

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60133
Summary Calendar

ROSIE KING,

Plaintiff-Appellant,

versus

MISSISSIPPI EMPLOYMENT SECURITY
COMMISSION, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Mississippi
(CA-3:91-425)

(September 29, 1994)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

After filing a sexual discrimination claim with the Equal Employment Opportunity Commission (the "EEOC") against Mississippi Employment Security Commission (the "MESC"), Rosie King received from the EEOC a right to sue letter. More than ninety days following receipt of this letter, King filed a complaint in the

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

United States District Court for the Southern District of Mississippi. In response, the MESC filed a motion for summary judgment based on King's untimely filing of the complaint. The district court granted the MESC's motion and dismissed the complaint with prejudice.

King appeals the dismissal of her case, contending that (1) the circumstances justified equitable tolling of the limitations period; (2) she was denied adequate, effective, and meaningful access to the courts; (3) the magistrate judge abused his discretion in denying her motion to proceed in forma pauperis and for appointment of counsel; and (4) the court erred in denying her post-judgment Rule 60(b) motion. Finding no error, we affirm.

I

King was fired from the MESC after complaining of sexual harassment and discrimination on the job. She filed a charge with the EEOC and received a "no cause" determination and right to sue letter on June 5, 1991.¹

On July 25, King filed the right to sue letter together with a financial affidavit for appointment of counsel and request to proceed in forma pauperis with the district court clerk. On August 27, the magistrate judge denied King's request for appointment of counsel and request to proceed in forma pauperis. The magistrate

¹The parties disagree as to when the EEOC released this letter. As reflected on the mailing return receipt, the letter was received by King on June 5, 1991.

judge, however, gave King an additional thirty days to file her lawsuit and to pay the filing fee. On September 13, King paid the filing fee and attempted unsuccessfully to file a copy of the right to sue letter as her complaint.

On September 17, the clerk's office notified King that she needed to file a complaint in compliance with the magistrate judge's order of July 25. On October 21, the magistrate judge allowed King until November 14 to "employ private counsel, to pursue any litigation which she may desire in the above cause," or notify the clerk that she would proceed pro se. On November 13, King filed with the clerk as her complaint the right to sue letter together with an attached handwritten caption.

The MESC filed a motion for summary judgment on December 8, 1993. On January 24, 1994, the district court granted this motion after finding that King's complaint was not timely filed within the ninety-day limitations period prescribed by Title VII. The district court further found that the circumstances proceeding this motion did not justify equitable tolling of this period. Further, assuming tolling was justified for consideration of appointment of counsel, the court found that the complaint was still untimely. Finally, the court held that King failed to comply with the magistrate judge's orders, which were merely orders advising King to file the complaint, not orders holding or acknowledging that the complaint had been filed so as to toll the period based on justifiable reliance. Consequently, the district court granted the

MESC's motion for summary judgment and dismissed the complaint with prejudice on January 24, 1994. King filed a notice of appeal from this judgment on February 23, 1994.

Also on February 23, 1994, King filed a motion for relief from judgment pursuant to Rule 60(b)(2)(6) based on newly discovered evidence detailed in an affidavit given by King.² The district court denied the motion on March 2, 1994, and no separate appeal has been taken from this order.

II

We review a summary judgment de novo, applying the same standard used by the district court. Calpetco 1981 v. Marshall Exploration, Inc., 989 F.2d 1408, 1412 (5th Cir. 1993). Under Rule 56(c) of the Federal Rules of Civil Procedure, we examine the evidence presented to determine that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

A

A Title VII action must be filed within ninety days of receipt from the EEOC of a notice of right to sue upon the charge presented to the Commission. Firle v. Mississippi State Dep't of Educ., 762 F.2d 487, 488 (5th Cir. 1985). A claimant who fails to file within

²This affidavit is not part of the record on appeal. Furthermore, King mistakenly and misleadingly labels this affidavit in the record excerpts as her response to the MESC's motion for summary judgment, when she actually submitted it in support of her post-judgment motion. However, because this affidavit was not made part of the record on appeal, we will not consider it.

this time period loses the right to pursue the claim. Hallstrom v. Tillamook County, 493 U.S. 20, 31, 110 S.Ct. 304, 107 L.Ed. 237 (1989). Equitable tolling of the ninety-day limitations period is extended only infrequently. Irwin v. Veterans Admin., 111 S.Ct. 453, 457 (1990). Generally, this tolling is only allowed where the claimant has "actively pursued his judicial remedies by filing a defective pleading during the statutory period." Irwin, 111 S.Ct. at 458; see Rowe v. Sullivan, 967 F.2d 186, 192 (5th Cir. 1992)(applying equitable tolling when claimant "vigorously pursued" his claim but filed untimely due to lack of sophistication with Title VII procedure). When the claimant fails to "exercise due diligence in preserving his legal rights," equitable tolling will not save his claim. Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 151, 104 S.Ct. 1723, 1725, 80 L.Ed.2d 196 (1984).

