IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DARLENE MARIE ARCHIBALD,

OPINION AND ORDER

Plaintiff,

10-cv-558-bbc

v.

ASPIRUS, INC.; ASPIRUS VNA HOME HEALTH, INC.; ASPIRUS EXTENDED CARE, INC.; and employees of above named Defendants, each individually and jointly: LINDA HACKBARTH, Human Resource Leader, Aspirus, Inc.; SARAH GOETSCH, RN Regional Supervisor, Aspirus VNA HOME Health Care, Inc.; KARLA HUBER, RN Team Leader, Aspirus VNA Home Health Care, Inc., and BARBARA MOSKONAS AUSTIN, Scheduler and Supervisor, Aspirus VNA Extended Services,

Defendants.

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In this civil suit for damages, plaintiff Darlene Marie Archibald contends that defendants violated her rights under Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e-2000e-10, 42 U.S.C. §1985(3) and state tort law in seven different ways: (1) the corporate defendants (Aspirus, Inc., Aspirus VNA Home Health, Inc. and Aspirus Extended Care, Inc.)

discriminated against her because of her sincerely held religious beliefs and practices; (2) these same defendants subjected her to disparate treatment by disciplining her under a series of unwritten conduct policies used in an illegal manner to suppress her verbal expressions of her Catholic/Christian faith; (3) they created a hostile work environment by disciplining her for refusing to curtail her expressions of religion; (4) they failed to agree to her repeated requests for a reasonable religious accommodation for her sincerely held religious beliefs and practices; (5) they retaliated against her for opposing and reporting the religious discrimination, harassment and hostile work environment; (6) the corporate defendants, Linda Hackbarth and Sarah Goetsch conspired to deprive her of her right to freely exercise her faith in her off-duty hours and to place the badges and incidents of slavery upon her by limiting her freedom to travel freely; and (7) all of the defendants violated Wisconsin tort law by opposing her post termination unemployment insurance benefits and defaming her at the benefits hearing and Barbara Modkonas Austin maliciously interfered with her at will employment contract with the Aspirus defendants.

Defendants have moved for dismissal of the entire case under Fed. R. Civ. P. 12(b)(6), with the exception of plaintiff's claim that she was subjected to discriminatory acts occurring on or after July 15, 2008. They argue that the other claims are untimely, unexhausted, not alleged in the complaint, precluded under state law or nonactionable because they fail to state a claim. They have also asked the court to direct plaintiff to re-file her complaint in

a manner complying with Fed. R. Civ. P. 8(a), limited to the claim or claims remaining. This request will be granted. The operative complaint (plaintiff's first amended complaint) is neither short (71 pages) nor plain and it is not always easy to see from it why plaintiff believes she is entitled to relief.

I conclude also that, with one exception, plaintiff's complaint must be dismissed on the grounds asserted by defendants. Plaintiff filed a charge with the EEOC 298 days after defendants was terminated her from her job as a personal care worker, thereby preserving her right to challenge her termination as discriminatory, but preventing her from challenging her remaining claims of discrimination, retaliation or failure to accommodate her religion for acts that occurred 300 days or more before she filed. Her hostile environment claim is not barred on this ground but on another one: she never identified hostile environment in the charge she filed with the EEOC and thus never exhausted it.

Plaintiff's First Amendment claim must be dismissed because she has not alleged any state action, a requirement for such a claim. Her Thirteenth Amendment claim will be dismissed because it does not amount to a badge or incident of slavery for a private employer to direct an employee not to visit the homes of her patients after work hours to discuss religion.

Plaintiff's state law claim of defamation based on defendants' opposition to her unemployment benefits claim and their testimony at the hearing will be dismissed. Under

state law, witnesses at quasi-judicial hearings such as benefits hearings are absolutely immune from suit for defamation. Her claim of intentional interference with an employment at will contract may go forward.

From my review of plaintiff's complaint and the documents attached to it, I find that it fairly states the following allegations of fact. Menominee Indian Tribe of Wisconsin v. Thompson, 161 F.3d 449, 456 (7th Cir. 1998) ("'[D]ocuments attached to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to his claim.'" (quoting Wright v. Associated Insurance Cos., 29 F.3d 1244, 1248 (7th Cir.1994)). They may be considered by the court without converting a motion to dismiss into a motion for summary judgment. Id.

ALLEGATIONS OF COMPLAINT

A. The Parties

Plaintiff Darlene Marie Archibald is a 63 year old female and a devout "Catholic/ Christian." She has been a secular Franciscan since 1991. Her personal beliefs compel her to say "God bless you" and "I'll pray for you" to other people when leaving their presence or ending a telephone conversation.

In 1989, plaintiff was hired as a personal care worker by the predecessor of defendant Aspirus, Inc. After Aspirus Wausau Hospital acquired the predecessor in January 2002,

plaintiff continued as a home health aide, personal care worker and supportive homecare worker for defendants Aspirus VNA Home Health, Inc. and Aspirus VNA Extended Care, Inc. (which I will refer to respectively as Home Health and Extended Care), until she was terminated on July 17, 2008.

Defendant Aspirus, Inc., Home Health and Extended Care are private, non-stock, nonprofit health care systems organized under the laws of the state of Wisconsin. Aspirus, Inc. is the parent corporation of the other two corporations. All three use the same personnel policies, employee handbooks and human resources staff.

Defendant Linda Hackbarth is employed by one or more of the three defendant corporations as Human Resource Leader, Extended Services. Her duties include implementing, maintaining and enforcing defendants' personnel policies. Defendant Sarah Goetsch, RN Regional Supervisor, was an employee of defendant Home Health, supervising the direct care staff. Defendant Karla Huber, RN Team Leader, was employed by defendant Home Health, supervising direct care staff. Defendant Barbara Moskonas Austin was employed by defendant Extended Care as scheduler of caregivers for work in patient homes.

B. Alleged Discriminatory Actions

It is the pattern and practice of the Aspirus defendants to discriminate against Catholics/Christians by suppressing verbal expressions of religion in the workplace to insure

that persons of other faiths or no faith are not offended. It is also their practice to harass persons who fail to suppress their verbal expressions of religion in the workplace, create a hostile work environment for such persons by soliciting reports of infractions from coworkers and patients and retaliate against any employee who attempts to oppose the religious discrimination and harassment. Moreover, the Aspirus defendants ignore or deny any requests for religious accommodations made by Catholics/Christians.

The Aspirus defendants have in place an employee handbook that includes a written policy prohibiting discrimination based upon religion, but defendants have put into practice unwritten employment policies that override the written policies as they relate to religious discrimination against Catholics/Christians. Defendants used diversity training to inform its workforce of a new policy of zero tolerance for Catholic/Christian verbal expression and used two of the performance standards of their Patient/Client Relations Policy as a way to hide their discriminatory, unwritten policy of prohibiting verbal religious expression. The first of these standards prohibits "[e]ngaging in offensive conversation with any patient/client (e.g. jokes that have ethnic, racial, or sexual overtones)." The second tells employees that if they are "uncertain whether an act is prohibited or not, he/she will discuss it with their Supervisor." Defendant Hackbarth and another employee met with plaintiff in November 2006 and discussed these performance standards with her. Sometime after June 26, 2007, plaintiff was put on "decision-making leave" without pay to decide whether she wanted to

continue working for defendants, subject to the conditions that she refrain from inappropriate conversations about religion with clients and coworkers and comply with all work policies, procedures and requirements.

C. Plaintiff's Termination

Plaintiff was notified of her termination on July 17, 2008, during a meeting with Tera Neuendank, employee relations specialist, and defendant Austin. On July 28, 2008, Neuendank wrote plaintiff to document the meeting. She said that plaintiff's termination was based on inappropriate comments that plaintiff had made, which included "inappropriate comments [to patients] regarding washing certain areas of their body as well as concerns regarding [plaintiff's] compensation and job duties" and plaintiff's history "with the negative comments regarding [plaintiff's] job responsibilities and inappropriate conversations with clients." Dkt. #2, exh. I. Plaintiff believes that her only inappropriate comments were related to her expressions of religious belief to coworkers and patients.

