

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-60806  
Summary Calendar

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HAROLD GAINES,

Plaintiff-Appellant,

versus

THE CITY OF VICKSBURG,  
MISSISSIPPI, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court for the  
Southern District of Mississippi  
(J 93 CV 56)

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(September 8, 1995)

Before JOLLY, JONES, and STEWART, Circuit Judges.

PER CURIAM:\*

Harold Gaines sued the City of Vicksburg, Mississippi, its Mayor, and Aldermen (collectively, "the City") for racial discrimination in its failure to promote him and for retaliation against him based upon his allegation of racial practices in the City's Fire Department. He based his cause of action upon 42

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

U.S.C. §§ 1981, 1983, and 2000e et seq. (Title VII). After some discovery, the district court granted the defendants' motion for summary judgment as to all claims. Gaines now appeals one issue, the grant of summary judgment as to his failure-to-promote claim. We affirm.

I

"We review the district court's grant of summary judgment de novo, applying the same standards used by the district court." Hopper v. Frank, 16 F.3d 92, 96 (5th Cir. 1994). We may, of course, affirm the grant of summary judgment on grounds other than those relied upon by the district court when the record contains an adequate and independent basis for the result. Chauvin v. Tandy Corp., 984 F.2d 695, 697 (5th Cir. 1993).

On appeal, Gaines finds fault with the district court's analysis of his failure-to-promote claim, arguing that the district court failed to recognize that he was suing under § 1983 based on a theory of disparate impact, not disparate treatment. Because he has chosen to appeal only this narrow issue, all other potential issues regarding the district court's ruling are considered abandoned. Price v. Digital Equip. Corp., 846 F.2d 1026, 1028 (5th Cir. 1988).

We hold that Gaines's argument fails because a disparate impact case cannot be pursued under § 1983. It is clear from Gaines's brief that he is appealing the district court's refusal to consider disparate impact under § 1983. The framework of disparate

impact cases is found in 42 U.S.C. §2000e-2, section 703 of Title VII. Section 1983 cannot be employed as a basis for a cause of action for the deprivation of a right created by Title VII. Irby v. Sullivan, 737 F.2d 1418, 1429 (5th Cir. 1984).

Moreover, even if Gaines had intended to base this disparate impact claim on Title VII alone, the district court did not have jurisdiction to consider the claim. "There are two requirements for filing a Title VII action in federal court: 1) the complaint must be filed within the time frame allotted by Title VII, and 2) the complainant must have first exhausted [his] administrative remedies." Tolbert v. United States, 916 F.2d 245, 247 (5th Cir. 1990). As the district court acknowledged, Gaines did not meet these prerequisites; in short, the record does not reflect that Gaines ever filed a Title VII charge of discrimination with the EEOC. The district court was, therefore, without jurisdiction to consider the disparate impact claim under Title VII.

## II

For the foregoing reasons, the district court's grant of summary judgment is

A F F I R M E D.