IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JANE C. VOLLMERT,

Plaintiff,

v.

STATE OF WISCONSIN
DEPARTMENT OF TRANSPORTATION,

Defendant.

OPINION AND ORDER

97-C-547-C

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This is a civil action for money damages and other relief brought pursuant to the Americans with Disabilities Act, 42 U.S.C. §§ 12101 - 12213. Plaintiff Jane C. Vollmert was employed by defendant State of Wisconsin Department of Transportation in the special plates unit until she was transferred out of the unit to avoid termination. She filed this suit, claiming that defendant failed to accommodate her disabilities and that supervisors in the special plates unit subjected her to harassment because of her disabilities.

In an order entered on September 17, 1998, I granted defendant's motion for summary judgment on both of plaintiff's claims under the ADA. Specifically, I held that plaintiff could not meet her burden of establishing that she is a "qualified individual" under the ADA because

there was no evidence from which a jury could conclude that plaintiff was capable of learning the new computer system had her disabilities been accommodated with a specialized training program. I rejected the proposed testimony of plaintiff's expert that plaintiff would have learned the new system had she been given such training, deciding that the expert failed to provide an explanation for his conclusion. In addition, I held that no reasonable jury could conclude that plaintiff was subjected to a hostile work environment or harassment.

On November 24, 1999, the Court of Appeals for the Seventh Circuit reversed the decision that defendant was entitled to summary judgment on plaintiff's failure to accommodate claim, holding that plaintiff's expert report was sufficient to raise a genuine issue of fact regarding plaintiff's ability to perform the job with accommodations. See Vollmert v. Wisconsin Dept. of Transportation, 197 F.3d 293 (7th Cir. 1999).

Presently before the court is plaintiff's motion for leave to file an amended complaint pursuant to Fed. R. Civ. P. 15(a) and defendant's motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). Subject matter jurisdiction is present. See 28 U.S.C. § 1331. Plaintiff's motion for leave to amend her complaint will be granted as to her claim against defendant State of Wisconsin Department of Transportation under the Rehabilitation Act and will be denied as to her claim against defendant state and proposed defendants Kevin H. Huggins, Tara Ayres, Martha Gertsch and Barbara Wehrle under 42 U.S.C. § 1983.

Defendant's motion for judgment on the pleadings will be granted as to plaintiff's ADA claim.

OPINION

I. MOTION FOR JUDGMENT ON THE PLEADINGS

Defendant contends that plaintiff's claim in her original complaint under the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 - 12213 is barred by the Seventh Circuit's decisions in Erickson v. Board of Governors of State Colleges and Universities, 207 F.3d 945 (7th Cir. 2000) and Stevens v. Illinois Dept. of Transportation, 210 F.3d 732 (7th Cir. 2000). Because plaintiff has brought the same claim in her proposed amended complaint, I will assume that defendant renews its motion as to plaintiff's ADA claim in her amended complaint. Plaintiff does not dispute that her ADA claim against defendant State of Wisconsin Department of Transportation is barred by the Seventh Circuit's recent decisions.

With two exceptions, the Eleventh Amendment prohibits suits against the state by citizens of another state or by the state's own citizens for monetary damages or equitable relief. See Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999). First, a state may waive the protections of the amendment and consent to suit in federal court. See Clark v. Barnard, 108 U.S. 436, 447-448 (1883); see also Florida Prepaid Postsecondary Educ., 527 U.S. 627 (repudiating the doctrine of constructive waiver). Second,

Congress may use its enforcement powers under the Fourteenth Amendment to abrogate the state's Eleventh Amendment immunity through an unequivocal expression of its intent to do so and pursuant to a valid exercise of power. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 55 (1996); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

In Erickson, 207 F.3d at 952, the Court of Appeals for the Seventh Circuit held that because the ADA does not enforce the Fourteenth Amendment, "the Eleventh Amendment and associated principles of sovereign immunity block private litigation against states in federal court" under the act. In Stevens, 210 F.3d at 741, the court reiterated that "[s]tates are entitled to Eleventh Amendment immunity for suits brought by individuals under the ADA" in federal court. In plaintiff's original and proposed amended complaints, she contends that defendant State of Wisconsin Department of Transportation is liable for violating her rights protected by the ADA. Now that the Court of Appeals for the Seventh Circuit has ruled as it did in Erickson and Stevens, it is evident plaintiff cannot recover from defendant in this court for violations of the ADA. Defendant's motion for judgment on the pleadings as to plaintiff's ADA claim will be granted.

II. MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

Fed. R. Civ. P. 15(a) states that "a party may amend [its] pleading only by leave of court" and that "leave shall be freely given when justice so requires." Whether to grant leave to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court. See Sanders v. Venture Stores, Inc., 56 F.3d 771, 773 (7th Cir. 1995). The Court of Appeals for the Seventh Circuit has enumerated four conditions that justify denying a motion to amend: undue delay; dilatory motive on the part of the movant; repeated failure to cure previous deficiencies; and futility of the amendment. See Cognitest Corp. v. Riverside Publishing Co., 107 F.3d 493, 499 (7th Cir. 1997). In addition, a motion to amend should not be granted if it will unduly prejudice the opposing party. See Samuels v. Wilder, 871 F.2d 1346, 1351 (7th Cir. 1989).

A. Delay

Defendant argues that plaintiff's motion should be denied because of her delay in filing the amended complaint. In support of its argument, defendant points out that plaintiff's original complaint was filed in August 1997, and her motion to amend was not filed until May 15, 2000. Defendant argues that plaintiff has been on notice since the Supreme Court's decision in Seminole Tribe v. Florida, 517 U.S. 44 (1996), that it was possible that individual ADA claims against the state would be barred. Plaintiff contends that she did not delay

unnecessarily in bringing her motion because she had no reason to bring a claim under the Rehabilitation Act until the Seventh Circuit held that the Eleventh Amendment barred claims against states under the ADA. Plaintiff points out that despite defendant's contention that she should have been on notice that states may be immune from ADA claims, defendant failed to raise sovereign immunity as a defense at any point in this litigation until now; in fact, defendant admitted in its answer that, "the immunity of state agencies has been expressly abrogated by the ADA." Plaintiff need not have predicted the Seventh Circuit's decision to bar suits brought by an individual against a state under the ADA. The month and a half between plaintiff's filing of an amended complaint and the Seventh Circuit's decision in Erickson does not constitute unreasonable delay.

B. Prejudice

Defendant argues that plaintiff's motion for leave to amend should be denied because it will unduly prejudice them insofar as it has litigated plaintiff's ADA claim through the court of appeals and it will be forced to litigate this case for a second time. Plaintiff contends that amending her complaint will not unduly prejudice defendant for two reasons: the factual allegations in the amended complaint are the same as those in the original complaint and the substantive elements of her new claims are similar to those in her original complaint.

Allowing plaintiff to amend her complaint will cause defendant minimal prejudice. Plaintiff's proposed amended complaint does not significantly alter the scope of this lawsuit. Rather, she is realleging the same claims in a way that is not barred by the doctrine of sovereign immunity. The Rehabilitation Act provides the mechanism for doing so. "The elements of [claims under the ADA and the Rehabilitation Act] are substantially similar; the Rehabilitation Act is distinguishable only because it is limited to programs receiving federal financial assistance." Silk v. City of Chicago, 194 F.3d 788, 798 n.6 (7th Cir. 1999). The real prejudice would result from not allowing plaintiff to pursue her claims against defendant if she has a potentially viable cause of action. In emphasizing the broad policy of allowing amendments under Rule 15(a), the Supreme Court explained that "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, [s]he ought to be afforded an opportunity to test [her] claim on the merits." See Foman v. Davis, 371 U.S. 178, 182 (1962). Rather than defending against plaintiff's ADA claim following the court of appeals' remand of this case, defendant will now defend against a similar claim under the Rehabilitation Act.

Defendant contends that it would be especially prejudicial to allow plaintiff to amend her complaint to add defendants Huggins, Ayres, Gertsch and Wehrle. Defendant is correct. Plaintiff has failed to present any reason to justify the fundamental unfairness to the proposed defendants of naming them as defendants at this late point in litigation. I assume she named

them in the hopes of proceeding under § 1983 in the event she is prevented from going forward under the Rehabilitation Act. Because individuals do not seem to fit within the Rehabilitation Act's provision for suits against "any program or activity receiving Federal financial assistance", 29 U.S.C. § 794, it is unlikely that plaintiff could recover from individual defendants under § 1983. See, e.g., Blumenthal v. Murray, 995 F. Supp. 831, 836 (N.D. Ill. 1998) ("The Rehabilitation Act, like Title VII, applies only to employers and not individuals"); Crowder v. True, No. 95-C-4704, 1998 WL 42318, at *5 (N.D. Ill Jan. 29, 1998) (stating that "it is unlikely that an individual federal official could be . . . subject to § 504"); Simenson v. Hoffman, No. 95-C-1401, 1995 WL 631804, *5 (N.D. Ill Oct. 24, 1995) (stating that "individual liability is also prohibited under the Rehabilitation Act."). See also Williams v. Banning, 72 F.3d 552 (7th Cir. 1995) (holding individual defendant is not liable as plaintiff's employer under Title VII); EEOC v. AIC Security Investigations, Ltd., 55 F.3d 1276, 1279-82 (7th Cir. 1995) (rejecting individual liability under ADA). As a result, they should not be put through the time and expense of defending a lawsuit that was originally filed three years ago. Plaintiff's motion for leave to file an amended complaint will be denied as to proposed defendants Huggins, Ayres, Gertsch and Wehrle.

