

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MARGE JARRELLS,

Plaintiff,

v.

SELECT PUBLISHING, INC.

Defendant.

OPINION AND ORDER

00-C-0433-C

This is a civil action in which pro se plaintiff Marge Jarrells alleges that she was not hired by defendant Select Publishing, Inc. because of her age and race. Plaintiff seeks back pay and damages under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C §2000e and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34.

Presently before this court is defendant's motion to dismiss plaintiff's amended complaint on the grounds that plaintiff failed to serve process within 30 days in a manner prescribed by Wis. Stat. § 801.11(5) and failed to allege either that she received a right to sue letter from the Equal Employment Opportunity Commission for its Title VII claim or that she had filed an age discrimination claim with the EEOC within 60 days prior to filing this federal lawsuit. Because I find that defendant is correct on all grounds, defendant's

motion will be granted and plaintiff's amended complaint will be dismissed with prejudice.

PROCEDURAL BACKGROUND

On September 15, 2000, pro se plaintiff Marge Jarrells filed a complaint in this court, alleging that Select Publishing, Inc. did not hire her as a telemarketer because of her age and race. Defendant moved to dismiss plaintiff's complaint on the several grounds, including plaintiff's failure to serve defendant properly, plaintiff's failure to allege that she had received a right to sue letter from the EEOC as required by 42 U.S.C. § 2000e-5(f)(1) and the fact that the complaint failed to state a claim upon which relief may be granted.

On December 18, 2000, this court entered an order instructing plaintiff how to obtain proper service of process under Fed. R. Civ. P. 4(h) when a waiver of service has not been obtained and filed. The order also outlined service of process requirements under Wis. Stat. § 801.11(5).

On May 4, 2001, this court granted defendant's motion and dismissed plaintiff's complaint without prejudice. The May 4 order allowed plaintiff, until May 21, 2001, in which to file an amended complaint alleging, among other things, that she had received a right to sue letter from the EEOC on her Title VII claim (which she could show by attaching the letter to the complaint) or that she had filed a charge of age discrimination with the EEOC 60 days before filing this suit. In addition, plaintiff was instructed that she would

have 30 days from the date of filing her amended complaint in which to serve defendant in compliance with the requirements of Wis. Stat § 801.11(5). Because there was a question whether adequate service of process had occurred, the order stated that “plaintiff is being given the opportunity to file an amended complaint, plaintiff is instructed to serve the amended complaint and summons on defendant a second time, insuring that she will be in compliance with the requirements of Wis. Stat § 801.11(5).” The order contained an excerpt of Wis. Stat. § 801.11(5).

On May 21, 2001, plaintiff filed documents (labeled “amended complaint”) and attached copies of two letters she had received from the EEOC. On May 24, 2001, this court instructed plaintiff that these “documents cannot stand on their own as plaintiff’s amended complaint because they were not in the form of pleadings required under Fed. R. Civ. P. 10.” The court pointed to a number of procedural deficiencies in plaintiff’s submission. For example, plaintiff failed to include a caption, request relief or make allegations of fact in numbered paragraphs. On the basis of these deficiencies, the court extended the deadline for filing an amended complaint to June 8, 2001. The order stated that “[plaintiff’s] amended complaint must be a document that will completely replace her original complaint.” In addition, plaintiff’s submission (her supposed amended complaint) included a “cc” notation indicating that plaintiff had merely sent a copy by regular mail to defendant. Because it was unclear whether plaintiff understood that simply mailing

defendant a copy of her submission would not constitute proper service under Wis. Stat. § 801.11(5), plaintiff was reminded that if she were to file a proper amended complaint, she would have 30 days from the date of filing to serve defendant in the manner prescribed in Wis. Stat. § 801.11(5). On June 8, 2001, plaintiff filed her amended complaint.

OPINION

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). A motion to dismiss will be granted only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" of the complaint. Cook v. Winfrey, 141 F.3d 322, 327 (7th Cir. 1998) (citing Hishon v. King & Spalding, 467 U.S. 69, 73, (1984)); Gossmeyer v. McDonald, 128 F.3d 481, 489 (7th Cir. 1997). On a motion to dismiss, the moving party must show "beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief." GATX Leasing Corp. v. National Union Fire Ins. Co., 64 F.3d 1112, 1114 (7th Cir. 1995) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). The court will accept plaintiff's factual allegations as true, drawing all reasonable inferences in plaintiff's favor. See Harrell v. Cook, 169 F.3d 428, 431 (7th Cir. 1999).

Defendant alleges in its motion to dismiss plaintiff's amended complaint that (1) it never received service of process as required under Wis. Stat. § 801.11(5) and (2) the

amended complaint fails to state a claim upon which relief can be granted because it fails to allege the existence of an EEOC right to sue letter or the filing of an age discrimination claim within 60 days prior to the filing of this lawsuit. Instead of addressing defendant's arguments in her brief in opposition to the motion to dismiss, plaintiff responds by discussing the merits of her case and wholly ignoring the alleged procedural defects. (There are other procedural deficiencies with plaintiff's amended complaint, but I will limit discussion to only those defects alleged by defendant in its motion to dismiss.) Although plaintiff does not address the issue of service in her brief in opposition, she attaches two delivery receipts to her brief: a U.S. Postal Service certified mail receipt showing delivery on June 25, 2001; and a receipt indicating hand delivery of plaintiff's summons and amended complaint to Rebecca Long, defendant's receptionist, on July 25, 2001.

Wis. Stat. § 801.11(5) outlines the proper manner in which to serve process to a domestic corporation. It provides that service may be made:

(a) By personally serving the summons upon an officer, director or managing agent of the corporation or limited liability company either within or without this state. In lieu of delivering the copy of the summons to the officer specified, the copy may be left in the office of such officer, director or managing agent with the person who is apparently in charge of the office.

(b) If with reasonable diligence the defendant cannot be served under par. (a), then the summons may be served upon an officer, director or managing agent of the corporation or limited liability company by publication and mailing as provided in sub. (1).

(c) By serving the summons in a manner specified by any other statute upon the defendant or upon an agent authorized by appointment or by law to accept service of the summons for the defendant.

Under Wis. Stat. § 801.11(5) and by previous order of this court, because plaintiff filed her amended complaint on June 8, 2001, she was required to personally serve process within 30 days, or no later than July 9, 2001. The July 25, 2001, hand delivery of the amended complaint did not comply because it occurred after the 30 days had expired. Although the U.S. Postal Service delivery on June 25, 2001, came within the 30-day time limit, it is deficient because it was mailed and not personally served. On May 24, 2001, this court instructed plaintiff explicitly that mailing the summons and amended complaint would not constitute proper service of process under Wisconsin law. Specifically, the order stated that if plaintiff “believes that mailing a copy of her amended complaint to the defendant constitutes proper service . . . she is mistaken.” Order entered May 24, 2001, dkt. #21, at 2-3. Furthermore, “when a statute prescribes how service is to be made, compliance with the statute is required for personal jurisdiction even where the defendant has actual notice of the summons and complaint.” Horrigan v. State Farm Insurance Co., 106 Wis. 2d 675, 681, 317 N.W.2d 474, 477 (1982). Therefore, the fact that defendant received the amended complaint by mail within the 30-day time frame does not satisfy service of process under Wisconsin law.

Defendant also rests its motion to dismiss on the fact that plaintiff's amended complaint fails to state a claim upon which relief can be granted. Defendant points out, and rightly so, that plaintiff does not allege that she received an EEOC right to sue letter on her Title VII claim (or attach a right to sue letter) or that she filed a charge of age discrimination with the EEOC 60 days before filing this suit. Before suing in federal court, a plaintiff alleging a Title VII or Age Discrimination in Employment Act violation must file a claim with the EEOC. See 42 U.S.C. § 2000e-5(f)(1) and 29 U.S.C. § 626(d). The fact that plaintiff included copies of EEOC letters in earlier correspondence to the court does not meet the liberal requirements of a well-pleaded complaint. See Fed. R. Civ. P. 8(a)(2) (pleadings "shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief"). In fact, the order of May 24, 2001, could not have been more clear; it stated that plaintiff had "two weeks in which to file an amended complaint in which she attaches a right to sue letter if she has one or includes allegations that she filed a charge of discrimination with the EEOC sixty days before filing her ADEA claim in federal court."

Plaintiff was warned by this court on numerous occasions that she had 30 days from the date of filing her amended complaint in which to serve process on defendant in a manner prescribed by Wis. Stat. § 801.11(5). In addition, plaintiff was told repeatedly that her amended complaint would have to contain all necessary allegations, including those pertaining to the EEOC filing requirements. Because plaintiff failed to serve process properly

pursuant to Wis. Stat. § 801.11(5) and failed to state a claim upon which relief can be granted by not alleging that she received a right to sue letter from the EEOC on her Title VII claim or that she filed a charge of age discrimination with the EEOC 60 days before filing this suit, defendant's motion to dismiss will be granted.

ORDER

IT IS ORDERED that the motion of defendant Select Publishing, Inc. to dismiss the amended complaint is GRANTED and plaintiff Marge Jarrells' amended complaint is DISMISSED with prejudice. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 14th day of September, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge