IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MELINDA SCHUMACHER,

Plaintiff,

v.

THE SWISS COLONY, INC. and
JOE HUNTER,

Defendants.

OPINION AND ORDER

06-C-47-C

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Plaintiff Melinda Schumacher was an employee in the human resources department for defendant The Swiss Colony, Inc. Defendant Joe Hunter was the vice president of human resources. Initially, plaintiff asserted various federal claims against defendants related to their treatment of her as an employee. However, when defendants filed this motion for summary judgment on each of these claims, she failed to discuss any of them in her response to the motion. Instead, she identified for the first time in her response brief a state law claim under Wis. Stat. § 146.82 for unlawful disclosure of medical records. Because I conclude that plaintiff has abandoned her federal claims and supplemental jurisdiction over plaintiff's new state law claim is inappropriate, this case will be dismissed.

In her complaint, plaintiff alleged that defendants took a series of adverse actions against her while she was employed by them. First, they reduced her duties and insulted, ostracized and threatened her after she participated in a sexual harassment investigation. Second, after she took medical leave for serious health conditions related to both her physical and mental health, they intentionally disclosed her confidential medical information to Swiss Colony employees unauthorized to view them. Finally, they used the information in plaintiff's confidential medical records to terminate her. Plaintiff asserted four causes of action in her complaint: (1) interference with her rights under the Family and Medical Leave Act, 29 U.S.C. §§ 2601-54; (2) retaliation for participating in activity protected by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e; (3) discrimination on the basis of disability, in violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12131- 12134; and (4) invasion of privacy, in violation of Wis. Stat. § 895.90 (which is now renumbered as Wis. Stat. § 995.90).

On October 11, 2006, defendants filed a motion for summary judgment. In the 36-page brief accompanying their motion, defendants attacked each of plaintiff's claims on multiple grounds: she did not properly exhaust her administrative remedies on her Title VII and ADA claims, she was not a "qualified individual with a disability" for the purpose of obtaining the protections of the ADA, she did not qualify for protection under the FMLA, she had insufficient evidence to prove that defendants terminated her for an unlawful reason

and she could not satisfy the elements of a claim under Wis. Stat. § 995.50. On October 30, 2006, before filing a response to defendants' motion for summary judgment, then-counsel for plaintiff moved to withdraw from the case.

The court granted the motion to withdraw, plaintiff obtained new counsel and the deadline for filing a response was extended. When plaintiff did file a response to defendants' motion on January 26, 2007, there was another unexpected turn of events: plaintiff ignored every argument defendants made in their motion for summary judgment. Not one word of plaintiff's response brief was devoted to defending any of the causes of action she identified in her complaint and on which defendants moved for summary judgment. Instead, as if she were responding to another motion, she argued that there was sufficient evidence in the record to allow a jury to find that defendants had violated Wis. Stat. § 146.82, which prohibits the willful disclosure of "patient health care records."

Plaintiff's response raises two obvious questions. First, what is the status of the four claims plaintiff raised in her complaint? Second, may plaintiff proceed with her claim under Wis. Stat. § 146.82?

With respect to plaintiff's original claims, I conclude that plaintiff has abandoned them. In a number of cases the court of appeals has held that a failure to oppose an argument operates as a waiver. For instance, in Wojtas v. Capital Guardian Trust Co., No. 05-4248, – F.3d – , 2007 WL 475823, *2 (7th Cir. Feb. 15, 2007), the court concluded that