C. Futility

1. Rehabilitation Act claim against defendant State of Wisconsin Department of Transportation

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), provides that "[n]o otherwise qualified individual with a disability in the United States, as defined in section [705(20)] of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." Initially, the Rehabilitation Act did not provide an enforcement mechanism, but Congress added § 505(a)(2) as an enforcement provision in 1978, see 29 U.S.C. § 794a(a)(2), which the Supreme Court has interpreted as granting an implied private cause of action. See Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 72-73 (1992).

In plaintiff's motion for leave to file an amended complaint, she seeks to add a claim against defendant State of Wisconsin Department of Transportation under § 504 of the Vocational Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794. Plaintiff contends that defendant may be liable under the Rehabilitation Act because of its acceptance of federal funds. In Stanley v. Litscher, 213 F.3d 340, 344 (7th Cir. 2000), the court of appeals held

that suits against a state under § 504 of the Rehabilitation Act are not barred by the doctrine of sovereign immunity when the state agency defendant has accepted federal funds. ("We therefore agree with the fourth, ninth and eleventh circuits that the Rehabilitation Act is enforceable in federal court against recipients of federal largess.") Because plaintiff's claim under the Rehabilitation Act is not barred by sovereign immunity, her motion for leave to amend her complaint to add a claim under the Rehabilitation Act against defendant State of Wisconsin Department of Transportation will be granted.

2. § 1983 claims against defendant State of Wisconsin Department of Transportation

In addition to bringing a claim under § 504 of the Rehabilitation Act, plaintiff is attempting to bring a claim under § 1983 to enforce § 504 of the Rehabilitation Act of 1973. "[I]t is well established that neither a state nor a state agency [] is a 'person' for purposes of § 1983." Ryan v. Illinois Dept. of Children and Family Services, 185 F.3d 751, 758 (7th Cir. 1999) (citing Will v. Michigan Dept. of State Police, 491 U.S. 58, 64, 71 (1989) (holding that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983")). See also Arizonans for Official English v. Arizona, 520 U.S. 43, 69 n.24 (1997) (noting that "[s]tate officers are subject to § 1983 liability for damages in their personal capacities. . . ."). As a state agency, defendant State of Wisconsin Department of Transportation cannot be

liable for damages under § 1983.

Furthermore, because the Eleventh Amendment's prohibitions against suits against a state includes suits against state agencies, see Ford Motor Co. v. Dep't of Treasury of Indiana, 323 U.S. 459, 462-63 (1945); Gleason v. Board of Education of City of Chicago, 792 F.2d 76, 79 (7th Cir. 1986) (stating "the eleventh amendment 'prohibits federal courts from entertaining suits by private parties against States and their agencies'") (quoting Alabama v. Pugh, 438 U.S. 781, 782 (1978)), plaintiff's claim under § 1983 against defendant State of Wisconsin Department of Transportation is barred by the Eleventh Amendment. Plaintiff will be denied leave to amend her complaint to add a claim under § 1983.

ORDER

IT IS ORDERED that

1. Plaintiff Jane Vollmert's motion for leave to file an amended complaint is GRANTED with respect to the claims raised in her amended complaint under the Rehabilitation Act against defendant State of Wisconsin Department of Transportation.

2. The motion is DENIED with respect to plaintiff's claims under § 1983 against defendant State of Wisconsin Department of Transportation and proposed defendants Kevin H. Huggins, Tara Ayres, Martha Gertsch and Barbara Wehrle.

3. Defendant State of Wisconsin Department of Transportation's motion for judgment on the pleadings as to plaintiff's claims under the Americans with Disabilities Act is GRANTED.

4. The amendment shall be deemed served and filed as of the date of this order.

5. A scheduling conference will be held by telephone on Friday, August 24, 2000 at 8:30 a.m. Mr. A. Steven Porter is to initiate the conference call.

Entered this 14th day of August, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge