Nauls failed to file a timely response to Clorox's motion for summary judgment within the deadline and provided no reason for the delay. The district court also noted that Nauls's response, which was attached as an exhibit to her motion and included excerpts from her deposition as evidence, did not present sufficient evidence to raise a genuine issue of fact that would preclude the granting of a summary judgment.

Nauls has not shown that the district court's denial of her Rule 60(b) motion was so unwarranted as to constitute an abuse of discretion. In her motion, Nauls contends only that the district court erred in granting the motion for summary judgment because she now wants to show that genuine issues of material fact exist. Nauls does not allege any of the specific grounds for a Rule 60(b) motion exist. She has not shown that the district court's denial of her motion was based on a fundamental misconception of law warranting relief under Rule 60(b). She has also failed to

establish that "extraordinary circumstances are present" which would require relief under Rule 60(b)(6). Further, Nauls's motion does not fall within the exception established by Harrison v. Byrd; although Nauls's motion was filed within the thirty-day appeal period, she did not allege that the district court "overlooked or failed to consider a controlling principle of law" concerning either her age discrimination claim or her workers' compensation retaliation claim as required by Harrison. See Harrison, 765 F.2d at 503. Rather, she presented an argument and supporting evidence for the first time. Nor has Nauls provided any explanation for her delay to this court; she briefs the appeal as though the underlying judgment were on appeal and as though her response had been timely filed and considered. As noted above, review of the underlying judgment of the district court is precluded. Id.

CONCLUSION

Because Nauls has not shown that the district court abused its discretion in denying her motion, the judgment of the district court is AFFIRMED.