IP 03-1442-C T/K Gibson v Perry
Judge John D. Tinder Signed on 7/15/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ROY L. GIBSON, JR., LARRY J. MILLER, SR.,	)	
Plaintiffs,	)	
vs.	)	1:03-cv-1442-JDT-TAB
STEPHEN J. PERRY, Administrator of General Services Administration of the U.S. Government; and GENERAL SERVICES ADMINISTRATION,	)	
Defendants.	)	

ENTRY ON MOTIONS TO SET ASIDE JUDGMENT (DKT. NOS. 32, 42) [1]

This entry concerns Plaintiffs Roy L. Gibson Jr.'s and Larry J. Miller, Sr.'s motions of November 15, 2004, and January 28, 2005, to set aside the court's final judgment of August 10, 2004. The Plaintiffs are moving pursuant to Federal Rule of Civil Procedure 60(b)(6) to set aside judgment in favor of Defendants Stephen J. Perry and the General Services Administration regarding the Plaintiffs' appeal of a final Equal Employment Opportunity Commission ("EEOC") order.

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[1] This Entry is a matter of public record and may be made available to the public on the court's web site, but it is not intended for commercial publication either electronically or in paper form. Although the ruling or rulings in this Entry will govern the case presently before this court, this court does not consider the discussion in this Entry to be sufficiently novel or instructive to justify commercial publication or the subsequent citation of it in other proceedings.

I.

Plaintiffs Roy L. Gibson Jr. and Larry J. Miller, Sr. filed their original complaint against Defendants Stephen J. Perry and the General Services Administration on October 2, 2003. The Plaintiffs were appealing a final EEOC order under 42 U.S.C.A. § 2000e-16(c) (" § 2000e-16(c)"). This order altered an earlier order by an Administrative Law Judge that would have reinstated the Plaintiffs with unconditional offers for placements, as the Plaintiffs had been terminated from their federal employment for misconduct unrelated to the issues underlying the Plaintiffs' complaints on January 12, 1999. (Compl. ¶ 8; Aug. 10, 2004, Entry ¶ 2-3.) The Defendants filed a motion for summary judgment, or alternatively to dismiss, on June 18, 2004, on the grounds that the court lacked jurisdiction. After the Plaintiffs failed to respond to the motion, this court granted the Defendants' motion and entered judgment on the merits in favor of the Defendants on August 10, 2005.

Several weeks later, after Plaintiffs' counsel became aware that he had neglected to notice the Defendants' and the court's filings, including the final judgment entered against the Plaintiffs, he filed the initial motion to set aside judgment claiming that he had never received electronic service.[2] The court filed an entry in response to

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[2] On June 9, 2005, Plaintiffs' counsel consented to receive service through electronic filings. *See* Local Rule 5.7. When a new document is filed electronically, the court's system generates a Notice of Electronic Filing, which is mailed via e-mail to the filer and all attorneys of record in the matter. The Notice of Electronic Filing contains a

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the motion on November 23, 2004, ordering the Defendants and Plaintiffs to provide evidence regarding compliance with service requirements. The Plaintiffs subsequently filed (after two successful motions for enlargements of time) a verified motion to set aside judgment concurrently with an affidavit as evidence of compliance with service requirements on January 28, 2005. Plaintiffs' counsel argues that due to circumstances beyond his control his office was unable to access the electronic filing system for lack of proper training or password. For the reasons stated below, the court will deny the Plaintiffs' motion and allow the judgment to stand on the merits of the case, or alternatively on procedural grounds.

II.

The Plaintiffs have moved under Federal Rule of Civil Procedure 60(b)(6) to set aside the court's final judgment of August 10, 2004. Rule 60(b)(6) is a catch-all or safety valve provision that allows relief from a final judgment or order when "any other reason justifying relief from the operation of the judgment" exists. *Lowe v. McGraw-Hill Cos., Inc.*, 361 F.3d 335, 342 (7th Cir. 2004). "[R]ule 60(b) is an extraordinary remedy and is granted only in exceptional circumstances." *C.K.S. Eng'rs, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202, 1205 (7th Cir. 1984) (citations omitted). The Plaintiffs' denial of ever receiving service does not come close to producing the

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[2](...continued)
hyperlink to the filed document which constitutes service of the electronically filed document, thereby replacing conventional paper service. Local Rule 5.1(a)(3).

extraordinary circumstances required to overcome the dismissal of this case either on the merits or procedurally.

The Plaintiffs provide no authority or evidence countering the August 10, 2004, dismissal of their claims for lack of jurisdiction. As stated in the entry of that same date, the Plaintiffs' original cause of action seeks only to challenge some of the remedies ordered by the EEOC. The law does not permit such a limited challenge under a § 2000e-16(c) civil action. *Timmons v. White*, 314 F.3d 1229, 1233-1238 (10th Cir. 2003). In *Timmons*, the court held that a former employee could not limit the District Court's review in a *de novo* civil action to the issue of remedy. The court stated that "[d]*e novo* means here, as it ordinarily does, a fresh, independent determination of 'the matter' at stake; the court's inquiry is not limited to or constricted by the administrative record, nor is any deference due the agency's conclusion." *Id*. at 1234 (citation omitted). Under this reasoning, the Plaintiff may not present only a portion of the EEOC's final order for review *de novo* at the District Court level.[3] Thus, the Plaintiffs fail to overcome the judgment against them on the merits.

Alternatively, the Plaintiffs' failure to respond the Defendants motion to dismiss renders the case ripe for a summary ruling under Local Rule 7.1(a)[4]. The court in *Fox v.*

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[3] As stated in the Entry of August 10, 2004, the only appellate decision suggesting a contrary result, *Pecker v. Heckler*, 801 F.2d 709 (4th Cir. 1986), fails to differentiate between an action for an enforcement of a final EEOC decision and a *de novo* civil action, and does not conclude that piecemeal litigation as attempted by the Plaintiffs here is not recognized.

[4] Local Rule 7.1(a) states that: "[f]ailure to file an answer brief or reply brief within

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American Airlines, Inc., 389 F.3d 1291, 1294 (D.C. Cir. 2004), found the excuse that counsel did not receive an electronic filing to be "nothing but an updated version of the classic 'my dog ate my homework' line." In that case, as here, the plaintiff's counsel claimed that he did not receive electronic court filings, and therefore was unable to comply with local rules regarding timely responses to filings. *Id*. The court went on to note that technology may not be used as a scapegoat for prompt filings, as "ignorance of [the] court's docket 'is nothing but negligence, which does not justify untimely action.'" *Id. (quoting Norgaard v. DePuy Orthopaedics, Inc.*, 121 F.3d 1074, 1075 (7th Cir. 1997)). In sum, plaintiffs may not successfully petition the court to set aside judgments under Rule 60(b)(6) when the cause of the judgment is attorney negligence. *See, e.g.*, *Easley v. Kirmsee*, 382 F.3d 693, 700 (7th Cir. 2004) (declining to address a Rule 60(b)(6) motion because it "is unavailable when attorney negligence is at issue").

Under the above authority, Plaintiffs' counsel's reasoning that he should be granted a Rule 60(b)(6) motion because he somehow could not access electronic filings for lack of training or proper password is utterly without merit. Even if Plaintiffs' counsel or his staff could not attend training sessions offered by the court, the court's website provides a user manual for the court's CM/ECF electronic filing system. Furthermore, Plaintiffs' counsel's argument that he did not have the proper password until August is irrelevant because he did have access to e-mailed hyperlinks to the documents that had

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the time prescribed may subject the motion to summary ruling."

been filed.[5] Moreover, as noted above, failure to receive electronic service is no excuse for an untimely response to a filing. The court refuses to grant the Plaintiffs' motion for what appears to be inexcusable neglect and careless disregard for filing deadlines.

III.

For the foregoing reasons, the Plaintiffs' motions to set aside judgment (Dkt. Nos. 32, 42) pursuant to Rule 60(b)(6) is **DENIED**. The court's final judgment of August 10, 2004, remains intact.

ALL OF WHICH IS ORDERED this 15th day of July 2005.

John Daniel Tinder, Judge
United States District Court

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[5] The court further notes that on November 22, 2004, Plaintiffs' counsel's website, http://mosslaw.lawoffice.com/firmover.htm., advertised that "[w]e utilize state-of-the-art technology and cost-effective methods to provide services in a timely, ethical, friendly and client-oriented manner." This website appears to be no longer available.