D. Unemployment Benefits

When plaintiff filed a claim for unemployment benefits, the Aspirus defendants defended the claim, citing the events documented in Neuendank's July 28, 2008 letter. At the hearing, defendants defamed plaintiff and attempted to damage her character and

repuation by using the religiously discriminatory disciplinary actions and the religiously motivated pretextual incident as "just cause" for her termination, in an effort to prevent her from receiving unemployment benefits. The administrative law judge ruled in favor of restoring plaintiff's unemployment insurance benefits after finding that the charge of misconduct could not be sustained.

E. Filing of Complaint

Plaintiff filed a complaint with the Equal Employment Opportunity Commission on May 7, 2009, 298 days after her July 17, 2008 termination, dkt. #14, exh. II. She alleged in her complaint that she had been the subject of discrimination on the basis of her religion, had been disciplined for discussing religion with patients and retaliated against for her religious expression. Id. The EEOC prepared the Notice of Charge of Discrimination and mailed it to defendant Home Health on May 12, 2009. Dkt. #14, exh. KK. On May 28, 2009, plaintiff signed a formal Charge of Discrimination document that she had received from the EEOC and sent it back. Dkt. #14, exh. LL. In this document, she said that she had been subject to disciplinary action for expressing her religious beliefs, that she objected to the attempt to silence her and that she was terminated from her employment for saying "God bless you" and "I'll pray for you." Id. She received a Right to Sue letter on July 1, 2010 and filed this timely law suit on September 28, 2010.

OPINION

A. Plaintiff's First Claim - Discrimination

Relying on National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002), defendants contend that plaintiff's claim of discrimination against the corporate defendants in violation of 42 U.S.C. § 2000e-2 is barred as untimely as to all discrete acts and incidents that occurred before July 15, 2008, that is, more than 300 days before plaintiff filed her charge of discrimination with the EEOC. (Defendants agree that plaintiff's claim of discriminatory termination is not barred because it took place within the 300-day limitations period and have not moved to dismiss that part of plaintiff's claim.) As relevant to this case, 42 U.S.C. § 2000e-5(e)(1) gives a claimant 300 days after the "alleged unlawful employment practice occurred" in which to file a charge of discrimination. Each discrete act of discrimination or retaliation starts the time running. Morgan, 536 U.S. at 111.

In an effort to avoid the effect of § 2000e-5(e)(1) on the discriminatory or retaliatory acts that took place before July 15, plaintiff argues that the disciplinary actions beginning in 2006, including harassment, failure to accommodate and retaliatory incidents are discrete incidents, as the term is used in Morgan. She offers a number of different theories to bolster her position. She argues first that although the incidents might seem to be discrete acts, they are bound together by defendants' progressive code of conduct policy, in which each

disciplinary action taken against an employee moves that employee another step closer to termination. Not only are they part of a progression, but, she maintains, defendants "opened the door" and "gave life" to these earlier incidents when Tera Neuendank referred to plaintiff's earlier incidents of religiously discriminatory disciplinary measures in her termination letter. In other words, plaintiff is asserting that her treatment amounted to an unlawful and continuing employment practice.

This assertion cannot stand up to a close reading of Morgan, which rejected a similar argument. In that case, the claimant argued that the statute did not require the filing of a charge within 300 days of a discrete act but within 300 days of an "unlawful employment practice." The Court found the argument rebutted by the listing of actions qualifying as "unlawful employment practices" in § 2000e-2(a), many of which are discrete acts, such as refusing to hire a person or discharging an employee. It was unpersuaded that "the term 'practice' converts related discrete acts into a single unlawful practice for the purpose of timely filing," id. at 111, holding that "discrete discriminatory acts are not actionable if time-barred, even if they are related to acts alleged in timely filed charges." Id. at 113. Accordingly, it reversed the court of appeals' decision to the contrary, rejecting the application of the "continuing violation doctrine" in this context. The lower court had ruled that this doctrine allowed it to consider "conduct that would ordinarily be time barred 'as long as the untimely incidents represent an ongoing unlawful employment practice,'" Morgan

v. National R.R. Passenger Corp., 232 F.3d 1008, 1014 (9th Cir. 2000); it held that the continuing violation doctrine applied to "serial violations," which meant that so long as one act fell within the filing period, a court could take into consideration for purposes of liability discriminatory and retaliatory acts that were plausibly or sufficiently related to the act. Id. at 1015.

In essence, plaintiff's theory is that the various acts of discrimination and retaliation to which she was subjected for two to three years constituted on ongoing unlawful employment practice for purposes of the 300-day limitations period. Morgan shows that this theory is not a viable one, even if Neuendank made reference to plaintiff's earlier discipline in her termination letter to plaintiff and defendants followed a progressive discipline policy that built on each disciplinary action applied to plaintiff.

Plaintiff does not deny that each step of the policy was an adverse action based allegedly on discrimination, but she maintains that in Morgan, the Supreme Cort left open an opportunity for litigants who can show "something more" than time-barred acts of discrimination. She derives this idea from the statement in Delaware State College v. Ricks, 449 U.S. 250, 257 (1980), quoted in Morgan, 536 U.S. at 112-13: "'Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination.'" She maintains that this "something more" may be found in the circumstances of her case in which her employers utilized a progressive code of conduct

policy to implement and enforce a larger employment practice of maintaining a written anti-discriminatory policy on religion, while at the same time implementing and enforcing an illegal and total ban on Christian/Catholic verbal expression in the workplace in violation of the Civil Rights Act. Plt.'s Br., dkt. #30, at 9-10. To the extent that plaintiff is arguing that the illegal nature of this discriminatory practice justifies treating a continuing violation as a means around Morgan, her argument fails. Allegedly illegal discrimination and retaliation are the bases of all claims under the Civil Rights Act; they cannot be a reason for special treatment of the particular discrimination that plaintiff allegedly suffered.

To the extent plaintiff is arguing that this "dual" practice prevented her from realizing the nature of her discrimination, her argument is related to her allegation that she was not aware that the incidents that occurred before July 15, 2008 were actionable until she was terminated for patently false reasons. Apparently, the combination of this action together with the earlier reasons she had been given for discipline opened her eyes to defendants' discrimination against her.

This argument seems to be an effort to claim her right to the benefit of the doctrine of equitable tolling of the 300-day deadline. The doctrine is applied only sparingly, Morgan, 536 U.S. at 113, and generally only in circumstances in which the employer, agencies or courts have lulled the employee into inaction. Plaintiff has not alleged that anyone kept her from finding out that she might have been subjected to illegal discrimination. In fact, any

argument that she did not recognize the illegal nature of the acts cannot be squared with the allegations in her complaint. For example, at ¶ 43 of the complaint, plaintiff alleges that she participated in diversity training soon after the Aspirus defendants acquired the predecessor home health care before 2004. At one of these sessions, she asked the trainer, "Where do the new diversity policies leave my right to express my faith?" and was told that "her religious expressions were not allowed to be expressed because those expressions might offend one of their Muslim workers."

At ¶ 44, plaintiff alleges that she was told at various times by human resource staff or supervisors that her Catholic/Christian expressions were no longer acceptable in the workplace. At ¶ 48, plaintiff alleges that her explanation of events was ignored when she tried to defend her actions each time she was disciplined. At ¶ 49, plaintiff alleges that she was retaliated against when she continued to object to discriminatory treatment. At ¶ 50, she alleges that she was never offered a reasonable, non-disruptive accommodation to allow her to make her simple statements of faith such as "God bless you." If these sworn allegations are true, plaintiff was well aware that defendants' treatment of her was actionable. In any event, the standard for equitable tolling is not what the particular plaintiff understood but whether a reasonable person in the plaintiff's position would have been aware of the *possibility* that she had suffered an adverse employment action because of illegal discrimination. Beamon v. Marshall & Ilsley Trust Co., 411 F.3d 854, 860-61 (7th Cir.

2005) (citing Chakonas v. City of Chicago, 42 F.3d 1132, 1135 (7th Cir. 1994)). A reasonable person in plaintiff's situation would have understood as early as the diversity training session that defendants were not allowing her to express certain religious sentiments. That plaintiff understood it is shown by her immediate objection to the rules and her efforts to obtain an accommodation to allow her to keep expressing her beliefs.

Plaintiff says in her brief that she had no reason to believe that she had "viable, actionable discrimination" claims after either November 2006, when she had written counseling, or after July 3, 2007, when she signed the document for decision-making leave, because she had been told by a lawyer in June 2007 that she had no claim that was actionable at that time. Dkt. #30 at 19. But the running of the filing time does not start or stop because of a lawyer's opinion about the merits of a case. "'If a plaintiff were entitled to have all the time he needed to be *certain* his rights had been violated, the statute of limitations would never run—for even after judgment, there is no certainty.'" Id. at 861 (quoting Cada v. Baxter Healthcare Corp., 920 F.2d 446, 451 (7th Cir. 1990) (emphasis in original)).

Plaintiff argues correctly that Morgan does not bar her from pursuing her claim of hostile work environment for the entire period she was subjected to it. Such a claim is an exception to its general holding. Morgan, 536 U.S. at 115 ("Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct.") (citing

1B. Lindemann & P. Grossman, Employment Discrimination Law 348-49 (3d ed. 1996)). Whether there is any other reason why she cannot pursue this claim of hostile environment is a question to take up in the next section.

Finally, plaintiff argues that her claims of a hostile working environment and a failure to accommodate her religious beliefs are not time barred for the days of July 15-17, 2008 (which are within the 300-day limitations period), because each of those days was a day on which defendants did not remove the discriminatory ban of religious expression. Her theory is that "[e]ach day the illegal ban was not lifted represented a new and separate violation of a hostile working environment and a failure to accommodate Plaintiff's religious beliefs and practices." Plt.'s Br., dkt. #30, at 19. This theory is correct as it relates to plaintiff's claim of a hostile environment, but not as to her claim of failure to accommodate. The denial of a request for accommodation is a discrete act that starts the running of its own limitations period. Elemenayer v. ABF Freight System, Inc., 318 F.3d 130, 135 (2d Cir. 2003) ("[o]nce the employer has rejected the proposed accommodation, no periodic implementation of that decision occurs"). Therefore any claim of failure to accommodate would be timely only if plaintiff could show that during the three-day period from July 15-July 17, 2008, she made an explicit request for an accommodation and it was denied. She has not alleged that she did so. She has alleged only that her earlier requests remained unanswered through the day of her termination, which is not sufficient under Morgan, 536 U.S. at 110 ("[a] discrete

retaliatory or discriminatory act 'occurred' on the day that it 'happened'). In her complaint, plaintiff says she made repeated requests of defendants for accommodation of her religious belief, all of which were denied before July 15, 2008. Am. Cpt., dkt. #17, ¶¶ 93, 101, 151.

B. Plaintiff's Second, Third and Fourth Claims - Disparate Treatment, Hostile Work Environment and Failure to Accommodate

The corporate defendants named in this charge have moved for dismissal of these claims on the ground that plaintiff's timely charge of discrimination and retaliation was inadequate to exhaust her remedies on the matters making up her second claim (disparate treatment based on her expression of religious beliefs), third claim (hostile work environment) and fourth claim (failure to accommodate). Defendants seem to accept plaintiff's claim of disparate treatment as something distinct from discrimination, but nothing in the complaint supports such a distinction. The kinds of acts plaintiff lists in her claim of discrimination are the same as those she lists as disparate: defendants' differential treatment of her because of her Catholic/Christian expression in the workplace. I will assume that the acts alleged to have constituted disparate treatment are subsumed in plaintiff's claim of discrimination and consider in this section only the claims of hostile work environment and failure to accommodate. To the extent that the two claims are different, plaintiff's claim for disparate treatment fails because she did not identify any acts that occurred within the

300-day limitation period.

42 U.S.C. § 2000e-5(e)(1) requires persons complaining of allegedly discriminatory practices in the workplace to first file a charge of discrimination within 300 days of the "alleged unlawful practice." This gives the agency an opportunity to investigate the charges and, if it finds evidence of discrimination, attempt conciliation of the problem. § 2000e-5(b). If this effort is unsuccessful or if the agency concludes that no discrimination occurred, it will issue a Right to Sue letter. The claimant then has 90 days from receipt of the letter to file a lawsuit, but any such lawsuit may contain "only those claims that were included in her EEOC charge, or that are reasonably related to the allegations of the charge and growing out of such allegations." McKenzie v. Illinois Department of Transportation, 92 F.3d 473, 481 (7th Cir. 1996). See also Gawley v. Indiana University, 276 F.3d 301, 313-14 (7th Cir. 2001).

A review of the documents that plaintiff filed with her complaint shows that she did not allege any illegal acts other than religious discrimination and retaliatory discharge in any document she sent to the EEOC. In her initial charging document, filed on May 7, 2009, plaintiff wrote "religion" and "retaliation" as her reasons for believing she had been the subject of discrimination. Dkt. #14, exh. II. She explained the discriminatory actions in the document, alleging that she had been discharged in retaliation for "resisting attempts to silence my religious expression and for attempting to report them to higher-ups."

Plaintiff never identified failure to accommodate as a reason for her charge, although she mentioned it as part of her discrimination claim in the section in which she was asked to describe the discriminatory action: "Despite my verbal and written protests, I was never given the opportunity to have a reasonable accommodation." One sentence later, she says that "[a] reasonable accommodation would have been just that: stopping if anyone objected." Dkt. #14-3, at 4. Sparse as this is (she does not say that she ever asked for an accommodation or if so, when she asked), it might have sufficed to give notice of this claim, even though she failed to mention it in the second document she filed with the EEOC six days later, on May 11, 2009, that listed only "religious discrimination, harassment, and retaliation." Dkt. #14-4. Compare Kolupa v. Roselle Park District, 438 F.3d 713, 716 (7th Cir. 2006) (holding that plaintiff's discrimination charge did not hint at what accommodation he wanted; "even on appeal he does not tell us what he wanted the Park District to do, other than disregard his religion"), with Cheek v. Western and Southern Life Ins. Co., 31 F.3d 497, 500 (7th Cir. 1994) ("because most EEOC charges are completed by laypersons rather than by lawyers, a Title VII plaintiff need not allege in an EEOC charge each and every fact that combines to form the basis of each claim in her complaint").

However, even if the filed charge could be read to allege failure to accommodate, plaintiff would bump up against the same obstacle that bars most of her discrimination claim, which is the omission from her EEOC charge of any discrete act of failure to

accommodate her religion that occurred within the period covered by her discrimination charge, July 15-17, 2008. I conclude that defendants are entitled to dismissal of these claims for plaintiff's failure to exhaust her EEOC remedies as to her claims of hostile environment and failure to accommodate.

C. Plaintiff's Fifth Claim - Retaliation

Plaintiff's fifth claim against the corporate defendants is based on the allegedly retaliatory acts to which she was subjected before July 15, 2008 and the post termination retaliation to which she was subject when defendants opposed her claim for unemployment benefits. She identifies two acts of pre-termination retaliation, being required to take a decision-making leave and the increased job scrutiny she endured from defendants. (Plaintiff did not include in her complaint any claim of retaliatory termination.) These two components of her claim are barred because they occurred before July 15, 2008, more than 300 days before she filed her discrimination and retaliation charge. Plaintiff's allegations of post termination retaliation based on defendants' opposition to her claim for unemployment benefits and defendants' defamatory and disparaging remarks at the hearing must be dismissed for lack of exhaustion because she never raised it before the EEOC.

For ease of reference, the rulings on the Title VII claims are outlined below.

Claim	Nature of claim	Disposition	Reason
First claim	Discrimination prior to termination	Dismissed	Barred by 300-day limitations period
First claim	Discrimination in connection with termination	No action	Not at issue on this motion; defendants did not move for dismissal
Second claim	Disparate treatment	Subsumed by claim of discrimination	Not distinct from claim of discrimination
Third claim	Hostile work environment	Dismissed	Failure to exhaust EEOC remedies
Fourth claim	Failure to accommodate religious practices	Dismissed	Failure to exhaust EEOC remedies & barred by 300-day limitations period
Fifth claim	Retaliatory acts before July 15, 2008	Dismissed	Barred by 300-day limitations period
Fifth claim	Post termination retaliation	Dismissed	Failure to exhaust EEOC remedies

D. Plaintiff's Sixth Claim - Conspiracy to Violate Her First and Thirteenth Amendment Rights

Plaintiff asserts her sixth claim for relief against the corporate defendants and Goetsch and Hackbarth under 42 U.S.C. § 1985(3), alleging that individual defendants Goetsch and Hackbarth conspired with each other to deprive plaintiff of her First Amendment right to exercise her Catholic/Christian faith and subject her to the badges and incidents of slavery. (Although plaintiff has named the corporate defendants in this claim, she does not allege that they had any role in the alleged violations outlined in this claim; in fact, she alleges that the individual defendants "conspired against their employers' own interests." Cpt., dkt. #17, at 66.)

