

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

CAROLYN A. FLINT : CIVIL ACTION
 :
 v. :
 :
 CITY OF PHILADELPHIA : NO. 98-95

MEMORANDUM AND ORDER

Norma L. Shapiro, J.

May 6, 1998

Carolyn Flint ("Flint"), filing this Title VII action, alleged age, race and gender discrimination, and subsequent retaliation. The City of Philadelphia ("the City") filed a motion to dismiss for failure to file a charge with the Equal Employment Opportunity Commission ("EEOC") within the deadline set by 42 U.S.C. § 2000e-5 on the discrimination claim, and for lack of any adverse employment action in the retaliation claim. Flint failed to file a claim within the required period, but the equitable tolling doctrine may extend the deadline; the discrimination claim will not be dismissed. Flint has failed to allege any adverse employment action to support a retaliation claim, and the court will dismiss the retaliation claim.

FACTS

Flint, a City employee, applied for a position in the City Finance Department. On or about October 31, 1991, the City informed Flint that she was not eligible and would not be considered for the position. Flint protested this decision by a written grievance with her union. The written grievance was based on the union's collective bargaining agreement. Flint's

grievance terminated in a ruling in her favor which the City has appealed.

In her complaint, Flint alleges she did not learn that her removal from the eligibility list had been based on illegal discrimination until November 4, 1994. Flint filed a charge of discrimination with the EEOC on July 25, 1995. Flint filed this complaint on January 8, 1998, and the City filed a motion to dismiss on February 2, 1998.

DISCUSSION

A court should grant a motion to dismiss for failure to state a claim upon which relief may be granted only if "it appears to a certainty that no relief could be granted under any set of facts which could be proved." Schrob v. Catterson, 948 F.2d 1402, 1408 (3d Cir. 1991). In deciding a motion to dismiss under Fed. R. Civ. P. 12(b)(6), "all allegations in the pleadings must be accepted as true and the plaintiff ... must be given the benefit of every favorable inference that can be drawn from those allegations." Id. at 1405 (citations omitted). The statute of limitations can form the basis of a Rule 12(b)(6) motion to dismiss, where the complaint facially shows noncompliance with the limitations period and the affirmative defense clearly appears on the face of the pleading. See Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380 (3d Cir. 1994); Trevino v. Union Pacific Railroad Co., 916 F.2d 1230 (7th Cir. 1990); 5A Wright and Miller, Federal Practice and Procedure: Civil 2d, § 1357.

A motion to dismiss relying on matters outside the pleadings may be treated as a motion for summary judgment under Rule 56, provided all parties have had an opportunity to present pertinent material. Fed. R. Civ. P. 12(b). See Carter v. Stanton, 405 U.S. 669, 671 (1972) (per curiam) (where matters outside the pleadings are presented and not excluded by the court, motion to dismiss should be treated as one for summary judgment); Young v. Biggers, 938 F.2d 565, 568 (5th Cir. 1991) (trial court properly converted motion to dismiss to one for summary judgment where matters outside the pleadings were considered and plaintiff was afforded the opportunity to present evidence). Both parties have presented evidence outside the pleadings. The defendant submitted documents related to the posting, Flint's responses, the arbitrator's decision, and all of the government's appeals. In her response, Flint submitted an affidavit, as well as two letters to the EEOC.

Prior to converting a motion to dismiss into a motion for summary judgment, the district court must provide adequate notice to the parties. Rose v. Bartle, 871 F.2d 331, 342 (3d Cir. 1989) ("We have held that it is reversible error for a district court to convert a motion under Rule 12(b)(6) ... into a motion for summary judgment unless the court provides notice of its intention to convert and allows an opportunity to submit materials admissible."). The court has not notified the parties that the motion will be converted to a motion for summary judgment, nor given them opportunity to submit additional

materials. Rather than converting the motion to dismiss to a motion for summary judgment, the court will exclude the evidence outside the pleadings, without prejudice to either party making a motion for summary judgment at the close of discovery. However, in ruling on the motion, the court will consider matters of public record. Oshiver, 38 F.3d at 1384, n.2.

I. Statute of limitations

Title VII allows Flint to bring an action within 180 days after the alleged act of discrimination. 42 U.S.C. § 2000e-5(e). However, if she initially filed a complaint with a state or local agency with the authority to adjudicate her claim, the deadline for filing a charge of employment discrimination with the EEOC is extended to 300 days. Id. Although the complaint contains no such allegation, it is possible that she filed a complaint with the Pennsylvania Human Relations Commission, the relevant state agency. Drawing the reasonable inference that she did so, she had 300 days after the alleged act of discrimination in which to bring a charge with the EEOC.

II. Discovery Rule

Generally the statute of limitations begins to run when the plaintiff's cause of action accrues. There are two related doctrines that might extend the deadlines for Flint to file a charge of discrimination: the "discovery rule," and the "equitable tolling doctrine." See, generally, Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380 (3d Cir. 1994). The discovery rule delays accrual of the statute of limitations

period until the plaintiff discovers she has been injured. Id. at 1385. The equitable tolling doctrine stops the statute of limitations from running where the accrual date has passed; the statute of limitations is tolled in light of equitable considerations even though the plaintiff discovered she was injured. Id. at 1390.

Under the discovery rule, Flint did not have to discover that the injury was based on discrimination, but only that she was "aware of the existence of and source of an injury." Id. at 1386. Her claim accrued "upon awareness of actual injury, not upon awareness that th[e] injury constitute[d] a legal wrong." Id.

According to the complaint, Flint discovered the injury "[o]n or about October 31, 1991," (Complaint, ¶ 8), when she was informed she had been found ineligible for the position she sought. The statute of limitations began running at that point. She did not file the charge of discrimination with the EEOC until July 25, 1995, several years after the deadline under 42 U.S.C. § 2000e-5(e). Her allegations of discrimination for removal from the eligibility list are time-barred unless the equitable tolling doctrine applies.

II. Equitable Tolling

The equitable tolling doctrine provides that it "may be appropriate [to toll the limitations period:] (1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) where the plaintiff in some

extraordinary way has been prevented from asserting his or her rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum." New Castle County v. Halliburton Nus Corp., 111 F.3d 1116, 1125-26 (3d Cir. 1997) (quoting Oshiver, 38 F.3d at 1387). The pleadings contain no allegation or inference that Flint in some extraordinary way was prevented from asserting her rights, or mistakenly asserted her rights in the wrong forum.

Flint's non-compliance with the statutory limitations period is excusable only if "(1) the defendant actively misled the plaintiff respecting the reason for the [adverse employment action], and (2) this deception caused the plaintiff's non-compliance with the limitations provision." Oshiver, 38 F.3d at 1389. In explaining this basis for equitable tolling, the Court of Appeals has stated:

"where the plaintiff has been actively misled regarding the reason for [the adverse employment action], the equitable tolling doctrine provides the plaintiff with the full statutory limitations period, starting from the date the facts supporting the plaintiff's cause of action either become apparent to the plaintiff or should have become apparent to a person in the plaintiff's position with a reasonably prudent regard for his or her rights."

Id. at 1387.

To benefit from the equitable tolling doctrine, Flint must establish that she could not have discovered the essential factual information bearing on her claim by the exercise of reasonable diligence. New Castle County, 111 F.3d at 1125; Oshiver, 38 F.3d at 1390; Cada v. Baxter Healthcare Corp., 920

F.2d 446, 452 (7th Cir. 1990), cert. denied, 501 U.S. 1261 (1991). "The plaintiff who fails to exercise this reasonable diligence . . . lose[s] the benefit of" the equitable tolling doctrine. Oshiver, 38 F.3d at 1390.

In Oshiver, the plaintiff filed a charge of discrimination with the EEOC 440 days after she was terminated from a law firm with the explanation that the firm "did not have sufficient work to sustain her position." Oshiver, 38 F.3d at 1384. A year later, she learned that the firm hired a male attorney "shortly after her dismissal, . . . to take over her duties." Id. The Court of Appeals found that: there were issues of fact whether the plaintiff had been misled when she was told she was terminated because of lack of work; whether she was aware that she was replaced by a male employee, a "critical fact that would have alerted a reasonable person to the alleged unlawful discrimination;" and whether a person in her position with a reasonably prudent regard for her rights would have learned of the allegedly discriminatory act. Id. at 1392. The allegations, giving Oshiver the benefit of all reasonable inferences, were sufficient to raise the possibility of equitable tolling, and the motion to dismiss based on the statute of limitations was denied.

The facts in this action closely resemble those in Oshiver, and the doctrine of equitable estoppel may apply. Flint alleges that the City provided a non-discriminatory reason for her ineligibility, i.e., that she did not meet the qualifications for the position, and that she did not learn of the Finance

Department's illegal discrimination against her until November, 1994, when she learned who was actually hired. Her allegations, with all reasonable inferences therefrom, essentially charge: 1) the City actively misled her regarding the reasons for her removal from the eligibility list; 2) this deception caused her non-compliance with the limitations period; and 3) the critical facts that would have alerted a reasonable person to the alleged unlawful conduct only became known to Flint on November 4, 1994. Flint's allegations, and all reasonable inferences that can be drawn therefrom, are sufficient to invoke equitable tolling.

The factual questions remaining as to the applicability of the equitable tolling doctrine are: 1) whether the City misled Flint regarding the reason she was removed from the eligibility list, and for how long; 2) whether she was aware that male employees were hired in her place, and when; and 3) whether a person with a reasonably prudent regard for their rights would have been misled, and for how long.

The effect of the arbitration in this cause of action must be considered at some time as well. Plaintiff's grievance has been sustained by the arbitrator and the Court of Common Pleas. An appeal of the award is pending before the Commonwealth Court. If Flint prevails, the result in that proceeding will affect the claims to be determined by this court.

IV. Retaliation

Flint claims that the City retaliated against her for filing a discrimination claim by appealing the arbitrator's favorable

decision on her union contract claims to the Court of Common Pleas, and then to the Commonwealth Court.

To sustain a claim of discriminatory retaliation under Title VII, Flint must allege that: 1) she engaged in activity protected under Title VII; 2) her employer took an adverse employment action against her; and 3) there was a causal connection between her participation in the protected activity and the adverse employment action. Valentin v. Crozer-Chester Medical Center, 986 F. Supp. 292, 302 (E.D. Pa. 1997). Flint's filing the charge of discrimination with the EEOC meets the first requirement that she engaged in protected activity.

However, Flint has not alleged that the employer took any adverse employment action against her. An "adverse employment action." must be serious and tangible enough to affect Flint's terms and conditions of employment. Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997). "Retaliatory conduct other than discharge or refusal to rehire is thus proscribed by Title VII only if it alters the employee's 'compensation, terms, conditions, or privileges of employment,' deprives him or her of 'employment opportunities,' or 'adversely affect[s] his [or her] status as an employee.'" Id. (citing Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996); McDonnell v. Cisneros, 84 F.3d 256, 258 (7th Cir. 1996)).

The denial of her application for promotion to the Finance Department position was an adverse employment decision if she were eligible for the position, but the City's decision to appeal

the arbitrator's decision affected Flint's employment only in an indirect way. The complaint alleges that the City chose to appeal the arbitration award "for the purposes of delay and retaliation." (Complaint, ¶ 12). Taking an appeal from the arbitration award was the City's legal right. Its choice to appeal the arbitrator's decision on union contract claims independent from Flint's allegations of discrimination does not constitute an adverse employment action in reprisal for her EEOC claims. Even if the decision had been by a district court on Flint's discrimination claim, the City's recourse to its appellate rights would not provide grounds for a retaliation claim; appealing a legal decision is not an adverse employment action for Title VII liability. Cf. Robinson, 120 F.3d at 1300 (finding that unsubstantiated oral reprimands and unnecessary derogatory comments do not constitute an adverse employment action).

CONCLUSION

It is possible the equitable tolling doctrine applies, and the court will not dismiss Flint's discrimination claim. An appeal from a legal decision is not an adverse employment action, so the retaliation claim will be dismissed.

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ORDER

AND NOW this 6th day of May, 1998, upon consideration of defendant's motion to dismiss, and plaintiff's response in opposition thereto, it is **ORDERED** that:

Defendant's motion to dismiss is **GRANTED** in part:

1. Plaintiff's claim for discrimination will not be dismissed. Defendant shall answer plaintiff's discrimination claim within ten days of the date of this order.

2. Plaintiff's claim for retaliation is dismissed.

Norma L. Shapiro, J