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June 20, 2023

VIA E-MAIL [ctappfilings@sccourts.org]

The Honorable V. Claire Allen
Chief Deputy Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: South Carolina CVS Pharmacy, L.L.C. vs. KPP Hilton Head, LLC
Trial Court Case No. 2020-CP-07-00155
Appellate Case No. 2020-001446

Dear Ms. Allen:

Our firm represents Appellant South Carolina CVS Pharmacy, L.L.C. ("CVS"). On June 14, 2023, I received the enclosed letter from opposing counsel claiming I breached the South Carolina Rules of Professional Conduct by making "false statements of law" and "misrepresentations" to the Court during oral arguments on June 6, 2023 (the "Letter"). *See* **Exhibit A**. I strongly disagree with opposing counsel's assertions in the Letter, and stand behind every statement made during oral arguments in this matter.

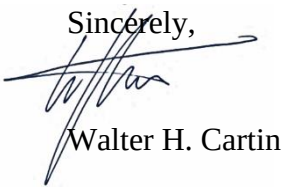
The parties have briefed *ad nauseum* the legal issues addressed in the Letter. At this point, I believe it would be inappropriate, and contrary to the South Carolina Appellate Court Rules, to engage in further, unrequested briefing on these issues.

As such, I am simply enclosing for the Court's convenience copies of the actual cases cited in the Letter and referenced during oral arguments: *Workman v. Bill M, et al.*, 2017 WL 4863055 (D.S.C. 2017) (*See* **Exhibit B**); and *Watts-Means v. Prince George's Family Crisis Center*, 7 F.3d 40 (4th Cir. 1993). (*See* **Exhibit C**). I am confident that if the Court will review these cases, the Court will agree that my statements during oral argument were accurate and in no way "false statements of law" or "misrepresentations" to the Court.

I am happy to answer any questions that the Court may have or to provide further analysis regarding why I strongly disagree with opposing counsel's claim of misconduct. Should the Court desire any further briefing, discussion or clarification, I will make myself available at the Court's convenience.

With best regards, I am

Sincerely,



Walter H. Cartin

cc: P. Benjamin Zuckerman, Esq. (via E-mail only)
Thomas A. Pendarvis, Esq. (via E-mail only)
J. Evan Phillips (via E-mail only)

Exhibit A

June 14, 2023 Letter from Counsel for KPP Hilton Head, LLC

PENDARVIS LAW

June 14, 2023

VIA EMAIL ONLY
Walter H. Cartin, Esq.
PARKER POE ADAMS & BERNSTEIN, LLP
WaltCartin@parkerpoe.com

Re: SOUTH CAROLINA CVS PHARMACY, L.L.C. vs. KPP HILTON HEAD, LLC
Appellate Case No.: 2020-001446

Ref: Misrepresentation of Holdings in two Cases

Dear Walt:

Understanding your desire to comply with the ethical obligations governing all lawyers, including, compliance with Rule 3.3(a)(1), RPC, Rule 407, SCACR, this is a request for you to send a letter to the Court of Appeals correcting your false statements of law made during the conclusion of Appellant's rebuttal during oral arguments before the Court of Appeals on June 6, 2023.

The following portion of your arguments were transcribed from the video recording of the oral arguments:

> *Two cases I want to address very quickly – Watts-Means and Workman, both of these cases involve an employee who brought employment claims against its employer they had gone through the EEOC process and a right to sue letter had been issued and after a right to sue letter is received you have 90-days to file suit. In both cases the Court looked at what it meant to receive that letter and in both instances the Court* ***found that the letter was received*** *when the slip notifying the folks that there was something at the Post Office for pick-up was placed in their mailbox at home. I-I think that's an important distinction. If it's in your mailbox at home, you're not collocated with it. You've got to drive, presumably, or ride a bike or walk to the post office. That's not the situation that was here. Assuming that it was just the slip in the mailbox, um, they had to walk fifteen feet – seven feet, however far it was to the counter to pick it up and it was actually available for pick-up.*

Contrary to your representations of law to the Court of Appeals, *Watts-Means v. Prince George's Family Crisis Center*, 7 F.3d 40 (4th Cir. 1993) and *Workman v. Bill M.,* 2017 WL4863055 (D.S.C. August 8, 2017) do ***not*** hold and do not support the position that delivery of mail constitutes receipt; rather, they stand for the proposition that for purposes of starting the limitations period in

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a Title VII EEOC matter, receipt is not required. In this regard, the *Watts-Means* Court, relying upon *Harvey v. City of New Bern Police Department*, 813 F.2d 652 (4th Cir. 1987), held, at 42, that the limitations period set in 42 U.S.C. §2000e-5(f)(1) for when suit must be filed "is triggered when the Postal Service delivers notice to a plaintiff that a right-to-sue letter is available for pick-up, and not when the letter is actually picked up." Indeed, *Watts-Means* expressly says that *Harvey* holds "that delivery of notice to plaintiff's home triggers the limitations period ***even if plaintiff did not actually receive the letter***." (Emphasis added). *Workman*, at *3, concurs. Notably, this holding is entirely consistent with strictly construing an option against the option holder; in the Title VII EEOC context, the recipient of EEOC's notice letter holds the option, not the sender of notice.

As you well know, the Lease at issue in our case specifically calls for ***provable receipt***, not just delivery. Both alternatives set out in Part II, Section 27 require provable receipt: the registered or certified mail, return receipt requested, *requires a signature*; the overnight courier service alternative expressly includes the phrase "*provided a receipt is required*." The Lease requires provable receipt, not simple delivery. Neither *Watts-Means* nor *Workman* provide authority that the express Lease provisions do not mean what they say.

We expect that you will want to be the person who advises the Court of the error or your representations and will want to refer to them as "misstatements" and not "misrepresentations" as we would be inclined to refer to them. Please advise if we can expect you to do so and we can avoid doing so ourselves.

With kind regards, I remain

Sincerely,

PENDARVIS LAW OFFICES, P.C.

Thomas A. Pendarvis

TAP/tll
Enclosures
ec: P. Benjamin Zuckerman, Esq.
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7 F.3d 40
United States Court of Appeals,
Fourth Circuit.

Sonja WATTS–MEANS, Plaintiff–Appellant,
v.
PRINCE GEORGE'S FAMILY CRISIS CENTER, Defendant–Appellee (Two Cases).
Sonja WATTS–MEANS, Plaintiff–Appellee,
v.
PRINCE GEORGE'S FAMILY CRISIS CENTER, Defendant–Appellant.

Nos. 92–2476, 92–2553 and 92–2603.
|
Argued June 9, 1993.
|
Decided Sept. 15, 1993.

Synopsis

Former employee of nonprofit corporation which provided shelter and supportive services for domestic violence victims brought Title VII employment discrimination action against corporation arising from termination of her employment. Employee moved to amend complaint to add § 1983 and state law wrongful discharge and defamation claims. The United States District Court for the District of Maryland, Marvin J. Garbis, J., denied motion as to § 1983 claims and dismissed action. Employee appealed. The Court of Appeals, Richard L. Williams, Senior District Judge, sitting by designation, held that: (1) 90–day period within which employee had to file Title VII action was triggered by Postal Service's delivery of notice to employee that she could pick up Equal Employment Opportunity Commission's (EEOC) right-to-sue letter, rather than by her picking up letter five days later; (2) equitable tolling was not appropriate; and (3) corporation did not act "under color of law" as required for § 1983 liability.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (4)

[1] Civil Rights Time for proceedings; limitations

Ninety-day period within which former employee had to file her Title VII employment discrimination action was triggered by Postal Service's delivery of notice to employee that she could pick up Equal Employment Opportunity Commission's (EEOC) right-to-sue letter, rather than by her picking up letter five days later. Civil Rights Act of 1964, § 706(e), 42 U.S.C.A. § 2000e–5(f)(1).

124 Cases that cite this headnote

[2] Civil Rights Time for proceedings; limitations

Equitable tolling of 90–day period, within which former employee had to file her Title VII employment discrimination action, was not appropriate so as to allow for her filing of action within 90 days of her picking up Equal Employment Opportunity Commission's (EEOC) right-to-sue letter, rather than within 90 days of Postal Service's delivery five days earlier of notice to employee that she could pick up right-to-sue letter; employee suspected letter was from EEOC and still had 85 days to file action when she picked it up. Civil Rights Act of 1964, § 706(e), 42 U.S.C.A. § 2000e–5(f)(1).

150 Cases that cite this headnote

[3] Civil Rights Employment practices

Private, nonprofit corporation which provided shelter and supportive services for domestic violence victims did not act "under color of law" as required to render it liable to corporation's former employee under § 1983 arising from her termination, despite county's provision of financial support for corporation and membership of county official on corporation's board of directors; board had nothing to do with decision to terminate employee and official had only one of 21 votes on board. 42 U.S.C.A. § 1983.

6 Cases that cite this headnote

[4] Civil Rights Private Persons or Corporations, in General

Action of private actor can constitute action "under color of law" as required to render actor subject to liability under § 1983 only in four instances: when action is coerced by state, when state has delegated to private actor a responsibility that it has constitutional duty to perform, when state has delegated to private actor a traditionally and exclusively public function, or when state assists private actor in enforcing private actor's rights. 42 U.S.C.A. § 1983.

10 Cases that cite this headnote

Attorneys and Law Firms

***41** Brenda C. Wagner, Wagner & Lewis, Washington, DC, argued for appellant.

James E. McCollum, Jr., College Park, MD, argued for appellee.

Before RUSSELL, Circuit Judge, ANDERSON, United States District Judge for the District of South Carolina, sitting by designation, and WILLIAMS, Senior United States District Judge for the District of Virginia, sitting by designation.

OPINION

RICHARD L. WILLIAMS, Senior District Judge:

Sonja Watts–Means appeals the district court's refusal to allow her to amend her complaint in her action against her former employer, Family Crisis Center, Inc. of Prince George's County (the Center), and the district court's dismissal of her claims. We find no error in the district court's actions and affirm.

I

The Center is a private non-profit corporation in Prince George's County, Maryland (the County), that was established to provide shelter and supportive services for victims of domestic violence. During the relevant period for this action, its board of directors had twenty-one voting members, twenty of whom were private individuals and one of whom served in his capacity as a County official. The Center's only other substantial connections with the County were that it occupied a building owned by the County and was required to pay little or no rent, it received some financial support from the County, and its utilities costs were paid for by the County. None of the Center's employees or management personnel were government employees.

Watts–Means was employed by the Center in August, 1986. In February, 1987, the Center's assistant director in an "employee evaluation report" described Watt–Means' job performance as deficient and recommended that she be terminated. The Center's executive director agreed and terminated Watts–Means. The termination decision was reviewed and affirmed by a committee of the Center's board of directors.

Watts–Means filed Title VII charges with the Equal Employment Opportunity Commission (EEOC), but the EEOC determined that her termination had not been unlawful. The EEOC sent Watts–Means notification of its determination, in what is termed a "right-to-sue" letter, by certified mail on March 18, 1988. The Postal Service attempted to deliver the letter to her on March 21, 1988, and not finding her home, left a slip of paper indicating that she should pick up the letter at the post office. Although she suspected that the letter was from the EEOC, she did not pick it up until March 26, 1988.

On June 24, 1988, Watts–Means filed Title VII claims in the District of Maryland. Three and a half years later, she sought to amend her complaint to add claims under 42 U.S.C. § 1983, for violation of the Fourteenth Amendment, and under state law, for wrongful discharge and defamation. The district court allowed Watts–Means to add the wrongful discharge and defamation claims but refused to allow the section 1983 claim on the ground that it was futile because the Center had not acted under color of law.

The district court then dismissed Watts–Means' action, finding that her Title VII claims were not timely filed and that it had no pendent jurisdiction over her remaining state law claims for wrongful discharge and defamation because no federal claims remained in her action.

***42** II

[1] We first address whether the district court erred in holding that Watts–Means' Title VII claims were not timely filed. We conclude that it did not.

Title VII plaintiffs have a ninety-day period in which to file their claims after the EEOC has given them a right-to-sue letter. 42 U.S.C. § 2000e–5(f)(1). Watts–Means filed her Title VII claims within ninety days of when she picked up her right-to-sue letter at the post office, but not within ninety days of when the Postal Service delivered notice to her that she could pick up the letter. At issue, therefore, is whether the Postal Service's delivery of this notice to Watts–Means triggered the limitations period.

We are of the opinion that it did. This Court held in *Harvey v. City of New Bern Police Dept.,* 813 F.2d 652 (4th Cir.1987), that delivery of a right-to-sue letter to a plaintiff's home triggers the limitations period even if the plaintiff does not actually receive the letter. *Harvey,* 813 F.2d at 654. It justified its holding on the grounds, first, that requiring "actual receipt" to trigger the period would allow some plaintiffs "open-ended time extension, subject to manipulation at will," and, second, that any injustices created by the rule could be remedied by equitable tolling. *Id.*

These same considerations persuade us to find that the limitations period is triggered when the Postal Service delivers notice to a plaintiff that the right-to-sue letter is available for pickup, and not when the letter is actually picked up. Requiring actual pickup to trigger the period would allow for the same manipulation of the limitations period that concerned the Court in *Harvey.* [1] Moreover, if triggering the period when the plaintiff receives notice of the letter would result in injustice, for example if the plaintiff was unaware that the letter about which he received notice was a right-to-sue letter and he was greatly delayed in picking it up, equitable tolling of the limitations period is available.

1 This concern is particularly acute in the present case because Watts–Means suspected that the letter about which she received notice from the Postal Service was a letter from the EEOC. If the limitations period was not triggered until she picked up the letter, she conceivably could have tolled the period for as long as she chose simply by not picking up the letter.

Because we find that the limitations period in this case was triggered on March 21, 1988, when Watts–Means received her notice that she could pick up a letter at the post office, we hold that her filing of her Title VII claims on June 24, 1988, was not within the limitations period.

[2] Equitable tolling of the filing period was not appropriate here. [2] When Watts–Means received notice from the Postal Service of a letter, she suspected that it was from the EEOC. At that point, she had the full ninety-day limitations period to file her claims. Even if she did not actually know that her right-to-sue letter had arrived until she picked up the letter at the post office five days later, she still had eighty-five days from then to file her claims. In *Harvey,* this Court found equitable tolling inappropriate when the plaintiff did not receive notice of his right to sue until six days after the limitations period began because he still had eighty-four days to file his claim. *Id.* We, therefore, find no injustice here in triggering the limitations period when Watts–Means received notice of the letter from the Postal Service. Because Watts–Means did not file her Title VII claims within the limitations period and equitable tolling was not appropriate, we conclude that the district court did not err in dismissing Watts–Means' Title VII claims as untimely filed. [3]

2 Indeed, Watts–Means does not even argue that equitable tolling of the filing period was appropriate.

3 The Center also argues that even if the Title VII claims were timely filed, the panel should affirm their dismissal because the Center was not in an industry affecting commerce, as Title VII requires. Because the claims were correctly dismissed as untimely filed, we find it unnecessary to reach the Center's argument.

III

[3] The only other issue raised by Watts–Means that merits even brief discussion is whether the district court erred in denying ***43** her leave to amend her complaint by adding a claim that her termination violated section 1983. [4] The district court refused to allow the amendment on the ground that the section 1983 claim was futile, *see* *Johnson v.*

Oroweat Foods Co., 785 F.2d 503, 510 (4th Cir.1986), as Watts–Means could not show that the Center acted under color of law. We agree.

4 Watts–Means makes several additional arguments as well, but we find that they are without merit and reject them without discussion.

[4] An action of a private actor like the Center can constitute action under color of law in only four instances: (1) when the action is coerced by the state; (2) when the state has delegated to the private actor a responsibility that it has a constitutional duty to perform; (3) when the state has delegated to the private actor a traditionally and exclusively public function; or (4) when the state assists a private actor in enforcing the private actor's rights. [5] *Andrews v. Federal Home Loan Bank of Atlanta,* 998 F.2d 214, 217 (4th Cir.1993). Watts–Means' only conceivable argument that the Center acted under color of law in terminating her is that its action was "coerced" by the County. As evidence of coercion, she points to the facts, first, that at the time of her termination the County provided financial support for the Center in the form of paying for its utilities, allowing it to use a government building for little or no rent, and giving it monetary grants, and, second, that a County official, acting in his official capacity, served on the Center's board of directors.

5 "In cases under section 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." *Rendell–Baker v. Kohn,* 457 U.S. 830, 838, 102 S.Ct. 2764, 2769, 73 L.Ed.2d 418 (1982) (quoting *United States v. Price,* 383 U.S. 787, 794 n. 7, 86 S.Ct. 1152, 1157 n. 7, 16 L.Ed.2d 267 (1966)). As a result, in this analysis, we use cases defining "state action" interchangeably with those interpreting "under color" of law.

We reject this argument. That the County provided financial support to the Center is not sufficient to render the Center's termination of Watts–Means an action that was coerced by the County. *See Rendell–Baker,* 457 U.S. at 840, 102 S.Ct. at 2770; *Blum v. Yaretsky,* 457 U.S. 991, 1011, 102 S.Ct. 2777, 2789, 73 L.Ed.2d 534 (1982). Nor is the fact that the County had a representative on the Center's board of directors. The board had nothing to do with the termination decision itself. The most that can be said is that the board, acting through one of its committees, reviewed the decision. This falls far short of being a situation in which state coercion or control could be found. *See Andrews,* at 217. And even if the board was responsible for the termination decision itself, the County, through its voting board member, could not have controlled or coerced this decision because it had only one of twenty-one total votes on the board. *See National Collegiate Athletic Ass'n v. Tarkanian,* 488 U.S. 179, 193, 109 S.Ct. 454, 462, 102 L.Ed.2d 469 (1988); *Arlosoroff v. National Collegiate Athletic Ass'n,* 746 F.2d 1019, 1022 (4th Cir.1984). [6]

6 Watts–Means places great emphasis on *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961), but *Burton* is easily distinguishable. *Burton* involved a state agency that owned a building out of which it operated a parking garage. The agency leased space in the building to a restaurant that discriminated against blacks. The Court held that the restaurant's discrimination was state action because "the State ha[d] so far insinuated itself into a position of interdependence with [the restaurant] that it [had to] be recognized as a joint participant in the challenged activity." *Burton,* 365 U.S. at 725, 81 S.Ct. at 862. Prince George's County has not entered into the same type of joint venture with the Center that was at issue in *Burton.*

Because it would be impossible for Watts–Means to show that the Center acted under color of law in terminating her, we agree with the district court that Watts–Means' section 1983 claim was futile and find no error in its refusal to allow her to add this claim to her complaint.

IV

For the reasons set forth, we affirm both the district court's refusal to allow Watts–Means to amend her complaint and its dismissal of her claims.

AFFIRMED.

All Citations

7 F.3d 40, 62 Fair Empl.Prac.Cas. (BNA) 1601, 62 Empl. Prac. Dec. P 42,569, 62 USLW 2247

2017 WL 4863055
Only the Westlaw citation is currently available.
United States District Court, D.
South Carolina, Greenville Division.

Olandio Ray WORKMAN, Plaintiff,
v.
BILL M., Montre Jeter, Caleb Davis, Chris Mattern, Tee Brokiskie, Michael Compos, John NLN, and Engineered Product Corporation Co., Defendants.

Civil Action No. 6:17-972-RBH-KFM
|
Signed 08/29/2017

Attorneys and Law Firms

Olandio Ray Workman, Greenville, SC, pro se.

James T. Hedgepath, Nexsen Pruet, Greenville, SC, for Defendants.

REPORT OF MAGISTRATE JUDGE

Kevin F. McDonald, United States Magistrate Judge

***1** This matter is before the court on defendant Engineered Products, LLC's ("Engineered Products") [1] motion to dismiss (doc. 26). Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(A), and Local Civil Rule 73.02(B)(2)(g) (D.S.C.), this magistrate judge is authorized to review all pretrial matters in employment discrimination cases and submit findings and recommendations to the district court.

1 This defendant is improperly identified as Engineered Product Corporation Co.

PROCEDURAL HISTORY

In his complaint, the plaintiff alleges unlawful employment discrimination (doc. 1). [2] The plaintiff alleges that he worked for the defendant until his termination on June 29, 2016 (doc. 1-2 at 3). The plaintiff, who is proceeding *pro se*, seeks relief against the defendants pursuant to Title VII of the Civil Rights Act of 1964, as amended ("Title VII"); the Americans with Disabilities Act ("ADA"); the Age Discrimination in Employment Act ("ADEA"); the Genetic Information Nondiscrimination Act ("GINA"); and 42 U.S.C. § 1983. Following initial review of the plaintiff's complaint, the undersigned recommended that the district court dismiss the individual defendants (Bill M., Montre Jeter, Caleb Davis, Chris Mattern, Tee Brokiskie, Michael Compos, and John NLN) from this action *without prejudice* and without issuance and service of process (doc. 19). That recommendation is currently pending before the district court.

2 The plaintiff's claims against the defendants in the instant case were originally part of a separate action filed by the plaintiff in this court on December 27, 2016, *Workman v. Manigault*, C.A. No. 6:16-4002-RBH. On April 13, 2017, the Honorable R. Bryan Harwell, United States District Judge, issued an order in that case granting the plaintiff's motion to divide the case into two separate actions (*see Workman v. Manigault*, C.A. No. 6:16-4002-RBH, doc. 22). As a result, the complaint in this case was filed by the Clerk of Court on April 13, 2017 (*see* doc. 1).

The undersigned authorized service of process against defendant Engineered Products (docs. 17, 19), and this defendant was served with a copy of the complaint by the United States Marshals Service on June 28, 2017 (doc. 25). Defendant Engineered Products filed the instant motion to dismiss for failure to state a claim on July 19, 2017 (doc. 26). On July 20, 2017, by order of this court filed pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), the plaintiff was advised of the summary judgment and motion to dismiss procedures and the possible consequences if he failed to respond adequately to the defendant's motion (doc. 27). The plaintiff filed his response in opposition to the motion to dismiss on July 27, 2017 (doc. 29).

FACTS PRESENTED

The plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") against defendant Engineered Products on July 8, 2016 (doc. 26-1; *see* doc. 1-4 at 5). In the charge, the plaintiff checked boxes stating that the alleged discrimination was based upon his race and retaliation (doc. 26-1). Specifically, the plaintiff alleged that on June 23, 2016, a supervisor and co-worker

requested that he "forge time" for them, which he refused to do (*id.*). He claimed that after refusing to do so, he was harassed, threatened, and called a racial expletive (*id.*). He further claimed that his voicemails to his supervisor were not returned (*id.*). The plaintiff further alleged that, on June 29, 2016, he was required to work with an employee who was a known drug user, and, when he "expressed [his] concern" to management, he was told to do it or go home (*id.*). He alleged that the employee called him a racially derogatory term and threatened him, and, when he told a supervisor about it, he was given permission to leave work (*id.*). The plaintiff alleged that he was thereafter notified of his discharge, without explanation, on June 30, 2016 (*id.*).

***2** After concluding its investigation, the EEOC determined that it was "unable to conclude that the information obtained establishes violations of the statutes" and issued a dismissal and notice of rights to the plaintiff informing him of his right to file a lawsuit (doc. 26-2). The notice was mailed to the plaintiff on September 2, 2016 (*id.*). The plaintiff states in his complaint that he received the notice on September 25, 2016 (doc. 1-4 at 5).

APPLICABLE LAW AND ANALYSIS

Defendant Engineered Products has moved for dismissal of the plaintiff's claims pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6). Rule 12(b)(1) provides for dismissal where the court lacks jurisdiction over the subject matter of a claim. A failure by the plaintiff to exhaust administrative remedies deprives the court of subject matter jurisdiction. *Jones v. Calvert Group, Ltd.*, 551 F.3d 297, 300-301 (4th Cir. 2009)

"The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint." *Williams v. Preiss-Wal Pat III, LLC*, 17 F. Supp. 3d 528, 531 (D.S.C. 2014) (quoting *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999)). Rule 8(a) sets forth a liberal pleading standard, which requires only a " 'short and plain statement of the claim showing the pleader is entitled to relief,' in order to 'give the defendant fair notice of what ... the claim is and the grounds upon which it rests.' " *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). "[T]he facts alleged 'must be enough to raise a right to relief above the speculative level' and must provide 'enough facts to state a claim to relief that is plausible on its face.' " *Robinson v. American Honda Motor Co., Inc.*, 551 F.3d 218, 222 (4th Cir. 2009) (quoting *Twombly*, 550 U.S. at 555, 569). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). The court must liberally construe *pro se* complaints to allow the development of a potentially meritorious case, *Hughes v. Rowe*, 449 U.S. 5, 9 (1980), and such *pro se* complaints are held to a less stringent standard than those drafted by attorneys. *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978).

"In deciding whether a complaint will survive a motion to dismiss, a court evaluates the complaint in its entirety, as well as documents attached or incorporated into the complaint." *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 448 (4th Cir. 2011). The court may consider such a document, even if it is not attached to the complaint, if the document "was integral to and explicitly relied on in the complaint," and there is no authenticity challenge. *Id.* at 448 (quoting *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609, 618 (4th Cir. 1999)). *See Pierce v. Office Depot*, C.A. No. 0:13-cv-3601, 2014 WL 6473630, at *5 (D.S.C. Nov. 18, 2014) ("[A] court may consider an EEOC charge and other EEOC documentation when considering a motion to dismiss because such documents are integral to the complaint as Plaintiff necessarily relies on these documents...." (internal citations and quotations omitted)); *Int'l Ass'n of Machinists & Aerospace Workers v. Haley*, 832 F. Supp. 2d 612, 622 (D.S.C. 2011) ("In evaluating a motion to dismiss under Rule 12(b)(6), the Court ... may also 'consider documents attached to ... the motion to dismiss, so long as they are integral to the complaint and authentic.' ") (quoting *Sec'y of State for Def. v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007)).

Title VII Race and Retaliation Claims

***3** As noted above, in his charge of discrimination, the plaintiff alleged only race discrimination and retaliation, and he also alleges Title VII race discrimination and retaliation in his complaint. Defendant Engineered Products argues that these claims should be dismissed as they are time-barred. The undersigned agrees.

Under Title VII, a claimant must file a civil action within 90 days of the date of his receipt of a duly issued notice of right to sue from the EEOC. *See* 42 U.S.C. § 2000e–5(f)(1); *see also* *Watts–Means v. Prince George's Family Crisis Ctr.*, 7 F.3d 40, 42 (4th Cir. 1993) ("Title VII plaintiffs have a ninety-day period in which to file their claims after the EEOC has given them a right-to-sue letter.") (citing 42 U.S.C. § 2000e–5(f)(1)). If suit is not brought within the statutory time period, the case is subject to dismissal. *See* *Harper v. Burgess*, 701 F.2d 29, 30 (4th Cir. 1983) (affirming dismissal of a lawsuit brought pursuant to Title VII because the plaintiff did not file suit within the 90-day limitation period required by 42 U.S.C. § 2000e-5(f)).

Pro se litigants are not exempt from this statutory requirement. *See, e.g.*, *Anderson v. Greenville Health Sys.*, C.A. No. 6:16-01051-MGL, 2016 WL 6405751, at *2 (D.S.C. Oct. 31, 2016) (dismissing a *pro se* plaintiff's complaint as untimely and rejecting the plaintiff's request for equitable tolling to relieve the "strict application" of the limitations period). The United States Supreme Court has emphasized the importance of adhering to this time period, stating that "[p]rocedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants...." *Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984).

The notice of right to sue informed the plaintiff that he was required to commence his Title VII claim within 90 days of his receipt of the notice or he would lose that right (doc. 26-2, notice of right to sue). More specifically, the notice states: "Your lawsuit must be filed WITHIN 90 DAYS of your receipt of this notice; or your right to sue based on this charge will be lost" (*id.* (emphasis in original)).

The Fourth Circuit has held that for purposes of Title VII's 90-day limitation period, the date of a plaintiff's "receipt" of his notice of right to sue is determined by delivery of the notice, not actual receipt by the plaintiff. *Watts-Means*, 7 F.3d at 42 (holding that "receipt" of a right to sue letter occurred upon delivery of the right to sue letter to a post office box, not upon plaintiff's retrieval of the letter from the post office box); *see also* *Harvey v. City of New Bern Police Dept.*, 813 F.2d 652, 654 (4th Cir. 1987) (holding that delivery of notice to plaintiff's home triggered limitations period even if plaintiff did not actually receive the notice on that date); *Wiseman v. Amcor Rigid Plastics, USA*, C.A. No. 3:11-2478-CMC-PJG, 2012 WL 1203616, at *2 (D.S.C. Apr. 11, 2012) (dismissing plaintiff's Title VII claim as time-barred when the plaintiff contended that his temporary relocation delayed his actual receipt of his notice of right to sue).

The plaintiff alleges that he actually received the notice of right to sue on September 25, 2016 (doc. 1-4 at 5). However, as noted above, the date of a plaintiff's receipt of his notice is determined by the delivery date and not actual receipt by the plaintiff. Further, defendant Engineered Products disputes this date because the plaintiff was arrested on September 24th and remained in the Greenville County Detention Center on September 25th (doc. 26-3, det. ctr. record).[3] "When the actual date of the plaintiff's receipt of notice is unknown or in dispute, the court presumes receipt three days after mailing." *Dunbar v. Food Lion*, 542 F.Supp.2d 448, 450–51 (D.S.C. 2008) (citation omitted). *See also* *Ish v. Arlington Cnty. Va.*, C.A. No. 90-2433, 1990 WL 180127, at *2 (4th Cir. Nov. 21, 1990) (holding that, under what is now Fed. R. Civ. P. 6(d), if the date of receipt of the right to sue notice is unknown or disputed, the 90-day period begins to run three days after the mailing date); *Wiseman*, 2012 WL 1203616, at *3 n.1 (same).

[3] The court may take judicial notice of this public record in the context of a Rule 12(b)(6) motion to dismiss. *See, e.g., Barnard v. Durham*, C.A. No. 6:03-3321-20BI, 2003 WL 23851078, at *2 n.1 (D.S.C. Nov. 24, 2003) (taking judicial notice of an inmate record).

***4** The EEOC mailed the notice of right to sue to the plaintiff on September 2, 2016 (doc. 26-2, notice of right to sue). Because the exact delivery date to the plaintiff is in dispute, and due to the intervening Labor Day holiday on September 5, 2016, the court must presume that the notice was delivered to the plaintiff's home by September 6, 2016. Accordingly, the plaintiff was required to commence any Title VII lawsuit based on the claims in the charge within 90 days of September 6, 2016. Thus, the 90-day period expired on December 5, 2016.

Here, the plaintiff is entitled to the holding in *Houston v. Lack*, 487 U.S. 266, 270-71 (1988) (prisoner's pleading was filed at the moment of delivery to prison authorities for forwarding to district court).[4] The earliest possible date the plaintiff could have delivered his complaint to detention

center employees for mailing is December 21, 2016, the date on which he signed his complaint (doc. 1 at 8). Accordingly, the plaintiff's race discrimination and retaliation claims under Title VII were filed over two weeks after the limitations period ended.

[4] The plaintiff was in the detention center at the time of the filing of the complaint in *Workman v. Manigault*, C.A. No. 6:16-4002-RBH, from which the claims against the defendants in the instant case were severed.

Although the requirement in Title VII that "suits be filed within 90 days of receiving a notice of right to sue from the [EEOC may] be subject to tolling in appropriate circumstances," *Office of Pers. Mgmt. Richmond*, 496 U.S. 414, 439 (1983), "[f]ederal courts have typically extended equitable [tolling] only sparingly," *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). In his response to the motion to dismiss (doc. 29), the plaintiff does not address the defendant's argument that his claims are time-barred, and he has failed to show that he is entitled to equitable tolling.

Based upon the foregoing, the plaintiff's Title VII race discrimination and retaliation claims against Engineered Products are time-barred and should be dismissed as a matter of law pursuant to Rule 12(b)(6).

Sexual Harassment, ADA, ADEA, and GINA Claims

Defendant Engineered Products further argues that the plaintiff's claims of Title VII sexual harassment and violations of the ADA, ADEA, and GINA should be dismissed pursuant to Rule 12(b)(1) because they were not alleged in his EEOC charge. The undersigned agrees. "[A] failure by the plaintiff to exhaust administrative remedies concerning a Title VII claim deprives the federal courts of subject matter jurisdiction over the claim. The same is true of claims made under the ADEA." *Jones v. Calvert Group, Ltd.*, 551 F.3d 297, 300-301 (4th Cir. 2009) (citation omitted). Similarly, before filing suit under the ADA, a plaintiff must exhaust his administrative remedies by bringing a charge with the EEOC. *See* 42 U.S.C. § 12117(a) (indicating that the procedures of the ADA are identical to those provided in Title VII). Further, GINA's remedies section incorporates the exhaustion provisions of Title VII. 42 U.S.C. § 2000ff–6(1)(a) (incorporating "[t]he powers, procedures, and remedies provided in" the enforcement and remedies provisions of Title VII); *See Ellie v. Sprint*, C.A. No. TDC–15–0881, 2015 WL 5923364, at *1 (D. Md. Oct. 7, 2015) (applying the exhaustion requirement to a GINA claim).

Only those discrimination claims stated in the initial charge, those reasonably related to the original complaint, and those developed by reasonable investigation of the original complaint may be maintained in a subsequent lawsuit. *See* *Chacko v. Patuxent*, 429 F.3d 505, 506 (4th Cir. 2005) (holding that a plaintiff fails to exhaust her administrative remedies where her "administrative charges reference different time frames, actors, and discriminatory conduct than the central factual allegations in [her] formal lawsuit"). "Allowing a complaint to encompass allegations outside the ambit of the predicate EEOC charge would circumscribe the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notice of the charge, as surely as would an initial failure to file a timely EEOC charge." *Williams v. Little Rock Mun. Water Works*, 21 F.3d 218, 273 (8th Cir. 1994) (internal quotation marks and citation omitted). In determining whether the exhaustion requirement has been met in any individual case, a court must endeavor to "strike a balance between providing notice to employers and the EEOC on the one hand and ensuring plaintiffs are not tripped up over technicalities on the other." *Sydnor v. Fairfax Cnty., Va.*, 681 F.3d 591, 594 (4th Cir. 2012).

***5** In his response in opposition to the motion to dismiss, the plaintiff argues only that the court should liberally construe his complaint because he is proceeding *pro se* and allow him to "correct deficiencies [by] amendment" (doc. 29). However, amendment of the plaintiff's complaint will not cure the deficiency of failure to exhaust his administrative remedies. Nothing in the plaintiff's charge references or arguably identifies a sexual harassment, ADA, ADEA, or GINA claim (doc. 26-1, EEOC charge). In his charge, the plaintiff makes no mention whatsoever of alleged sexual harassment, his age, an alleged disability, or any genetic information (*see id.*). Rather, the charge focuses entirely on the plaintiff's claim that he was unlawfully discriminated against because of his race and retaliated against in violation of Title VII (*id.*). Further, the plaintiff checked the charge's boxes for "Race" and "Retaliation"; however, he did not check the charge's boxes for "Sex," "Age," "Disability," or "Genetic Information" (*id.*).

"[F]actual allegations made in formal litigation must correspond to those set forth in the administrative charge."

Chacko, 429 F.3d at 509 (4th Cir. 2005). As argued by the defendant, the plaintiff cannot now attempt to expand the scope of his charge with entirely new claims and allegations because the charge "frames the scope of future litigation." *Id.* *See Moyer v. SCANA Corp.*, C.A. No. 3:13-cv-3127-CMC-WWD, 2014 WL 4536356, at *5–6 (D.S.C. Sept. 10, 2014) (dismissing plaintiff's claims asserted in litigation that were not alleged in her charge of discrimination).

Because the plaintiff failed to exhaust his administrative remedies prior to filing his Title VII sexual harassment, ADA, ADEA, and GINA claims, those claims should be dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction.

***Section 1983* Claim**

Lastly, defendant Engineered Products, which is a privately owned company, argues that the plaintiff has failed to state a claim under 42 U.S.C. § 1983 because the plaintiff has made no allegation that it acted under color of state law. In order to state a claim under Section 1983, a plaintiff must allege two essential elements: (1) that he was deprived of a right secured by the Constitution or the laws of the United States; and (2) that the alleged deprivation was committed by a person acting under color of state law. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999). In his response to the motion to dismiss, the plaintiff states that the Section 1983 claim should not have been filed in this lawsuit and requests that the court "stri[ke] it off this suit" (doc. 29). Accordingly, the Section 1983 claim against this defendant should be dismissed.

CONCLUSION AND RECOMMENDATION

Wherefore, based upon the foregoing, this court recommends that defendant Engineered Products' motion to dismiss (doc. 26) be granted.

IT IS SO RECOMMENDED.

All Citations

Not Reported in Fed. Supp., 2017 WL 4863055

Exhibit B

Workman v. Bill M, et al., 2017 WL 4863055 (D.S.C. 2017)

2017 WL 4863055
Only the Westlaw citation is currently available.
United States District Court, D.
South Carolina, Greenville Division.

Olandio Ray WORKMAN, Plaintiff,

v.

BILL M., Montre Jeter, Caleb Davis, Chris Mattern, Tee Brokiskie, Michael Compos, John NLN, and Engineered Product Corporation Co., Defendants.

Civil Action No. 6:17-972-RBH-KFM
|
Signed 08/29/2017

Attorneys and Law Firms

Olandio Ray Workman, Greenville, SC, pro se.

James T. Hedgepath, Nexsen Pruet, Greenville, SC, for Defendants.

REPORT OF MAGISTRATE JUDGE

Kevin F. McDonald, United States Magistrate Judge

***1** This matter is before the court on defendant Engineered Products, LLC's ("Engineered Products") [1] motion to dismiss (doc. 26). Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(A), and Local Civil Rule 73.02(B)(2)(g) (D.S.C.), this magistrate judge is authorized to review all pretrial matters in employment discrimination cases and submit findings and recommendations to the district court.

PROCEDURAL HISTORY

In his complaint, the plaintiff alleges unlawful employment discrimination (doc. 1). [2] The plaintiff alleges that he worked for the defendant until his termination on June 29, 2016 (doc. 1-2 at 3). The plaintiff, who is proceeding *pro se*, seeks relief against the defendants pursuant to Title VII of the Civil Rights Act of 1964, as amended ("Title VII"); the Americans with Disabilities Act ("ADA"); the Age Discrimination in Employment Act ("ADEA"); the Genetic Information Nondiscrimination Act ("GINA"); and 42 U.S.C. § 1983. Following initial review of the plaintiff's complaint, the undersigned recommended that the district court dismiss the individual defendants (Bill M., Montre Jeter, Caleb Davis, Chris Mattern, Tee Brokiskie, Michael Compos, and John NLN) from this action *without prejudice* and without issuance and service of process (doc. 19). That recommendation is currently pending before the district court.

The undersigned authorized service of process against defendant Engineered Products (docs. 17, 19), and this defendant was served with a copy of the complaint by the United States Marshals Service on June 28, 2017 (doc. 25). Defendant Engineered Products filed the instant motion to dismiss for failure to state a claim on July 19, 2017 (doc. 26). On July 20, 2017, by order of this court filed pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), the plaintiff was advised of the summary judgment and motion to dismiss procedures and the possible consequences if he failed to respond adequately to the defendant's motion (doc. 27). The plaintiff filed his response in opposition to the motion to dismiss on July 27, 2017 (doc. 29).

FACTS PRESENTED

The plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") against defendant Engineered Products on July 8, 2016 (doc. 26-1; *see* doc. 1-4 at 5). In the charge, the plaintiff checked boxes stating that the alleged discrimination was based upon his race and retaliation (doc. 26-1). Specifically, the plaintiff alleged that on June 23, 2016, a supervisor and co-worker requested that he "forge time" for them, which he refused to do (*id.*). He claimed that after refusing to do so, he was harassed, threatened, and called a racial expletive (*id.*). He further claimed that his voicemails to his supervisor were not returned (*id.*). The plaintiff further alleged that, on June 29, 2016, he was required to work with an employee who was a known drug user, and, when he "expressed [his] concern" to management, he was told to do it or go home (*id.*). He alleged that the employee called him a racially derogatory term and threatened him, and, when he told a supervisor about it, he was given permission to leave work (*id.*). The plaintiff alleged that he was thereafter notified of his discharge, without explanation, on June 30, 2016 (*id.*).

***2** After concluding its investigation, the EEOC determined that it was "unable to conclude that the information obtained establishes violations of the statutes" and issued a dismissal

and notice of rights to the plaintiff informing him of his right to file a lawsuit (doc. 26-2). The notice was mailed to the plaintiff on September 2, 2016 (*id.*). The plaintiff states in his complaint that he received the notice on September 25, 2016 (doc. 1-4 at 5).

APPLICABLE LAW AND ANALYSIS

Defendant Engineered Products has moved for dismissal of the plaintiff's claims pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6). Rule 12(b)(1) provides for dismissal where the court lacks jurisdiction over the subject matter of a claim. A failure by the plaintiff to exhaust administrative remedies deprives the court of subject matter jurisdiction. *Jones v. Calvert Group, Ltd.*, 551 F.3d 297, 300-301 (4th Cir. 2009)

"The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint." *Williams v. Preiss-Wal Pat III, LLC*, 17 F. Supp. 3d 528, 531 (D.S.C. 2014) (quoting *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999)). Rule 8(a) sets forth a liberal pleading standard, which requires only a " 'short and plain statement of the claim showing the pleader is entitled to relief,' in order to 'give the defendant fair notice of what ... the claim is and the grounds upon which it rests.' " *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). "[T]he facts alleged 'must be enough to raise a right to relief above the speculative level' and must provide 'enough facts to state a claim to relief that is plausible on its face.' " *Robinson v. American Honda Motor Co., Inc.*, 551 F.3d 218, 222 (4th Cir. 2009) (quoting *Twombly*, 550 U.S. at 555, 569). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). The court must liberally construe *pro se* complaints to allow the development of a potentially meritorious case, *Hughes v. Rowe*, 449 U.S. 5, 9 (1980), and such *pro se* complaints are held to a less stringent standard than those drafted by attorneys. *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978).

"In deciding whether a complaint will survive a motion to dismiss, a court evaluates the complaint in its entirety, as well as documents attached or incorporated into the complaint." *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 448 (4th Cir. 2011). The court may consider such a document, even if it is not attached to the complaint, if the document "was integral to and explicitly relied on in the complaint," and there is no authenticity challenge. *Id.* at 448 (quoting *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609, 618 (4th Cir. 1999)). *See Pierce v. Office Depot*, C.A. No. 0:13-cv-3601, 2014 WL 6473630, at *5 (D.S.C. Nov. 18, 2014) ("[A] court may consider an EEOC charge and other EEOC documentation when considering a motion to dismiss because such documents are integral to the complaint as Plaintiff necessarily relies on these documents...." (internal citations and quotations omitted)); *Int'l Ass'n of Machinists & Aerospace Workers v. Haley*, 832 F. Supp. 2d 612, 622 (D.S.C. 2011) ("In evaluating a motion to dismiss under Rule 12(b)(6), the Court ... may also 'consider documents attached to ... the motion to dismiss, so long as they are integral to the complaint and authentic.' ") (quoting *Sec'y of State for Def. v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007)).

Title VII Race and Retaliation Claims

***3** As noted above, in his charge of discrimination, the plaintiff alleged only race discrimination and retaliation, and he also alleges Title VII race discrimination and retaliation in his complaint. Defendant Engineered Products argues that these claims should be dismissed as they are time-barred. The undersigned agrees.

Under Title VII, a claimant must file a civil action within 90 days of the date of his receipt of a duly issued notice of right to sue from the EEOC. *See* 42 U.S.C. § 2000e–5(f)(1); *see also* *Watts–Means v. Prince George's Family Crisis Ctr.*, 7 F.3d 40, 42 (4th Cir. 1993) ("Title VII plaintiffs have a ninety-day period in which to file their claims after the EEOC has given them a right-to-sue letter.") (citing 42 U.S.C. § 2000e–5(f)(1)). If suit is not brought within the statutory time period, the case is subject to dismissal. *See* *Harper v. Burgess*, 701 F.2d 29, 30 (4th Cir. 1983) (affirming dismissal of a lawsuit brought pursuant to Title VII because the plaintiff did not file suit within the 90-day limitation period required by 42 U.S.C. § 2000e-5(f)).

Pro se litigants are not exempt from this statutory requirement. *See, e.g.,* *Anderson v. Greenville Health Sys.*, C.A. No. 6:16-01051-MGL, 2016 WL 6405751, at *2 (D.S.C. Oct. 31, 2016) (dismissing a *pro se* plaintiff's complaint as untimely and rejecting the plaintiff's request for equitable tolling to relieve the "strict application" of the limitations period). The United States Supreme Court has emphasized the importance of adhering to this time period, stating that "[p]rocedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants...." *Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984).

The notice of right to sue informed the plaintiff that he was required to commence his Title VII claim within 90 days of his receipt of the notice or he would lose that right (doc. 26-2, notice of right to sue). More specifically, the notice states: "Your lawsuit must be filed WITHIN 90 DAYS of your receipt of this notice; or your right to sue based on this charge will be lost" (*id.* (emphasis in original)).

The Fourth Circuit has held that for purposes of Title VII's 90-day limitation period, the date of a plaintiff's "receipt" of his notice of right to sue is determined by delivery of the notice, not actual receipt by the plaintiff. *Watts-Means*, 7 F.3d at 42 (holding that "receipt" of a right to sue letter occurred upon delivery of the right to sue letter to a post office box, not upon plaintiff's retrieval of the letter from the post office box); *see also* *Harvey v. City of New Bern Police Dept.*, 813 F.2d 652, 654 (4th Cir. 1987) (holding that delivery of notice to plaintiff's home triggered limitations period even if plaintiff did not actually receive the notice on that date); *Wiseman v. Amcor Rigid Plastics, USA*, C.A. No. 3:11-2478-CMC-PJG, 2012 WL 1203616, at *2 (D.S.C. Apr. 11, 2012) (dismissing plaintiff's Title VII claim as time-barred when the plaintiff contended that his temporary relocation delayed his actual receipt of his notice of right to sue).

The plaintiff alleges that he actually received the notice of right to sue on September 25, 2016 (doc. 1-4 at 5). However, as noted above, the date of a plaintiff's receipt of his notice is determined by the delivery date and not actual receipt by the plaintiff. Further, defendant Engineered Products disputes this date because the plaintiff was arrested on September 24th and remained in the Greenville County Detention Center on September 25th (doc. 26-3, det. ctr. record).[3] "When the actual date of the plaintiff's receipt of notice is unknown or in dispute, the court presumes receipt three days after mailing." *Dunbar v. Food Lion*, 542 F.Supp.2d 448, 450–51 (D.S.C. 2008) (citation omitted). *See also* *Ish v. Arlington Cnty. Va.*, C.A. No. 90-2433, 1990 WL 180127, at *2 (4th Cir. Nov. 21, 1990) (holding that, under what is now Fed. R. Civ. P. 6(d), if the date of receipt of the right to sue notice is unknown or disputed, the 90-day period begins to run three days after the mailing date); *Wiseman*, 2012 WL 1203616, at *3 n.1 (same).

***4** The EEOC mailed the notice of right to sue to the plaintiff on September 2, 2016 (doc. 26-2, notice of right to sue). Because the exact delivery date to the plaintiff is in dispute, and due to the intervening Labor Day holiday on September 5, 2016, the court must presume that the notice was delivered to the plaintiff's home by September 6, 2016. Accordingly, the plaintiff was required to commence any Title VII lawsuit based on the claims in the charge within 90 days of September 6, 2016. Thus, the 90-day period expired on December 5, 2016.

Here, the plaintiff is entitled to the holding in *Houston v. Lack*, 487 U.S. 266, 270-71 (1988) (prisoner's pleading was filed at the moment of delivery to prison authorities for forwarding to district court).[4] The earliest possible date the plaintiff could have delivered his complaint to detention center employees for mailing is December 21, 2016, the date on which he signed his complaint (doc. 1 at 8). Accordingly, the plaintiff's race discrimination and retaliation claims under Title VII were filed over two weeks after the limitations period ended.

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Based upon the foregoing, the plaintiff's Title VII race discrimination and retaliation claims against Engineered Products are time-barred and should be dismissed as a matter of law pursuant to Rule 12(b)(6).

Sexual Harassment, ADA, ADEA, and GINA Claims

Defendant Engineered Products further argues that the plaintiff's claims of Title VII sexual harassment and violations of the ADA, ADEA, and GINA should be dismissed pursuant to Rule 12(b)(1) because they were not alleged in his EEOC charge. The undersigned agrees. "[A] failure by the plaintiff to exhaust administrative remedies concerning a Title VII claim deprives the federal courts of subject matter jurisdiction over the claim. The same is true of claims made under the ADEA." *Jones v. Calvert Group, Ltd.*, 551 F.3d 297, 300-301 (4th Cir. 2009) (citation omitted). Similarly, before filing suit under the ADA, a plaintiff must exhaust his administrative remedies by bringing a charge with the EEOC. *See* 42 U.S.C. § 12117(a) (indicating that the procedures of the ADA are identical to those provided in Title VII). Further, GINA's remedies section incorporates the exhaustion provisions of Title VII. 42 U.S.C. § 2000ff–6(1)(a) (incorporating "[t]he powers, procedures, and remedies provided in" the enforcement and remedies provisions of Title VII); *See Ellie v. Sprint*, C.A. No. TDC–15–0881, 2015 WL 5923364, at *1 (D. Md. Oct. 7, 2015) (applying the exhaustion requirement to a GINA claim).

Only those discrimination claims stated in the initial charge, those reasonably related to the original complaint, and those developed by reasonable investigation of the original complaint may be maintained in a subsequent lawsuit. *See* *Chacko v. Patuxent*, 429 F.3d 505, 506 (4th Cir. 2005) (holding that a plaintiff fails to exhaust her administrative remedies where her "administrative charges reference different time frames, actors, and discriminatory conduct than the central factual allegations in [her] formal lawsuit"). "Allowing a complaint to encompass allegations outside the ambit of the predicate EEOC charge would circumscribe the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notice of the charge, as surely as would an initial failure to file a timely EEOC charge." *Williams v. Little Rock Mun. Water Works*, 21 F.3d 218, 273 (8th Cir. 1994) (internal quotation marks and citation omitted). In determining whether the exhaustion requirement has been met in any individual case, a court must endeavor to "strike a balance between providing notice to employers and the EEOC on the one hand and ensuring plaintiffs are not tripped up over technicalities on the other." *Sydnor v. Fairfax Cnty., Va.*, 681 F.3d 591, 594 (4th Cir. 2012).

***5** In his response in opposition to the motion to dismiss, the plaintiff argues only that the court should liberally construe his complaint because he is proceeding *pro se* and allow him to "correct deficiencies [by] amendment" (doc. 29). However, amendment of the plaintiff's complaint will not cure the deficiency of failure to exhaust his administrative remedies. Nothing in the plaintiff's charge references or arguably identifies a sexual harassment, ADA, ADEA, or GINA claim (doc. 26-1, EEOC charge). In his charge, the plaintiff makes no mention whatsoever of alleged sexual harassment, his age, an alleged disability, or any genetic information (*see id.*). Rather, the charge focuses entirely on the plaintiff's claim that he was unlawfully discriminated against because of his race and retaliated against in violation of Title VII (*id.*). Further, the plaintiff checked the charge's boxes for "Race" and "Retaliation"; however, he did not check the charge's boxes for "Sex," "Age," "Disability," or "Genetic Information" (*id.*).

"[F]actual allegations made in formal litigation must correspond to those set forth in the administrative charge." *Chacko,* 429 F.3d at 509 (4th Cir. 2005). As argued by the defendant, the plaintiff cannot now attempt to expand the scope of his charge with entirely new claims and allegations because the charge "frames the scope of future litigation." *Id.* *See Moyer v. SCANA Corp.*, C.A. No. 3:13-cv-3127-CMC-WWD, 2014 WL 4536356, at *5–6 (D.S.C. Sept. 10, 2014) (dismissing plaintiff's claims asserted in litigation that were not alleged in her charge of discrimination).

Because the plaintiff failed to exhaust his administrative remedies prior to filing his Title VII sexual harassment, ADA, ADEA, and GINA claims, those claims should be dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction.

Section 1983 Claim

Lastly, defendant Engineered Products, which is a privately owned company, argues that the plaintiff has failed to state a claim under 42 U.S.C. § 1983 because the plaintiff has made no allegation that it acted under color of state law. In order to state a claim under Section 1983, a plaintiff must allege two essential elements: (1) that he was deprived of a right secured by the Constitution or the laws of the United States; and (2) that the alleged deprivation was committed

by a person acting under color of state law. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999). In his response to the motion to dismiss, the plaintiff states that the Section 1983 claim should not have been filed in this lawsuit and requests that the court "stri[ke] it off this suit" (doc. 29). Accordingly, the Section 1983 claim against this defendant should be dismissed.

CONCLUSION AND RECOMMENDATION

Wherefore, based upon the foregoing, this court recommends that defendant Engineered Products' motion to dismiss (doc. 26) be granted.

IT IS SO RECOMMENDED.

All Citations

Not Reported in Fed. Supp., 2017 WL 4863055

Footnotes

1 This defendant is improperly identified as Engineered Product Corporation Co.

2 The plaintiff's claims against the defendants in the instant case were originally part of a separate action filed by the plaintiff in this court on December 27, 2016, *Workman v. Manigault*, C.A. No. 6:16-4002-RBH. On April 13, 2017, the Honorable R. Bryan Harwell, United States District Judge, issued an order in that case granting the plaintiff's motion to divide the case into two separate actions (*see Workman v. Manigault*, C.A. No. 6:16-4002-RBH, doc. 22). As a result, the complaint in this case was filed by the Clerk of Court on April 13, 2017 (*see* doc. 1).

3 The court may take judicial notice of this public record in the context of a Rule 12(b)(6) motion to dismiss. *See, e.g., Barnard v. Durham*, C.A. No. 6:03-3321-20BI, 2003 WL 23851078, at *2 n.1 (D.S.C. Nov. 24, 2003) (taking judicial notice of an inmate record).

4 The plaintiff was in the detention center at the time of the filing of the complaint in *Workman v. Manigault*, C.A. No. 6:16-4002-RBH, from which the claims against the defendants in the instant case were severed.

Exhibit C

Watts-Means v. Prince George's Family Crisis Center, 7 F.3d 40 (4th Cir. 1993)

7 F.3d 40
United States Court of Appeals,
Fourth Circuit.

Sonja WATTS–MEANS, Plaintiff–Appellant,
v.
PRINCE GEORGE'S FAMILY CRISIS CENTER, Defendant–Appellee (Two Cases).
Sonja WATTS–MEANS, Plaintiff–Appellee,
v.
PRINCE GEORGE'S FAMILY CRISIS CENTER, Defendant–Appellant.

Nos. 92–2476, 92–2553 and 92–2603.
|
Argued June 9, 1993.
|
Decided Sept. 15, 1993.

Synopsis

Former employee of nonprofit corporation which provided shelter and supportive services for domestic violence victims brought Title VII employment discrimination action against corporation arising from termination of her employment. Employee moved to amend complaint to add § 1983 and state law wrongful discharge and defamation claims. The United States District Court for the District of Maryland, Marvin J. Garbis, J., denied motion as to § 1983 claims and dismissed action. Employee appealed. The Court of Appeals, Richard L. Williams, Senior District Judge, sitting by designation, held that: (1) 90–day period within which employee had to file Title VII action was triggered by Postal Service's delivery of notice to employee that she could pick up Equal Employment Opportunity Commission's (EEOC) right-to-sue letter, rather than by her picking up letter five days later; (2) equitable tolling was not appropriate; and (3) corporation did not act "under color of law" as required for § 1983 liability.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss.

Attorneys and Law Firms

***41** Brenda C. Wagner, Wagner & Lewis, Washington, DC, argued for appellant.

James E. McCollum, Jr., College Park, MD, argued for appellee.

Before RUSSELL, Circuit Judge, ANDERSON, United States District Judge for the District of South Carolina, sitting by designation, and WILLIAMS, Senior United States District Judge for the District of Virginia, sitting by designation.

OPINION

RICHARD L. WILLIAMS, Senior District Judge:

Sonja Watts–Means appeals the district court's refusal to allow her to amend her complaint in her action against her former employer, Family Crisis Center, Inc. of Prince George's County (the Center), and the district court's dismissal of her claims. We find no error in the district court's actions and affirm.

I

The Center is a private non-profit corporation in Prince George's County, Maryland (the County), that was established to provide shelter and supportive services for victims of domestic violence. During the relevant period for this action, its board of directors had twenty-one voting members, twenty of whom were private individuals and one of whom served in his capacity as a County official. The Center's only other substantial connections with the County were that it occupied a building owned by the County and was required to pay little or no rent, it received some financial support from the County, and its utilities costs were paid for by the County. None of the Center's employees or management personnel were government employees.

Watts–Means was employed by the Center in August, 1986. In February, 1987, the Center's assistant director in an "employee evaluation report" described Watt–Means' job performance as deficient and recommended that she be terminated. The Center's executive director agreed and terminated Watts–Means. The termination decision was reviewed and affirmed by a committee of the Center's board of directors.

Watts–Means filed Title VII charges with the Equal Employment Opportunity Commission (EEOC), but the EEOC determined that her termination had not been unlawful. The EEOC sent Watts–Means notification of its determination, in what is termed a "right-to-sue" letter,

by certified mail on March 18, 1988. The Postal Service attempted to deliver the letter to her on March 21, 1988, and not finding her home, left a slip of paper indicating that she should pick up the letter at the post office. Although she suspected that the letter was from the EEOC, she did not pick it up until March 26, 1988.

On June 24, 1988, Watts–Means filed Title VII claims in the District of Maryland. Three and a half years later, she sought to amend her complaint to add claims under 42 U.S.C. § 1983, for violation of the Fourteenth Amendment, and under state law, for wrongful discharge and defamation. The district court allowed Watts–Means to add the wrongful discharge and defamation claims but refused to allow the section 1983 claim on the ground that it was futile because the Center had not acted under color of law.

The district court then dismissed Watts–Means' action, finding that her Title VII claims were not timely filed and that it had no pendent jurisdiction over her remaining state law claims for wrongful discharge and defamation because no federal claims remained in her action.

***42** II

We first address whether the district court erred in holding that Watts–Means' Title VII claims were not timely filed. We conclude that it did not.

Title VII plaintiffs have a ninety-day period in which to file their claims after the EEOC has given them a right-to-sue letter. 42 U.S.C. § 2000e–5(f)(1). Watts–Means filed her Title VII claims within ninety days of when she picked up her right-to-sue letter at the post office, but not within ninety days of when the Postal Service delivered notice to her that she could pick up the letter. At issue, therefore, is whether the Postal Service's delivery of this notice to Watts–Means triggered the limitations period.

We are of the opinion that it did. This Court held in *Harvey v. City of New Bern Police Dept.,* 813 F.2d 652 (4th Cir.1987), that delivery of a right-to-sue letter to a plaintiff's home triggers the limitations period even if the plaintiff does not actually receive the letter. *Harvey,* 813 F.2d at 654. It justified its holding on the grounds, first, that requiring "actual receipt" to trigger the period would allow some plaintiffs "open-ended time extension, subject to manipulation at will," and, second, that any injustices created by the rule could be remedied by equitable tolling. *Id.*

These same considerations persuade us to find that the limitations period is triggered when the Postal Service delivers notice to a plaintiff that the right-to-sue letter is available for pickup, and not when the letter is actually picked up. Requiring actual pickup to trigger the period would allow for the same manipulation of the limitations period that concerned the Court in *Harvey.* [1] Moreover, if triggering the period when the plaintiff receives notice of the letter would result in injustice, for example if the plaintiff was unaware that the letter about which he received notice was a right-to-sue letter and he was greatly delayed in picking it up, equitable tolling of the limitations period is available.

Because we find that the limitations period in this case was triggered on March 21, 1988, when Watts–Means received her notice that she could pick up a letter at the post office, we hold that her filing of her Title VII claims on June 24, 1988, was not within the limitations period.

Equitable tolling of the filing period was not appropriate here. [2] When Watts–Means received notice from the Postal Service of a letter, she suspected that it was from the EEOC. At that point, she had the full ninety-day limitations period to file her claims. Even if she did not actually know that her right-to-sue letter had arrived until she picked up the letter at the post office five days later, she still had eighty-five days from then to file her claims. In *Harvey,* this Court found equitable tolling inappropriate when the plaintiff did not receive notice of his right to sue until six days after the limitations period began because he still had eighty-four days to file his claim. *Id.* We, therefore, find no injustice here in triggering the limitations period when Watts–Means received notice of the letter from the Postal Service. Because Watts–Means did not file her Title VII claims within the limitations period and equitable tolling was not appropriate, we conclude that the district court did not err in dismissing Watts–Means' Title VII claims as untimely filed. [3]

III

The only other issue raised by Watts–Means that merits even brief discussion is whether the district court erred in denying ***43** her leave to amend her complaint by adding a claim

that her termination violated section 1983.[4] The district court refused to allow the amendment on the ground that the section 1983 claim was futile, *see* *Johnson v. Oroweat Foods Co.,* 785 F.2d 503, 510 (4th Cir.1986), as Watts–Means could not show that the Center acted under color of law. We agree.

An action of a private actor like the Center can constitute action under color of law in only four instances: (1) when the action is coerced by the state; (2) when the state has delegated to the private actor a responsibility that it has a constitutional duty to perform; (3) when the state has delegated to the private actor a traditionally and exclusively public function; or (4) when the state assists a private actor in enforcing the private actor's rights.[5] *Andrews v. Federal Home Loan Bank of Atlanta,* 998 F.2d 214, 217 (4th Cir.1993). Watts–Means' only conceivable argument that the Center acted under color of law in terminating her is that its action was "coerced" by the County. As evidence of coercion, she points to the facts, first, that at the time of her termination the County provided financial support for the Center in the form of paying for its utilities, allowing it to use a government building for little or no rent, and giving it monetary grants, and, second, that a County official, acting in his official capacity, served on the Center's board of directors.

We reject this argument. That the County provided financial support to the Center is not sufficient to render the Center's termination of Watts–Means an action that was coerced by the County. *See* *Rendell–Baker,* 457 U.S. at 840, 102 S.Ct. at 2770; *Blum v. Yaretsky,* 457 U.S. 991, 1011, 102 S.Ct. 2777, 2789, 73 L.Ed.2d 534 (1982). Nor is the fact that the County had a representative on the Center's board of directors. The board had nothing to do with the termination decision itself. The most that can be said is that the board, acting through one of its committees, reviewed the decision. This falls far short of being a situation in which state coercion or control could be found. *See Andrews,* at 217. And even if the board was responsible for the termination decision itself, the County, through its voting board member, could not have controlled or coerced this decision because it had only one of twenty-one total votes on the board. *See* *National Collegiate Athletic Ass'n v. Tarkanian,* 488 U.S. 179, 193, 109 S.Ct. 454, 462, 102 L.Ed.2d 469 (1988); *Arlosoroff v. National Collegiate Athletic Ass'n,* 746 F.2d 1019, 1022 (4th Cir.1984).[6]

Because it would be impossible for Watts–Means to show that the Center acted under color of law in terminating her, we agree with the district court that Watts–Means' section 1983 claim was futile and find no error in its refusal to allow her to add this claim to her complaint.

IV

For the reasons set forth, we affirm both the district court's refusal to allow Watts–Means to amend her complaint and its dismissal of her claims.

AFFIRMED.

All Citations

7 F.3d 40, 62 Fair Empl.Prac.Cas. (BNA) 1601, 62 Empl. Prac. Dec. P 42,569, 62 USLW 2247

Footnotes

1 This concern is particularly acute in the present case because Watts–Means suspected that the letter about which she received notice from the Postal Service was a letter from the EEOC. If the limitations period was not triggered until she picked up the letter, she conceivably could have tolled the period for as long as she chose simply by not picking up the letter.

2 Indeed, Watts–Means does not even argue that equitable tolling of the filing period was appropriate.

3 The Center also argues that even if the Title VII claims were timely filed, the panel should affirm their dismissal because the Center was not in an industry affecting commerce, as Title VII requires. Because the claims were correctly dismissed as untimely filed, we find it unnecessary to reach the Center's argument.

4 Watts–Means makes several additional arguments as well, but we find that they are without merit and reject them without discussion.

5 "In cases under section 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." *Rendell–Baker v. Kohn,* 457 U.S. 830, 838, 102 S.Ct. 2764, 2769, 73 L.Ed.2d 418 (1982) (quoting *United States v. Price,* 383 U.S. 787, 794 n. 7, 86 S.Ct. 1152, 1157 n. 7, 16 L.Ed.2d 267 (1966)). As a result, in this analysis, we use cases defining "state action" interchangeably with those interpreting "under color" of law.

6 Watts–Means places great emphasis on *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961), but *Burton* is easily distinguishable. *Burton* involved a state agency that owned a building out of which it operated a parking garage. The agency leased space in the building to a restaurant that discriminated against blacks. The Court held that the restaurant's discrimination was state action because "the State ha[d] so far insinuated itself into a position of interdependence with [the restaurant] that it [had to] be recognized as a joint participant in the challenged activity." *Burton,* 365 U.S. at 725, 81 S.Ct. at 862. Prince George's County has not entered into the same type of joint venture with the Center that was at issue in *Burton.*