The First Amendment forbids *Congress* from prohibiting the free exercise of religion or "abridging the freedom of speech." U.S. Const., Am. 1. The amendment has been construed as applying to all governmental entities and employees but not to private actors. United Brotherhood of Carpenters and Joiners of America, Local 610 v. Scott, 463 U.S. 825, 831(1983) ("'The Fourteenth Amendment protects the individual against *state action*, not against wrongs done by *individuals.'*") (quoting United States v. Williams, 341 U.S. 70, 92 (1951)). Plaintiff cannot proceed on this part of her claim because she has not alleged that any state action was involved. She challenges only the actions of private individuals who are not alleged to be acting under color of state law.

The second aspect of this claim is hard to conceptualize. Plaintiff is contending that she can sue individual defendants under 42 U.S.C. § 1985(3). This statute provides a cause

of action for damages against private persons who conspire to deprive another person or any class of persons of "the equal protection of the laws or of equal privileges or immunities under the laws" or of having and exercising any right or privilege of a citizen of the United States." Apparently realizing that she cannot sue individuals for acts that are unconstitutional only if committed by the state, plaintiff has tried to allege a Thirteenth Amendment claim. The Thirteenth Amendment provides in pertinent part that "[n]either slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States . . ."

Plaintiff's allegation of being denied the right to visit her clients after work hours or lose her job does not amount to slavery under the Thirteenth Amendment. For starters, she has not alleged that she is a black citizen. Dombrowski, 459 F.2d at 195 (white plaintiff cannot claim cause of action on Thirteenth Amendment theory of Griffin v. Breckinridge, 403 U.S. 88 (1971)). It may be that she means merely to allege that defendant Goetsch and Hackbarth denied her the right to equal protection under the law, but this course of action is barred to her by the rule that the equal protection clause of "the Fourteenth Amendment is a right to protection against unequal treatment by a state." Id. (citing United States v. Guest, 383 U.S. 745 (1966)). See also Murphy v. Mount Carmel High School, 543 F.2d 1189, 1193-94 (7th Cir. 1976) (concluding that § 5 of Fourteenth Amendment does not authorize Congress to enact legislation such as § 1985(3) to provide cause of action against

private conspirators invading interest protected from state impairment by Amendment). Plaintiff cannot maintain this aspect of her suit against defendants because she is not a slave, the restrictions allegedly placed on her by defendants did not amount to slavery and she has not shown that defendants Goetsch or Hackbarth were state actors or acting in concert with state actors.

Defendants have asserted that plaintiff's First and Thirteenth Amendment claims would be barred by the "single entity conspiracy" doctrine, but it is not clear from the pleadings that this doctrine would be applicable and it is not necessary to decide it. As a general rule, if a plaintiff challenges a single act of discrimination by a single business entity, the fact that two or more agents of the entity participated in the wrongful acts does not make the act a conspiracy. Travis v. Gary Community Mental Health Center, Inc., 921 F.2d 108 (7th Cir. 1990) (intra-corporate discussions are not conspiracies); Elbe v. Wausau Hospital Center, 606 F. Supp. 1491, 1502 (W.D. Wis. 1985) (citing Dombrowski v. Dowling, 459 F.2d 190, 196 (7th Cir. 1972)). In this case, however, plaintiff is suing three different corporations. It is possible that their overlapping ownership would bring them under the Dombrowski umbrella, see Copperweld Corp. v. Independence Tube Corp. 467 U.S. 752, 777 (1984) (holding that plaintiff and its wholly owned subsidiary incapable of conspiring with each other for purposes of Sherman Act), but defendants have not shown that it would.

It is also possible that the single entity doctrine would not bar plaintiff's claims against defendants Hackbarth and Goetsch (the named defendants in this claim) if plaintiff could show that the two conspired with each other to carry out acts that were outside the scope of their employment. Again, however, it is not necessary to reach this question.

E. Plaintiff's Seventh Claim - State Law Claims

Plaintiff alleged in her complaint that she suffered distress, humiliation, defamation and other harms as a result of defendants' testimony at her unemployment benefits hearing. Wisconsin law accords immunity to persons who testify in judicial and quasi-judicial proceedings, so long as the testimony is given in a procedural context recognized as affording this privilege and it is relevant to the matter under consideration. Churchill v. WFA Econometrics Corp., 258 Wis. 2d 926, 932, 655 N.W.2d 505, 509 (Ct. App. 2002); Rady v. Lutz, 150 Wis. 2d 643, 647-48, 444 N.W.2d 58, 59 (Ct. App. 1989). So far as it appears from the complaint, defendants' testimony was given in a quasi-judicial proceeding and, although plaintiff paints the testimony as defamatory and disparaging, she has not alleged that it was not relevant to the issue at hand. Her description of the testimony in her complaint shows that the testimony centered on the issues she raises in this suit: whether her religious expression interfered with her ability to do her job and whether defendants had just cause to terminate her. Plaintiff may disagree with the accuracy of defendants'

testimony and with their opinions, but she cannot say that the testimony she describes was not relevant.

Plaintiff has also alleged that defendant Austin interfered with her terminable at will employment contract. Defendants argue that Wisconsin law does not recognize a claim of intentional interference with an at will employment contract, but the case they cite for this proposition holds to the contrary. Mendelson v. Blatz Brewing Co., 9 Wis. 2d 487, 491, 101 N.W.2d 805, 807 (1960) ("Wisconsin has aligned itself with the majority in holding that a cause of action is maintainable for unlawful interference with an employment contract terminable at will. Johnson v. Aetna Life Ins. Co., 1914, 158 Wis. 56, 147 N.W. 32."). In their reply brief, defendants cite a more recent case: Mackenzie v. Miller Brewing Co., 2000 WI App. 48 ¶ 63, 234 Wis. 2d 1, 608 N.W.2d 16 (Ct. App. 1980), but it too recognizes the tort. Id. ("'There can be tort liability for interference with a contract terminable at will'" (quoting Charolais Breeding Ranches, Ltd. v. FPC Security Corp., 90 Wis. 2d 97, 104, 279 N.W.2d 493 (Ct. App. 1979)). The court of appeals noted that the tort is conditioned on two showings, that the interference be improper and that it not be privileged. The case was appealed but only on the question of intentional misrepresentation, not on interference with an at will employment contract.

Defendants do not argue that defendant Austin was privileged to interfere with plaintiff's contract or that she did not act improperly. In any event, such a defense would

not be amenable to resolution on a motion to dismiss, but would require development of the relevant facts either at summary judgment or at a trial to determine whether defendant Austin "was acting with justification and in furtherance of the interests of the corporation and within the general scope of [her] authority or for personal wrongful motives." Id. at 492, 101 N.W.2d 807. Therefore, I conclude that this part of plaintiff's state law claim may go forward.

ORDER

IT IS ORDERED that

1. The motion of defendants Aspirus, Inc., Aspirus VNA Home Health, Inc., Aspirus VNA Extended Care, Inc., Linda Hackbarth, Sarah Goetsch, Karla Huber, Barbara Moskonas Austin to dismiss all claims of the complaint filed against them by plaintiff Darlene Marie Archibald with the exception of plaintiff's claim of discriminatory termination from her job is GRANTED in part. IT IS DENIED with respect to plaintiff's claim against defendant Austin of intentional interference with plaintiff's at will employment contract.

2. The complaint is DISMISSED against defendants Linda Hackbarth, Sarah Goetsch and Karla Huber.

3. To simplify the process of answering the complaint, I am directing plaintiff to file an amended complaint that is limited to those allegations relevant to the remaining claims.

Plaintiff should keep in mind Fed. R. Civ. P. 8, which requires a complaint to include a short and plain statement of the claims showing that the plaintiff is entitled to relief. The complaint should be limited to six pages and should not include argument or unnecessary detail.

Entered this 13th day of April, 2011.

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