

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

ROSE THOMPSON,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	NO. 01-1004
	:	
MERCK & CO., INC., et al.,	:	
Defendants	:	

MEMORANDUM

STENGEL, J.

January 11, 2007

Following a two year break in activity, I granted the defendants' unopposed motion to dismiss this employment discrimination case without prejudice for failure to prosecute. Plaintiff Rose Thompson now brings a motion through her previous counsel¹ to reopen the case. For the following reasons, I will grant the plaintiff's motion in its entirety.

I. BACKGROUND

This case was brought as one of several discrimination suits against Merck,² and followed the original suit, Julius Webb, et al. v. Merck & Co., Inc., et al., No. 99-0413, filed in the Eastern District of Pennsylvania. Thompson filed the case as a class action,

¹ On May 24, 3006, I granted counsel's unopposed motion for leave to withdraw which cited repeated unsuccessful attempts to contact Thompson. (Document #19). Defendants' motion to dismiss followed shortly thereafter. (Document #22).

² On the date she filed suit, Thompson was employed by Merck-Medco Rx Services of Nevada, Inc., which was a wholly-owned subsidiary of defendant Merck-Medco Managed Care, LLC, a wholly-owned subsidiary of defendant Merck & Co., Inc. Defendants allege that Merck-Medco Managed Care is no longer a subsidiary of defendant Merck, and that Merck-Medco was not properly served in this case. See Def's Memorandum of Law in Support of its Response at 2.

individually and on behalf of similarly situated African-American workers of defendant Merck-Medco, claiming racial discrimination in employment.

On June 18, 2001, in response to the defendants' first motion to dismiss, the late Honorable Charles R. Weiner ordered the parties to conduct discovery on the issue of whether Thompson was an employee of Merck.³ Neither party initiated any such discovery. On December 30, 2002, Judge Weiner dismissed the case without prejudice. Nevertheless, the case was reopened a few months later when the defendants filed a motion to strike all class allegations which Judge Weiner granted.

On May 25, 2004, the parties entered into a Stipulation in the Webb case wherein the parties and the Court agreed that discovery and trial would take place on a priority basis in the cases of plaintiffs Shannon Feddiman-Simon, Anthony Green, and Roger Moore.⁴ According to Thompson, these cases were prioritized as "bellwether" actions which were expected to provide information and perhaps settlement values in related litigation, including Thompson's claims. Following the death of Judge Weiner, this case was reassigned to me.

In March 2006, plaintiff's counsel repeatedly attempted to contact Thompson to inquire whether she wanted to continue with the case and whether she wanted to request

³ On April 23, 2001, defendant Merck filed a motion to dismiss, claiming it was not a proper defendant in this case because it was not Thompson's employer.

⁴ I note that this stipulation did not include an agreement that the claims of the other plaintiffs would be abandoned or suspended pending the prioritized discovery and trial of these three plaintiffs. See Exhibit B of Pl's motion to reopen the case.

that it be transferred to the District of Nevada.⁵ Thompson did not respond which prompted plaintiff's counsel to file an unopposed motion for leave to withdraw which I granted.

Shortly thereafter, the defendants filed an unopposed motion to dismiss for failure to prosecute. Upon receipt of the Order granting that motion, Thompson contacted her former counsel and explained that she had been in Philadelphia taking care of her daughter who had been severely injured in a car accident. The Order dismissing Thompson's claims had been forwarded to her by an acquaintance who was living in Thompson's residence in Nevada during her absence. Thompson has asked to have the case reopened.

II. DISCUSSION

Thompson's motion cites no applicable rules, but as a motion to reopen an action, the motion must fall under either Rule 59 or Rule 60 of the Federal Rules of Civil Procedure.⁶ I will construe this motion as one for relief from judgment pursuant to Rule 60(b) because it was filed more than ten days after the entry of judgment, a requirement of Rule 59. District courts have a great deal of discretion to grant relief under Rule 60(b),

⁵ Thompson claims disparate treatment while working in a factory in Nevada. The factory was allegedly owned and operated by defendant Merck. She never worked for Merck within the Eastern District of Pennsylvania.

⁶ The motion and its memorandum of law concentrate on why the case should not be dismissed, rather than on why it should be reopened. As shown above, the case has already been dismissed.

which traditionally has been given a liberal interpretation. Tozer v. Charles A. Krause Milling Co., 189 F.2d 242, 245 (3d Cir. 1951) (granting relief under Rule 60(b) and noting that courts have uniformly held that Rule 60(b) must be given a liberal construction); United States v. Enigwe, 320 F. Supp. 2d 301, 306 (E.D. Pa. 2004) (Rule 60(b) motion to set aside judgment is to be construed liberally to do substantial justice). Deciding cases on their merits, wherever practicable, is favored. Hritz v. Woma Corp., 732 F.2d 1178, 1181 (3d Cir. 1984) (“we have repeatedly stated our preference that cases be disposed of on the merits whenever practicable”); Tozer, 189 F.2d at 245 (“[T]he interests of justice are best served by a trial on the merits; only after a careful study of all relevant considerations should courts refuse to open default judgments”).

Rule 60(b) provides that upon such terms as are just, the court may relieve a party or a party’s legal representative from a final judgment, Order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the satisfaction, release, or discharge of a judgment or inequity in the prospective application of the judgment; or (6) any other reason justifying relief from operation of the judgment. Here, only the first reason, i.e., excusable neglect, is conceivably applicable.⁷ Thompson’s failure to remain accessible to counsel during the

⁷ The sixth potential basis under Rule 60(b) is a catch-all provision, and grants federal courts authority to provide relief from a final judgment “upon such terms as are just,” so long as the motion for relief is made “within a reasonable time” and does not rely on the grounds for
(continued...)

pendency of her case was neglect. The issue then is whether that neglect can be excused.

In discussing the standard for excusable neglect, the Supreme Court held that the issue is “an equitable one,” and that a court should consider “all relevant circumstances surrounding the party’s omission.” Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 395 (1993). The relevant factors to consider include (1) the danger of prejudice to the non-moving party; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay, including consideration of whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith.⁸ Id.

1. **Danger of Prejudice to the Non-Moving Party**

The defendants insist that they “will be greatly prejudiced if [they are] forced to continue to spend money defending a baseless action.” See Def.’s Memorandum of Law in Support of its Response at 5. I disagree. First, as the defendants concede, neither side has conducted any discovery in this case, even in the face of a court Order dated June 18, 2001. Second, whether the action is “baseless” remains to be seen.

⁷(...continued)

relief provided for in clauses (b)(1) through (b)(5). Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 863 (1988). Rule 60(b)(6) can be used to vacate judgments “whenever such action is appropriate to accomplish justice,” but it should only be used in “extraordinary circumstances.” Id. at 864. Extraordinary circumstances do not exist here which would justify such relief.

⁸ Although Pioneer was a bankruptcy case, the Third Circuit held that Pioneer’s four factor analysis of the excusable neglect standard applies in a Rule 60(b) context. See George Harms Constr. Co. v. Chao, 371 F.3d 156, 163 (3d Cir. 2004).

Moreover, the Court of Appeals for the First Circuit held that reopening a case does not create sufficient prejudice to the non-movant to refuse relief from judgment, stating “[o]f course, it is always prejudicial for a party to have a case reopened after it has been closed advantageously by an opponent’s default. But we do not think that is the sense in which the term ‘prejudice’ is used in Pioneer.” Pratt v. Philbrook, 109 F.3d 18, 22 (1st Cir. 1997).

Thus, I find that the danger of prejudice to the defendants in reopening this case is minimal, especially when compared with the prejudice to the plaintiff should her claims be precluded.

2. Length of the Delay

I granted plaintiff’s counsel leave to withdraw on May 24, 2006. The defendants filed a motion to dismiss for failure to prosecute on June 7, 2006, which I granted on June 9, 2006. On June 28, 2006, the plaintiff filed the instant motion to reopen her case. Nineteen days passed between the date the case was dismissed and the date the motion to reopen the case was filed. Once Thompson became aware of the dismissal of her case, she contacted her attorneys and explained the reasons for not being in contact with them. Further, there is no potential impact on judicial proceedings caused by such an insignificant delay in requesting the reopening. Thus, this factor also weighs in favor of Thompson.

3. Reason for the Delay

As shown above, there was no real delay in Thompson's requesting the reopening of her case. She had traveled from Nevada to Pennsylvania to care for her injured daughter, a situation which certainly predominated her life. Under these circumstances, it is understandable that a litigant would neglect to think of informing counsel of her whereabouts in a case which had already been languishing far too long. When Thompson became aware of the dismissal, she acted immediately and contacted her counsel.

4. Good Faith

A party acts in good faith where it acts with "reasonable haste to investigate the problem and to take available steps toward remedy." Welch & Forbes, Inc. v. Cendant Corp. (In re Cendant Corp. Prides Litig.), 235 F.3d 176, 184 (3d Cir. 2000). Thompson acted in good faith when she immediately contacted counsel upon receipt of the Order dismissing her case. Counsel, in turn, promptly filed this motion to reopen. Accordingly, this final factor also weighs in favor of the case's reopening.

Having considered all the Pioneer factors and all relevant circumstances, I find that the plaintiff's neglect was excusable. There is not sufficient prejudice to the defendants to prevent the reopening of the case, whereas denying the motion would preclude the plaintiff from pursuing her claims. There was virtually no delay between the time that Thompson learned of the dismissal and the time she contacted counsel to request a reopening. Thus, there has been little effect on the judicial proceedings. The plaintiff acted in good faith once she received a copy of the Order dismissing the case.

Therefore, having liberally construed Thompson's motion to set aside judgment and in keeping with our Circuit's preference to decide cases on their merits wherever practicable, I will reopen Thompson's case and allow her claims to proceed.

An appropriate Order follows.

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ORDER

STENGEL, J.

AND NOW, this 11th day of January 2007, upon consideration of the plaintiff's motion to reopen (Document #24), and the defendants' response thereto (Document #25), it is hereby **ORDERED** that the motion is **GRANTED**.

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.

