

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40633

Summary Calendar

JAMES TUCKER,

Plaintiff-Appellant,

v.

U.S DEPARTMENT OF ARMY,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(94-CV-313)

(December 6, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

James Tucker, proceeding *pro se* and *in forma pauperis*, appeals the district court's dismissal, without prejudice, of his complaint alleging employment discrimination based upon race in violation of Title VII of the Civil Rights Act 1964, 42 U.S.C. § 2000e-16, and upon age in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34. Specifically, Tucker

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

contests the district court's conclusion that this action was brought in an improper venue. We agree with the district court that the interests of justice would be served by litigating both of Tucker's claims in the Northern District of Texas. We conclude, however, that dismissing all of Tucker's claims was an inappropriate means to achieve this end. We therefore reverse and remand with instructions to transfer Tucker's claims to the Northern District of Texas.

I. FACTUAL AND PROCEDURAL BACKGROUND

Tucker was discharged from the United States Army after twenty-seven years of service. At the time of his discharge, Tucker was forty-three years old and stationed at the 90th United States Army Reserve Aviation Facility in Grand Prairie, Texas. Tucker filed suit in the Western District of Louisiana (where Tucker now resides), alleging that his termination was motivated by racial discrimination in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-16, as well as age discrimination in violation of the Age Discrimination in Employment Act. 29 U.S.C. §§ 621-634.

The Army moved to dismiss Tucker's claims under Rule 12(b)(3) of the Federal Rules of Civil Procedure on grounds that Tucker had initiated his suit in an improper venue. On May 27, 1994, the district court granted the motion and dismissed Tucker's claims without prejudice. Tucker filed a timely appeal to this court.

II. STANDARD OF REVIEW

We construe *pro se* complaints more liberally than those filed by counsel. Securities and Exch. Comm'n v. AMX Int'l, Inc., 7 F.3d 71, 75 (5th Cir. 1993); Johnson v. Atkins, 999 F.2d 99, 100 (5th Cir. 1993). Whether venue lies with a particular court is a question of law, which is reviewable on appeal *de novo*. United States v. Newsom, 9 F.3d 337, 338 (4th Cir. 1993); United States v. Childs, 5 F.3d 1328, 1331 (9th Cir. 1993); In re Manville Forest Prods. Corp., 896 F.2d 1384, 1391 (2d Cir. 1990).

III. ANALYSIS

Title VII contains a special venue provision which states that venue is proper:

in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such action may be brought within the judicial district in which the respondent has his principal office.

42 U.S.C. § 2000e-5(f)(3).

The Age Discrimination in Employment Act has no comparable special venue provision; therefore the general federal venue statute, 28 U.S.C. § 1391, applies. Under § 1391, in a suit against the federal government or its officers, venue is proper:

in any judicial district in which (1) a defendant in the action resides, (2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) the plaintiff resides if no real property is involved in the action.

28 U.S.C. § 1391(e).

The question presented by this case is whether venue is proper in the Western District of Louisiana. Insofar as the ADEA claim is concerned, 28 U.S.C. § 1391 plainly indicates that venue would be appropriate in the Western District of Louisiana because the plaintiff resides in Monroe, Louisiana. However, insofar as the Title VII claim is concerned, 42 U.S.C. § 2000e-5(f)(3) plainly indicates that venue is not appropriate in the Western District of Louisiana because the alleged discrimination took place in Texas, the relevant employment records are located in Texas, and the plaintiff would have continued to have been stationed in Grand Prairie, Texas but for the alleged discrimination. Thus, under the special venue provision of Title VII, venue is appropriate only in Texas.

The district court noted the conflict between these two venue statutes and concluded that dismissal was required because of the general rule that venue must be proper as to each distinct cause of action. Jones v. Bales, 58 F.R.D. 453, 458 (N.D. Ga. 1972) ("Where several overt acts appear in the complaint, venue must be proper as to each cause of action."), aff'd, 480 F.2d 805 (5th Cir. 1973); accord Beattie v. United States, 756 F.2d 91, 100 (D.C. Cir. 1984); see generally Charles Allen Wright, et al., 15 Federal Practice and Procedure § 3808 (2d ed. 1986).

The fact that the Title VII special venue statute has not been met does not mean that venue was "improper" so as to require dismissal under 28 U.S.C. § 1406(a) of all of Tucker's claims.

As to Tucker's ADEA claim, venue is proper in either the Western District of Louisiana or the Northern District of Texas. As to Tucker's Title VII claim, venue is proper in the Northern District of Texas. Thus, it is apparent that the Northern District of Texas represents a common ground in which venue would be proper for both of Tucker's claims. Indeed, the district court recognized this common ground and concluded that "requiring plaintiff to file his action there would both promote judicial economy and prevent piecemeal litigation."

The source of statutory power for affecting a transfer of Tucker's claims so as to promote the interests of justice differs as to each claim. With regard to Tucker's ADEA claim, the appropriate source of power to effect such a transfer is § 1404(a), not § 1406(a), because the forum chosen by Tucker-- the Western District of Louisiana-- is proper, albeit not a forum which serves the interest of justice. With regard to Tucker's Title VII claim, the appropriate source of power to effect such a transfer is § 1406(a), which was the statute relied upon by the district court to dismiss Tucker's claims. While the district court invoked the correct source of power with regard to Tucker's Title VII claim, we believe that it abused its discretion in opting to dismiss rather than transfer this claim, particularly in light of fact that the district court acknowledged that justice would be better served by having both of Tucker's claims litigated in Texas.

We therefore REVERSE and REMAND to the district court with instructions to transfer Tucker's ADEA claim to the Northern District of Texas pursuant to 28 U.S.C. § 1404(a) and to transfer Tucker's Title VII claim to the Northern District of Texas pursuant to 28 U.S.C. § 1406(a).

REVERSED AND REMANDED.