IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-50733
Summary Calendar

RAYMOND P. VEGA,

Plaintiff-Appellant,

v.

REXENE CORPORATION

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
MO 94 CA 103

June 20, 1995

Before KING, JOLLY, and DEMOSS, Circuit Judges.

PER CURIAM:[*]

Raymond P. Vega appeals from the district court's grant of summary judgment for Rexene Corporation. Because we find no genuine issue of material fact, we affirm the judgment of the district court.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I. FACTUAL AND PROCEDURAL BACKGROUND

On October 18, 1991, Rexene Corporation ("Rexene") filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. As a Rexene employee, Vega was scheduled as a potential creditor, and during the course of the bankruptcy proceedings, he received various notices and mailings that were sent to the creditors of Rexene.

On June 10, 1992, Vega's employment with Rexene was terminated. On July 7, 1992, the bankruptcy court entered an "Order Confirming First Amended Plan of Reorganization" (the "confirmation order") in Rexene's bankruptcy proceedings. The confirmation order established September 8, 1992, as the deadline for filing administrative claims against Rexene. Notice of the confirmation order and of the deadline for filing administrative claims was mailed to Vega on July 30, 1992. Vega, however, did not file any administrative claims.

On September 11, 1992, pursuant to the confirmed plan of reorganization, old Rexene Corporation was merged into Rexene Products Company. Rexene Products Company subsequently changed its name to Rexene Corporation. The plan of reorganization was consummated on September 18, 1992, and Rexene was granted a discharge pursuant to 11 U.S.C. §§ 524 and 1141.

On May 19, 1994, Vega filed a wrongful termination lawsuit against Rexene in federal district court, alleging violations of Title VII and the Texas Commission on Human Rights Act, both of which prohibit discrimination in employment on the basis of race or

handicap. On June 27, 1994, Rexene filed a motion to dismiss, and the court notified the parties of its intent to treat the motion as a motion for summary judgment. Subsequently, both parties filed their own summary judgment motions.

On October 3, 1994, the district court granted Rexene's motion for summary judgment. The court found that Vega's "failure to assert his claims as administrative expenses during the bankruptcy proceedings now results in his being barred from seeking monetary compensation for those claims in this Court." The court also concluded that Vega's "request for reinstatement clearly is a `claim' within the meaning of the Code since monetary relief in the form of front pay is an alternative to reinstatement. [Vega's] claim for reinstatement was, therefore, discharged in the bankruptcy proceedings." Finally, the court denied Vega's request for injunctive relief, as it noted that "[u]nder the circumstances, the policy considerations of the Bankruptcy Code coupled with the fact that Plaintiff was given ample opportunity to assert his claims militates against allowing Plaintiff to pursue injunctive relief against Rexene Corporation in this Court."

II. STANDARD OF REVIEW

We review the district court's grant or denial of summary judgment de novo, "reviewing the record under the same standards which guided the district court." Gulf States Ins. Co. v. Alamo Carriage Serv., 22 F.3d 88, 90 (5th Cir. 1994) (internal quotations omitted). Summary judgment is proper "when no genuine issue of material fact exists that would necessitate a trial." Id. In

determining on appeal whether the grant of summary judgment was proper, we view all factual questions in the light most favorable to the non-movant. See Lemelle v. Universal Mfg. Corp., 18 F.3d 1268, 1272 (5th Cir. 1994).

III. ANALYSIS AND DISCUSSION

Vega brings three arguments on appeal. First, he contends that his Title VII claim was not discharged because he was not given sufficient notice of the administrative claim deadline. Second, he argues that his claim for reinstatement is not discharged because it is an equitable remedy. Third, he asserts that summary judgment should not have been granted before allowing Vega to investigate whether liability insurance existed to satisfy a potential judgment against Rexene. We address each of these arguments in turn.

A. The Discharge of the Title VII Claim

Rexene filed for Chapter 11 bankruptcy protection on October 18, 1981. Vega's employment was terminated on June 10, 1992, and Rexene's plan of reorganization was subsequently confirmed on July 7, 1992. Thus, we characterize Vega's claim for monetary damages in his Title VII action as a post-petition, pre-confirmation tort claim, and neither party disputes this characterization.

Section 503 of the Bankruptcy Code addresses the allowance of administrative expenses, and Vega's post-petition tort claim is properly classified as an administrative expense. See In re MacDonald, 128 B.R. 161, 164 (Bankr. W.D. Tex. 1991) ("[C]ase law confirms that `damages for a post-petition tort become an

administrative expense under 11 U.S.C. § 503(b)(1)(A).'") (citing cases). As the MacDonald court explained, "[t]he plain language of Section 503 also emphasizes that any entity with an administrative claim that wants to share in the estate has to request payment, or risk being discharged without further recourse." Id.

On July 30, 1992, Vega was sent a "Notice of Final Date for Filing Administrative Claims Against the Debtors." The notice warned Vega to assert his administrative claim no later then September 8, 1992; otherwise, he would be "forever barred from asserting such Administrative Claim against any of the Debtors or any of their respective successors or assigns." Vega does not deny receiving such notice, yet he failed to request payment or to file any administrative claim.

If Vega had timely filed his administrative claim, the claim would have been preserved and he would have been given priority under the Bankruptcy Code. As we explained in Sequa Corp. v. Christopher (In re Christopher), 28 F.3d 512, 515-16 (5th Cir. 1994):

> The simple fact is that parties who deal with a bankrupt postpetition are frequently entitled to priority under §§ 503 and 507 of the Code, giving them an added level of protection as compared to the prepetition claimants. Additionally, the plan of reorganization cannot be confirmed under § 1129(a)(9)(A) unless the plan provides for the payment in cash and in full of persons holding "claims" for administrative expenses under §§ 503 and 507. Thus, persons holding claims against the debtor that arise post-petition are in some respects better able to protect their interests than are prepetition claimants.

As mentioned, on September 18, 1992, Rexene's plan of reorganization was consummated and Rexene was granted a discharge

under 11 U.S.C. §§ 524 and 1141. Under § 1141, a confirmed plan of reorganization is binding upon a debtor and all of its creditors, and the debtor is discharged "from any debt (with certain exceptions) that arose before the date of ***confirmation***." In re Christopher, 28 F.3d at 515; see 11 U.S.C. § 1141(a), (d). Section 524 provides that a discharge "operates as an injunction against the commencement or continuation of an action . . . to collect, recover or offset any such debt as a personal liability of the debtor . . . . " Rexene's confirmation order contains provisions that mirror these statutory sections. Thus, Vega's failure to assert his tort action as an administrative claim during the relevant time period in Rexene's bankruptcy proceedings prohibits him from seeking monetary compensation in his separate Title VII lawsuit. See In re Benjamin Coal Co., 978 F.2d 823, 827 (3d Cir. 1992) ("[T]he discharge of all existing claims, including administrative claims, upon confirmation of a Chapter 11 plan is unambiguous . . . in the Bankruptcy Code . . . .") (citing 11 U.S.C. § 1141(d)).

Vega does not contest the fact that his claims for monetary damages were discharged. Instead, he attempts to circumvent the failure to assert his administrative claim and the prohibition on continuing his action by arguing that the July 30, 1992 notice of the administrative bar date was insufficient. Essentially, Vega contends that the notice: 1) was ambiguous; 2) failed to itemize the different types of claims that needed to be filed; and 3) failed to advise of an alleged right to file a late claim with

cause. Unfortunately, Vega presented none of these arguments to the district court; thus, they are unavailing on appeal. See, e.g., Gilley v. Protective Life Ins. Co., 17 F.3d 775, 781 n.13 (5th Cir. 1994) ("We have held that an argument is waived if the party fails to make the argument in response to summary judgment."); Haubold v. Intermedics, Inc., 11 F.3d 1333, 1336 (5th Cir. 1994) (noting that an issue not raised in the summary judgment motion below is not ripe for appellate review); Quenzer v. United States (In re Quenzer), 19 F.3d 163, 165 (5th Cir. 1993) ("Typically, we will not consider on appeal matters not presented to the trial court."). Vega's claim was properly dismissed due to his failure to assert an administrative claim within the prescribed time period, and the district court correctly granted summary judgment for Rexene on this point.

B. The Reinstatement Claim

Vega asserts that the reinstatement portion of his Title VII action is not dischargeable. Because reinstatement is an equitable remedy, Vega apparently contends that his reinstatement request is not a "claim" within the meaning of the Bankruptcy Code; thus, Vega maintains that the reinstatement portion of his action is not dischargeable. Vega's original complaint requests front pay as an alternative to reinstatement: "Plaintiff states that pursuant to the wrongful discrimination he is entitled to reinstatement to his former position, or in the alternative, front pay." As Vega intimates, under Title VII, front pay is an equitable remedy that can be employed as an alternative to reinstatement. See Hadley v.

VAM P T S, 44 F.3d 372, 376 (5th Cir. 1995) ("Front pay is an equitable remedy that can be employed when reinstatement is not feasible.").

Under the Bankruptcy Code, "claim" is defined in the following manner:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

11 U.S.C. § 101(5). In United States v. LTV Corp. (In re Chateaugay Corp.), 944 F.2d 997, 999 (2d Cir. 1991), the Environmental Protection Agency ("EPA") filed a proof of claim for environmental response costs in a corporation's Chapter 11 proceedings where the corporation had been identified as a "potentially responsible party" under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). The Second Circuit wrestled with the distinction in § 101(5) between an "equitable remedy" and a "right to payment." The court found that the dispositive issue was "whether the injunctions, alleged to give rise to dischargeable `claims,' impose[d] a remedy for a performance breach that gives rise to a right of payment." Id. at 1007. The court concluded that:

> Since there is no option to accept payment in lieu of continued pollution, any order that to any extent ends or ameliorates continued pollution is not an order for breach of an obligation that gives rise to a right of

> payment and is for that reason not a "claim." But an order to clean up a site, to the extent that it imposes obligations distinct from any obligation to stop or ameliorate ongoing pollution, is a "claim" if the creditor obtaining the order had the option, which CERCLA confers, to do the cleanup work itself and sue for response costs, thereby converting the injunction into a monetary obligation.

Id. at 1008. If the equitable remedy is a "claim," of course, it is dischargeable in bankruptcy. See id. at 1008-09.

The situation in the instant case is analogous. Reinstatement relief for Vega, to the extent that it is not imposed to prevent Rexene from committing future wrongs, is a "claim," and is dischargeable, if Vega has the option of converting the relief into a monetary obligation. In Sheerin v. Davis (In re Davis), 3 F.3d 113, 116-17 (5th Cir. 1993), we determined whether equitable remedies were dischargeable by analyzing whether the applicable law viewed the payment of money as an available alternative. We noted that a particular equitable remedy in that case was "analogous to an injunction preventing Davis from committing future wrongs, which is an intangible command incapable of precise monetary estimation . . . ." Id. Thus, we found that "bankruptcy did not discharge this remedy." Id. Vega's reinstatement claim is different, however, because Title VII explicitly provides that front pay is an alternative to reinstatement, and Vega requested as much in his complaint. Therefore, Vega's claim for reinstatement was also discharged in Rexene's bankruptcy proceedings.

C. Liability Insurance

Finally, Vega argues that the district court should not have entered summary judgment without determining whether there was

liability insurance available to satisfy a potential judgment. Unfortunately, Vega also failed to present this argument to the district court; therefore, we do not consider it on appeal. See, e.g., Gilley, 17 F.3d at 781 n.13; Haubold, 11 F.3d at 1336; Quenzer, 19 F.3d at 165.

IV. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.