the plaintiff had waived his right to challenge the defendant's assertion of a statute of limitations defense because the plaintiff failed to oppose the defendant's argument in response to a motion to dismiss in the district court. Similarly, in Cincinnati Insurance Co. v. Eastern Atlantic Insurance Co., 260 F.3d 742, 747 (7th Cir. 2001), the plaintiff had "fail[ed] to mention" in its brief an argument by the defendant regarding the scope of an insurance policy exclusion. Even though the court expressed doubt about the correctness of the defendant's interpretation, it held nevertheless that the plaintiff had "acquiesce[d]" in the defendant's interpretation, rendering unnecessary any substantive determination by the court. And in countless cases the court of appeals has recognized that failing to develop an argument means that the party waives it. E.g., Davis v. Carter, 452 F.3d 686, 697 (7th Cir. 2006); Weinstein v. Schwartz, 422 F.3d 476, 477 n. 1 (7th Cir. 2005); Blise v. Antaramian, 409 F.3d 861, 866 (7th Cir. 2005); Hojnacki v. Klein-Acosta, 285 F.3d 544, 549 (7th Cir. 2002). However, in seeming tension with the above line of cases, the court has held that when a party fails to file *any* response to a summary judgment motion, the district court must still determine whether the undisputed facts show that the moving party is entitled to summary judgment on the merits. E.g., Doe v. Cunningham, 30 F.3d 879, 883 (7th Cir. 1994); Glass v. Dachel, 2 F.3d 733, 739 (7th Cir. 1993); Wienco, Inc. v. Katahn Associates, Inc., 965 F.2d 565, 567 (7th Cir. 1992).

Which rule governs in this case? Plaintiff's actions do not fit squarely into either

category. Although she did file a response, she did much more than fail to respond to a single argument. Thus, to determine which rule applies, it is necessary to determine also why the court treats one type of failure to respond differently from another. On the surface at least, it is puzzling how a failure to address *one* substantive argument or claim means that the party waives it but a failure to file *anything* means that no arguments or claims are waived. Although the court has not discussed the tension between the rules, I believe the resolution of the apparent conflict lies in the way the court evinces the intent of the party who has failed to respond.

This is common in criminal cases, in which the court often discusses the difference between "waiver" and "forfeiture." As is well known, a "waiver" is the *intentional* relinquishment of a right while a "forfeiture" is simply the negligent failure to assert the right. The waiver of a right prevents the defendant from reasserting the right at a later time but this is not necessarily the case if a defendant simply forfeits the right or objection. United States v. Charles, 476 F.3d 492, 495 (7th Cir. 2007).

The court of appeals appears to be applying the same type of distinction in civil cases. When a party fails to file any response, it is not necessarily clear that the party is acting intentionally. In fact, sometimes it is clear that the party has simply been negligent in failing to file a response, as it was in Cunningham and Wienco, in which the plaintiffs had missed the deadline for a filing a response to the defendants' motions for summary judgment, but

later indicated their desire to oppose the motions. In such a case, the court of appeals has determined that the moving party is still required to show to the district court that it is entitled to prevail on the merits. In contrast, when a party files a response but chooses to ignore certain arguments or claims, it is fair to infer that the party is either conceding that it cannot prevail on that issue or that it has no interest in pursuing it. In those cases, there is no need for the court to go through the motions of determining whether the moving party is substantively correct.

In this case, plaintiff did not miss a deadline or even fail to file a response altogether. Rather, she filed a response in which she disregarded the claims she had been asserting up until that point and raised a new legal theory instead. The only reasonable inference that may be drawn from this is that plaintiff decided not to pursue her original claims. Under these circumstances, it is pointless to determine the merits of those claims. Plaintiff's failure to respond to the arguments raised in defendant's motion "was clearly a strategic decision rather than a mere oversight." United States v. Cooper, 243 F.3d 411, 416 (7th Cir. 2001) (concluding that defendant had waived objection). Accordingly, I construe plaintiff's response as a motion to withdraw the causes of action identified in her complaint and I will grant the motion. Those claims will be dismissed with prejudice.

The remaining question is whether plaintiff may proceed with a claim under Wis. Stat. § 146.82. The first hurdle for plaintiff on this question is whether she gave defendants

notice of this claim. Not surprisingly, defendants argue in their reply brief that she did not. If this is correct, the claim must be dismissed. If plaintiff did not give defendants notice of this claim in her complaint, she would have to amend her complaint again to correct this deficiency, but a "plaintiff may not amend [her] complaint through arguments in [her] brief in opposition to a motion for summary judgment." Shanahan v. City of Chicago, 82 F.3d 776, 781 (7th Cir.1996).

Plaintiff should have anticipated that defendants would raise this argument in their reply brief, but she scarcely addresses it or even acknowledges that she is raising a claim not discussed in defendants' motion for summary judgment. She merely cites a case from the Court of Appeals for the Eleventh Circuit stating that complaints do not need to set out "the precise theory giving rise to recovery." Sams v. United Food & Commercial Workers International Union, AFL-CIO, CLC, 866 F.2d 1380, 1384 (11th Cir. 1989). Plaintiff is correct that parties are not required to plead legal theories. For example, in Bartholet v. Reishauer A.G. (Zurich), 953 F.2d 1073, 1078 (7th Cir. 1992), the court held that "the complaint need not identify a legal theory, and specifying an incorrect theory is not fatal." Similar statements may be found in numerous other cases. E.g., Rapid Test Products, Inc. v. Durham School Services, Inc., 460 F.3d 859, 860 (7th Cir. 2006); Simpson v. Nickel, 450 F.3d 303, 305 (7th Cir. 2006); Doe v. Smith, 429 F.3d 706, 708 (7th Cir. 2005). Although plaintiff was not required to identify legal theories in her complaint, one could

argue fairly that when she chose to do so, defendants were entitled to expect that she would not alter these theories without providing additional notice. Cf. Johnson v. Methodist Medical Center of Illinois, 10 F.3d 1300, 1305 (7th Cir. 1993) ("A complaint's allegations of negligence may be so specific that the plaintiff waives a claim of negligence based on other and different facts, particularly when plaintiff delays broadening the original claim.").

Ultimately, this question need not be resolved because it would be inappropriate for this court to adjudicate plaintiff's sole remaining claim regardless whether the notice plaintiff provided was adequate. Under 28 U.S.C. § 1367(a), a federal court may exercise supplemental jurisdiction over a state law claim if it is "so related to [the federal] claims . . . that they form part of the same case or controversy," meaning that the claims must "derive from a common nucleus of operative fact." Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999). It is questionable whether plaintiff's claim under Wis. Stat. § 146.82 could meet this standard. Plaintiff's federal claims were related to disability discrimination, denial of medical leave and retaliation. None of these claims necessarily involved the disclosure of medical records, though it is possible that plaintiff intended to allege originally that the disclosure of medical information was part of the retaliation she suffered.

In any event, as discussed above, plaintiff has abandoned her federal claims. Although federal courts do not automatically lose jurisdiction over state law claims when all the federal claims are dismissed, under 28 U.S.C. § 1367(c), a district court may dismiss the

state law claim in such a case. The court of appeals has elaborated that "the usual practice is to dismiss without prejudice state supplemental claims whenever all federal claims have been dismissed prior to trial." Groce, 193 F.3d at 501. I see no reason to depart from the general rule in this case, particularly because plaintiff has chosen to raise this claim at the eleventh hour in what appears to be a last ditch attempt to preserve a lawsuit that may not have had any meritorious federal claims to begin with.

I note briefly that diversity jurisdiction is not present either, even though it appears to be undisputed that the parties are of diverse citizenship (plaintiff is a citizen of Illinois and defendants are citizens of Wisconsin). Under Wis. Stat. § 146.84(1)(b) the damages for plaintiff's state law claim could be no more than $25,000, which is obviously less than the $75,000 needed to satisfy the "amount in controversy" requirement for diversity jurisdiction. 28 U.S.C. § 1332(a). Although the $25,000 limit does not include costs and attorney fees, costs do not count toward the amount in controversy, 28 U.S.C. § 1332(a), and attorney fees count only if they were incurred before the suit was filed. Smith v. American General Life and Accidental Insurance Co., Inc., 337 F.3d 888, 896-97 (7th Cir. 2003) ("post-filing attorney's fees cannot count toward the amount in controversy requirement because federal jurisdiction exists, if at all, at the time of filing"). Because it is clear that plaintiff did not even conceive of her claim under § 146.82 until after she filed the

lawsuit, she could not have incurred more than $50,000 in attorney fees on this claim before filing.

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by defendants The Swiss Colony, Inc. and Joe Hunter is GRANTED with respect to plaintiff Melinda Schumacher's federal law claims. These claims are DISMISSED WITH PREJUDICE.

2. I decline to exercise supplemental jurisdiction over plaintiff's state law claims. These claims are DISMISSED WITHOUT PREJUDICE to plaintiff's refiling them in state court.

3. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 19th day of March, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge