

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALSHE E. WOOD, : CIVIL ACTION  
: NO. 99-3022  
Plaintiff, :  
: v. :  
: CENTRAL PARKING SYSTEMS OF :  
PENNSYLVANIA, INC., :  
Defendant. :

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

JUNE 22, 2000

Plaintiff brought this action against defendant alleging sexual harassment and retaliation in the workplace in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e et seq., and the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Cons. Stat. Ann. § 951 et seq. Plaintiff claims that such unlawful conduct occurred while she worked as a cashier for defendant until it terminated her employment on January 27, 1998.

Defendant has moved to dismiss plaintiff's complaint contending that plaintiff failed to exhaust her administrative remedies. Because plaintiff is unable to show, under any set of facts, that she cooperated with the EEOC in the administrative process established by Congress to address claims of employment discrimination before filing suit in federal court or that equity excuses her non-compliance, the court will grant defendant's motion.

## I. BACKGROUND<sup>1</sup>

On November 2, 1998, plaintiff, represented by counsel, filed a charge against defendant with the Equal Employment Opportunity Commission ("EEOC"). On December 7, 1998, the EEOC issued a letter to plaintiff's counsel, with a copy to plaintiff, instructing plaintiff to complete various intake questionnaires to assist the EEOC in its investigation of plaintiff's charge. The letter stated that if plaintiff failed to return the form to the EEOC within thirty-three days or failed to contact the EEOC seeking clarification or an extension of time, the EEOC would dismiss the charge for failure to cooperate and issue a notice of rights.

Receiving no response, on February 12, 1999, the EEOC sent a second letter to plaintiff's counsel and provided a copy to plaintiff, repeating its request for additional information and advising plaintiff and plaintiff's counsel that failure to provide the requested information within ten days would constitute a failure to cooperate, resulting in the EEOC's dismissal of the charge and issuance of a right to sue letter. Finally, on April 5, 1999, the EEOC, having yet to hear from plaintiff or her counsel, sent plaintiff a "Dismissal and Notice of Rights." The Dismissal and Notice of Rights provided the

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<sup>1</sup> Plaintiff does not contest these facts. See Pl.'s Brief in Resp. to Def.'s Mot. to Dismiss under 12(b)(1) [hereinafter "Pl.'s Brief"] at 1-3 ("Pertinent Facts").

following reason for the closure of the EEOC file: "Having been given 30 days in which to respond, you failed to provide information, failed to appear or be available for interviews/conferences, or otherwise failed to cooperate to the extent that it was not possible to resolve your charge." The letter also informed plaintiff that this notice would constitute the only notice of her dismissal and that she could file a lawsuit against defendant within ninety days of having received the notice. Plaintiff's counsel filed the instant suit on behalf of his client on June 15, 1999.

## II. LEGAL STANDARD

Defendant characterized its motion as a motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). During oral argument, the court questioned defense counsel as to the appropriateness of moving to dismiss under Rule 12(b)(1) for failure to exhaust administrative remedies in light of the Third Circuit's recent decision in Anjelino v. New York Times Co., 200 F.3d 73, 87-88 (3d Cir. 2000) (as amended). Defense counsel maintained, however, that Anjelino applied only when the moving party sought to dismiss a case based on an untimeliness defense as opposed to an alleged failure to exhaust administrative remedies.<sup>2</sup>

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<sup>2</sup> At oral argument, plaintiff's counsel, characterizing plaintiff's failure to respond to the EEOC's requests for further information as failing to respond in a timely fashion, maintained

The court disagrees. In Anjelino, defendant moved to dismiss several of plaintiff's claims based upon, among other grounds, failure to exhaust administrative remedies. Id. at 93-97. According to the Third Circuit:

We conclude that the District Court erred in considering the Times' failure to exhaust and timeliness defenses as grounds for dismissal under Rule 12(b)(1) for lack of subject matter jurisdiction. Although it is a "basic tenet" of administrative law that a plaintiff should timely exhaust all administrative remedies before seeking judicial relief, the purpose of this rule is practical, rather than a matter affecting substantive justice in the manner contemplated by the District Court. The rule is meant to "provide courts with the benefit of an agency's expertise, and serve judicial economy by having the administrative agency compile the factual record." Failure to exhaust is "in the nature of statutes of limitation" and "do[es] not affect the District Court's subject matter jurisdiction." The characterization either of lack of exhaustion or of untimeliness as a jurisdictional bar is particularly inapt in Title VII cases, where the courts are permitted to equitably toll filing requirements in certain circumstances. Thus, the District Court should have considered the exhaustion and timeliness defenses presented in this case under Rule 12(b)(6), rather than under Rule 12(b)(1).

Id. (internal citations omitted) (emphasis added). Because the Third Circuit in Anjelino opined that district courts should not characterize either failure to exhaust or untimeliness defenses as jurisdictional bars, the court will treat defendant's instant motion under the Rule 12(b)(6) standard.

Pursuant to that standard, "[t]he motion to dismiss should be granted only if 'after accepting as true all of the

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that the instant motion should be resolved pursuant to the standard for deciding motions filed under Rule 12(b)(6).

facts alleged in the complaint, and drawing all reasonable inferences in the plaintiff's favor, no relief could be granted under any set of facts consistent with the allegations in the complaint.'" In re: Warfarin Sodium Antitrust Litig., \_\_\_ F.3d \_\_, No. CIV.A. 99-5034, 2000 WL 696390, at \*2 (3d Cir. May 30, 2000) (quoting Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts, Inc., 140 F.3d 478, 483 (3d Cir. 1998)); see, e.g., Kozlowski v. Extendicare Health Servs., Inc., No. CIV.A. 99-4338, 2000 WL 193502, at \*1 (E.D. Pa. Feb. 17, 2000) (treating defendant's motion to dismiss plaintiff's Title VII claim because plaintiff failed to cooperate with the EEOC under Rule 12(b)(6) having superseded its earlier opinion, which decided the motion pursuant to Rule 12(b)(1)).<sup>3</sup> "Moreover, 'a court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on that document.'" Kozlowski, 2000 WL 193502, at \*1 (quoting Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993)).

### III. DISCUSSION

Title VII provides, in pertinent part, that "[w]henever a charge is filed by or on behalf of a person claiming to be

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<sup>3</sup> Defendant cites the earlier version of Kozlowski as support for deciding its motion pursuant to Rule 12(b)(1). That opinion, Kozlowski v. Extendicare Health Servs., Inc., No. CIV.A. 99-4338, 2000 WL 128699 (E.D. Pa. Jan. 27, 2000), having been vacated, however, is no longer good law.

aggrieved ... alleging that an employer ... has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge ... on such employer ... and shall make an investigation thereof." See 42 U.S.C. § 2000e-5(b) (emphasis added). The purpose of this administrative scheme is to allow the EEOC "to settle disputes through conference, conciliation, and persuasion before the aggrieved party is permitted to file a lawsuit." Kozlowski, 2000 WL 193502, at \*2 (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974)); see also Robinson v. Dalton, 107 F.3d 1018, 1019 (3d Cir. 1997) (reiterating goals of administrative proceedings).

Defendant contends that the EEOC's dismissal of plaintiff's charge for failing to cooperate with its investigation bars plaintiff from bringing the instant suit. In response, plaintiff argues that she did cooperate by filing a timely charge that contained sufficient information about the events in question to assist the EEOC in its investigation of her claims. Plaintiff concedes that she did not respond to the EEOC's requests for information. Plaintiff argues, however, that she always intended to participate in the EEOC's investigation but that because she failed to notify her counsel or the EEOC that she had moved and changed her phone number after she filed the instant charge, she was unaware that the EEOC was seeking additional information from her. Plaintiff's counsel confirms that, upon receipt of the various letters from the EEOC, he tried

to contact plaintiff at her last known phone number and also mailed a letter to her at her last known home address to no avail. See Pl.'s Brief at 1-2.

Plaintiff also contends that despite a determination by the EEOC that plaintiff had failed to cooperate, the EEOC, pursuant to its own regulations, issued her a right-to-sue notice.<sup>4</sup> See 29 C.F.R. §§ 1601.18(b), 1601.28(b)(3). According to plaintiff, the right-to-sue notice authorizes her to bring her claim of employment discrimination in federal court regardless of whether she cooperated with the EEOC in its investigation. Plaintiff filed the instant suit within 90 days of receipt of the right-to-sue notice from the EEOC.<sup>5</sup>

A. Plaintiff's Failure to Cooperate

Very similar facts were before the court in Kozlowski v. Extendicare Health Services, Inc., No. CIV.A. 99-4338, 2000 WL 193502 (E.D. Pa. Feb. 17, 2000). Like plaintiff in the instant case, the plaintiff in Kozlowski received a dismissal and notice of rights letter from the EEOC. That notice similarly explained that the EEOC had closed its file because the plaintiff had

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<sup>4</sup> Congress authorized the EEOC "to issue, amend, or rescind suitable procedural regulations to carry out the provisions of [Title VII.]" See 42 U.S.C. § 2000e-12(a).

<sup>5</sup> Plaintiff's counsel alleges that after he received notice of the dismissal, he filed suit, and only during the following month, did his client finally contact him and tell him she had moved and changed her phone number.

"failed to provide information, failed to appear or be available for interviews/conferences, or otherwise failed to cooperate to the extent it was not possible to resolve her charge." Id. at \*2. In response to the defendant's motion to dismiss, the plaintiff argued that she did not need to respond to the EEOC's letter requesting more information because the charge she filed was sufficiently detailed.

The court rejected the plaintiff's argument, stating that the EEOC had concluded that the plaintiff failed to cooperate with its investigation. The court found that there was no support for the plaintiff's claim that her charge was sufficient or that the EEOC considered the information contained in her charge to be sufficient. Consequently, the court held that the plaintiff had failed to exhaust her administrative remedies, a failure that was fatal to her Title VII claim. "Thus, if a plaintiff fails to cooperate with the EEOC during its 180-day investigation and conciliation period, the plaintiff is preventing the EEOC from even attempting to accomplish, much less actually accomplishing, its congressionally-mandated purpose ...." Id. at \*3; see also McLaughlin v. State System of Higher Education, No. CIV.A. 97-1144, 1999 WL 239408 (E.D. Pa. Mar. 31, 1999) (granting defendants' motion for summary judgment on plaintiffs' Title VII claims finding that plaintiffs' failure to cooperate with EEOC constituted a failure to exhaust administrative remedies because "failure to cooperate in an EEOC

investigation, no less than failure to file with the administrative agency, serves to thwart the purpose underl[y]ing the enactment of Title VII") (quoting Davis v. Mid-South Milling Co., No. 89-2829-TUB, 1990 WL 275945, at \*3 (W.D. Tenn. Dec. 14, 1990), and citing Dates v. Phelps Dodge Magnet Wire Co., 604 F. Supp. 22, 27 (N.D. Ind. 1984); Duncan v. Consolidated Freightways Corp., No. CIV.A. 94-2507, 1995 WL 530652, at \*4 (N.D. Ill. Sept. 7, 1995)).

The court finds the reasoning of Kozlowski and McLaughlin persuasive. Plaintiff's failure to cooperate effectively barred the EEOC from performing its investigation into her charge -- an investigation it was required to make under the plain mandate of the statute. See 42 U.S.C. § 2000e-5(b); see also McLaughlin, 1999 WL 239408, at \*2 ("To allow plaintiffs to bring their Title VII claims in federal court under such circumstances would be to allow them to 'emasculate Congressional intent by short circuiting the twin objectives of investigation and conciliation.'") (quoting Robinson v. Red Rose Communications, Inc., No. CIV.A. 97-6497, 1998 WL 221028, at \*3 (E.D. Pa. May, 5, 1998)). Because plaintiff failed to cooperate with the EEOC's investigation of her claim, the court finds that plaintiff failed to exhaust her administrative remedies.