King contends that the doctrine of equitable tolling is applicable to delay the time within which she was able to file her complaint. King claims that equitable tolling is justified for two reasons--reliance on the magistrate judge's order of October 21, 1991, allowing her until November 14, 1991, to file the complaint and the clerk's erroneous refusal to accept the charge as a complaint. The ninety-day statutory period began running on June 5, 1991³ and expired on September 4, 1991. However, the

³The mailing return receipt contained in the record reflects June 5 as the date of delivery of the right to sue letter to King. Accordingly, this day will be used throughout for purposes of computation.

magistrate judge afforded King additional time within which to file her complaint in his August 27 order that extended the statutory period until September 26. King asserts that she relied upon the "clear language of the Magistrate's order which allowed her thirty days from the Order to file her complaint." Yet King did not file her complaint until November 13, 1991, far exceeding the expiration of the additional thirty days given by the magistrate judge, and in spite of the reminder sent to King by the clerk's office to file the suit before the expiration of the additional time given.

King further contends that the magistrate judge in his October 21 order extended the filing deadline a second time until November 14. In fact, the magistrate judge did not extend the time allowed for filing, but instead allowed King additional time within which to retain counsel or notify the clerk of her desire to proceed pro se, after hearing of King's financial difficulties in obtaining counsel. King attempts to persuade us that the magistrate judge led her to believe that by following his order she was complying with the procedural requirements of Title VII. Ironically, King's failure to file a complaint within either the original statutory period or the additional thirty-day period as ordered by the magistrate judge is exactly the inaction that barred her claim. We are not persuaded that King's misplaced reliance on the magistrate judge's order justifies equitable tolling of the limitations period so as to defeat the MESC's motion for summary judgment.

B

As a second ground for tolling, King claims that the clerk's failure to accept her charge letter as a complaint justified application of the doctrine. In response to the MESC's motion for summary judgment, King failed to provide any evidence in support of her contention that the clerk refused to accept her charge. King stated in her own affidavit that the clerk told her the charge was not necessary. This does not amount to a refusal of the charge and is not evidence sufficient to defeat the MESC's motion for summary judgment.

Without further discussion, we affirm the decision of the district court in granting the MESC's motion for summary judgment.

III

After the district court granted the MESC's motion for summary judgment, King filed a motion for relief from judgment pursuant to Rule 60(b). King raised several issues in this motion including two of the remaining issues raised on appeal--the denial of King's request for appointment of counsel and request to proceed in forma pauperis and the denial of King's request for discovery under the Rule 60(b) motion. However, King failed to appeal the denial of this motion, as she only appealed the judgment dismissing her complaint. The denial of a Rule 60(b) motion is a separately appealable order for which a notice of appeal must be filed. McKethan v. Texas Farm Bureau, 996 F.2d 734, 744 (5th Cir. 1993). "[W]here a 60(b) motion is filed after the appeal is noticed, an

appeal from the ruling on that motion must be separately taken if the issue raised in that motion is to be preserved for appeal." Ingrahm v. United States, 808 F.2d 1075, 1081 (5th Cir. 1987). We therefore lack jurisdiction to consider the judgment of the district court denying King's Rule 60(b) motion.

IV

Finally, King contends that she was denied her constitutional right of access to the courts by the refusal of the clerk to file her charge, the erroneous application of the standards for the appointment of counsel and in forma pauperis status and the district court judge's denouncement of the magistrate judge's order allowing the plaintiff forty-one days beyond the ninety-day statutory period to pursue her litigation. King did not raise this argument in the district court and now raises it for the first time on appeal.

Parties are required to challenge errors in the district court. "We refuse to entertain theories raised for the first time on appeal." Reynolds Metals Co., 758 F.2d at 1078. For this reason, we will not consider King's argument regarding deprivation of her right of access to the court.

V

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

A F F I R M E D.