

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50336
Summary Calendar

DEAN POLLARD,

Plaintiff-Appellant,

versus

TEXAS DEPARTMENT OF INSURANCE
and PHIL BALLINGER, in His
Individual and Official Capacity,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas

(A-93-CV-551)

(November 9, 1994)

Before POLITZ, Chief Judge, SMITH and WIENER, Circuit Judges.

PER CURIAM:*

Dean Pollard appeals denial of his motion for leave to amend his civil rights complaint and the dismissal of his action. We

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

affirm in part and vacate the dismissal in part and remand.¹

Pollard filed a charge of discrimination against his employer, the Texas Department of Insurance, with the Equal Employment Opportunity Commission. Within 90 days of receiving a notice of right to sue he filed suit, attaching the right-to-sue letter to his complaint. The complaint alleged violation of the fourteenth amendment, actionable through section 1983, but did not invoke Title VII of the Civil Rights Act of 1964, as amended.² On December 20, 1993 the Department moved for summary judgment. Realizing his oversight, on January 4, 1994 Pollard moved for leave to amend his complaint to add a Title VII claim based on the facts as originally alleged.³ The district court denied Pollard's motion, granted summary judgment on the basis of eleventh amendment immunity, and dismissed the suit. Pollard timely appealed.

The Federal Rules of Civil Procedure mandate that leave to amend "shall be freely given when justice so requires."⁴ The district court, however, denied leave to amend on the grounds that

¹The dismissal of the 42 U.S.C. § 1983 complaint on grounds of eleventh amendment immunity is affirmed. The remand is to permit Pollard an opportunity to assert his Title VII claim which is not barred by the eleventh amendment. **Fitzpatrick v. Bitzer**, 427 U.S. 445 (1976); **Clark v. Tarrant County, Texas**, 798 F.2d 736 (5th Cir. 1986) (Title VII generally overrides the eleventh amendment; section 1983 does not).

²42 U.S.C. § 2000e et seq.

³The amended complaint also proposed to delete a reference to the first amendment which Pollard characterized as a scrivener's error.

⁴Fed.R.Civ.P. 15(a); see also **Ashe v. Corley**, 992 F.2d 540 (5th Cir. 1993) (setting forth factors to be considered in evaluating a motion for leave to amend).

Pollard knew he had a Title VII claim when suit was filed and his failure to assert the claim earlier indicated "a lack of diligence and possibly bad faith." We are persuaded that the district court abused its discretion. The Department suffered no prejudice whatsoever from Pollard's failure to plead a Title VII claim at the outset. The original complaint amply notified the Department of the factual basis of Pollard's claim as well as the gravamen of his legal theory -- the elements of a section 1983 employment discrimination claim are essentially the same as those of a Title VII claim.⁵ Indeed, the attachment of the notice of right to sue to the complaint should have alerted the Department that Pollard intended to invoke Title VII.

The record contains no indicia of bad faith. To the contrary, the attachment of the right-to-sue letter to the complaint suggests inadvertence, as does the promptness with which Pollard sought to amend after the summary judgment motion brought the omission to his attention; the summary judgment motion was filed at the beginning of the holiday season and Pollard moved to amend immediately thereafter. The omission reflects carelessness on the part of Pollard's counsel but it was inappropriate to deprive Pollard of his claim, particularly in the absence of prejudice to the Department.⁶

⁵**Whiting v. Jackson State University**, 616 F.2d 116 (5th Cir. 1980).

⁶On remand, Pollard's Title VII claim will relate back to the date of filing of the original complaint for purposes of satisfying administrative prerequisites. **Sessions v. Rusk State Hospital**, 648 F.2d 1066 (5th Cir. 1981).

The judgment of dismissal is AFFIRMED IN PART and VACATED IN PART and the case is REMANDED for further proceedings consistent herewith.