B. Equitable Considerations

Plaintiff does not dispute that she failed to respond to the EEOC's requests for additional information. See 5/19/00 Tr. at 22-23. Rather, plaintiff argues that, under the circumstances, her failure to cooperate should be excused. The court recognizes that there may be equitable circumstances that would pardon plaintiff's failure to exhaust her administrative remedies because she did not cooperate with the EEOC's investigation of her charge. See Anjelino, 200 F.3d at 88. However, even accepting as true the circumstances asserted by plaintiff, i.e., that she was unaware of the EEOC's request for information because she had moved, the court finds that equitable considerations do not excuse her conduct.

It is undisputed that plaintiff's failure to cooperate and participate in the EEOC's investigation was of her own making. Under the EEOC's own regulations, it is the duty of a person bringing a charge to keep the EEOC apprised of any changes of address.<sup>6</sup> A reasonable corollary to this rule is that if a claimant chooses to retain a legal representative to speak for her, the claimant must likewise keep that representative informed as to where she can be reached. It cannot be the EEOC's duty to

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<sup>6</sup> The EEOC's regulations provide that "[t]he person claiming to be aggrieved has the responsibility to provide the Commission with notice of any change in address and with notice of any prolonged absence from that current address so that he or she can be located when necessary during the Commission's consideration of the charge." 29 C.F.R. § 1601.7(b).

track down "awol" claimants -- if so, given the EEOC's heavy workload, the EEOC would be unduly burdened.<sup>7</sup>

Finally, although plaintiff's counsel was unable to contact his client during that time, counsel never sought an extension of time from the EEOC to respond to the request for additional information while he determined plaintiff's whereabouts. Accordingly, there are no equitable grounds upon which plaintiff's conduct can be excused.

C. Plaintiff's Receipt of a Right-to-Sue Notice

Plaintiff next argues that the right-to-sue notice she received from the EEOC absolutely authorizes her to sue defendant in the federal courts even if she did not cooperate with the EEOC during its investigation of her charge. This argument is misplaced. The right-to-sue notice does not constitute a judgment on the part of the EEOC that a claimant is entitled to maintain a suit in the federal courts.<sup>8</sup> Rather, it is merely an administrative mechanism through which the EEOC closes its file and advises the claimant that relief, if any, must now be sought

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<sup>7</sup> The EEOC reports that in fiscal years 1998 and 1999, allegedly aggrieved employees submitted approximately 79,591 and 77,444 charges, respectively. See <http://www.eeoc.gov/stats/charges.html> (EEOC Enforcement Statistics and Litigation).

<sup>8</sup> Therefore, the court need not address defendant's contention at oral argument that the regulation authorizing the issuance of a right to sue notice when a claim is dismissed for failure to cooperate, 29 C.F.R. § 1601.28(b)(3), is invalid.

in another forum.<sup>9</sup> See, e.g., McLaughlin, 1999 WL 239408, at \*2 (rejecting plaintiffs' response that they were entitled to bring Title VII claim against defendants because they received a right-to-sue letter from EEOC); see generally Forehand v. Florida State

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<sup>9</sup> At least one other court in this district disagrees. In Melincoff v. East Norriton Physician Health Serv., No. CIV.A. 97-4554, 1998 WL 254971, at \*6 (E.D. Pa. Apr. 20, 1998), the court denied the defendant's motion to dismiss for failure to cooperate, finding that the EEOC, in its regulations 29 C.F.R. §§ 1601.18 and 1601.28, anticipated situations where plaintiffs would not cooperate and supported the plaintiff's argument that he had exhausted his remedies. According to that court, "it [would] seem[] contrary to the remedial purpose of ... Title VII to allow a checked box on [the plaintiff's] right to sue letter, notifying him that his file has been closed, to form the basis for dismissing plaintiff's claim for failure to exhaust administrative remedies where that same letter advised him that he had a right to sue in this Court"). In arriving at this conclusion, the court in Melincoff quoted EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 124 (1988), which stated that "Title VII was a remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process." 1998 WL 254971, at \*6. In Melincoff, however, as in the instant case, the plaintiffs were represented by counsel at the charge initiation stage.

Plaintiff further argues that the reasoning in Melincoff has been followed in two subsequent cases, Seybert v. West Chester Univ., 83 F. Supp.2d 547 (E.D. Pa. 2000), and Van Cleve v. Nordstrom, Inc., 64 F. Supp.2d 459 (E.D. Pa. 1999). Seybert, however, did not concern plaintiffs who had failed to cooperate with the EEOC but rather involved the issuance of right-to-sue notices prior to the 180 day exhaustion period. The court held that it had subject matter jurisdiction to hear a suit brought by employees even though the EEOC has issued early right-to-sue letters. 83 F. Supp.2d at 549-53. Moreover, the issuance of an early right-to-sue notice upon request arises only when the EEOC has determined that it is probable that it will be unable to complete its administrative processing within 180 days. See 29 C.F.R. § 1601.28(a)(2). In contrast, in the instant case, the plaintiff, by failing to cooperate, effectively made that determination for the EEOC. In addition, although the court in Van Cleve noted the existence of the Melincoff decision in a footnote, the court did not have to resolve the instant issue because the case before it could be decided on other grounds.

Hosp., 89 F.3d 1562, 1570 (11th Cir. 1996) (“[W]e readily conclude that there is no per se rule that receipt of a right-to-sue letter during pendency of the suit always satisfies the exhaustion requirement.”). Thus, plaintiff’s mere receipt of a right-to-sue notice does not establish administrative exhaustion.<sup>10</sup>

#### IV. CONCLUSION

The duty of an aggrieved employee to assist the EEOC in its investigation is crafted into both the language of Title VII and the EEOC’s own regulations. Plaintiff has failed to show, under any set of facts, that she cooperated with the EEOC in its investigation of her charge or that equitable considerations would excuse her failure to so cooperate. Accordingly, the court finds that plaintiff has failed to exhaust her administrative

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<sup>10</sup> Plaintiff contends that, at the very least, the court should remand her case to the EEOC for exhaustion. Plaintiff cites only Seybert v. West Chester University and Robinson v. Red Rose Communications, Inc., as authority for that request. In neither case, however, did the court remand the action to the EEOC. Rather, in Seybert, the court, in dicta, only stated that it “should be able to remand the case for further administrative processing” if it appeared that a case received little consideration by the EEOC. See 83 F. Supp.2d at 553. In Red Rose, finding that the issuance of a right to sue notice was premature, the court dismissed the plaintiff’s Title VII claim without prejudice to the plaintiff’s right to refile his charge with the EEOC and return to court once he had completed the administrative process. See 1998 WL 221028, at \*3. Thus, in the instant case, formal “remand” to the EEOC is not an option. Moreover, the court need not address at this time whether plaintiff may refile the instant claim with the EEOC, and whether, after exhaustion of administrative remedies, plaintiff could maintain an action in this court.

remedies and will therefore grant defendant's motion.

An appropriate order follows.

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: Defendant. :

ORDER

AND NOW, this 22nd day of June, 2000, upon consideration of defendant's motion to dismiss and plaintiff's response thereto, and after a hearing at which counsel for both parties participated, it is hereby **ORDERED** that defendant's motion (doc. # 8) is **GRANTED**. It is further **ORDERED** that the above-captioned action is **DISMISSED**, and the clerk shall mark this case **CLOSED**.

AND IT IS SO ORDERED.

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EDUARDO C. ROBRENO, J.