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 VNA EXTENDED CARE, INC.,
BARBARA MOSKONAS AUSTIN,

Defendants.

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The Aspirus defendants and individual defendant Barbara Moskonas Austin have moved under Fed. R. Civ. P. 11 for sanctions against plaintiff Darlene Marie Archibald and her counsel, Karen Mueller, for filing and pursuing a frivolous action. Although Rule 11 sanctions are a relatively rare phenomenon in this court, I conclude that they should be imposed here. Not all of the action was frivolous, as defendants concede, but significant portions of the pleadings were, and those portions have caused defendants unnecessary expenditures of money and time. Despite warnings from defendants of the obvious lack of merit of many of the claims, plaintiff persisted in pursuing claims unsupported by law or fact.

A conscientious lawyer presented with the warnings defendants provided would have taken steps to review and delete claims that were either legally or factually unsubstantiated, as subsections (2) and (3) of Rule 11(b) require.

Plaintiff's counsel argues that her client would have difficulty paying any monetary sanctions for the Rule 11 violation. Because the sanctions in this case are based upon plaintiff's counsel's assertions of claims not warranted by existing law or by a nonfrivolous argument for extending, modifying or reversing existing law, plaintiff cannot be held liable for any sanction. Rule 11(c)(5)(A). In imposing a sanction on plaintiff's counsel, I will keep in mind that no sanction should be imposed beyond what is adequate to compensate defendants for unnecessary work and to deter counsel from filing similarly frivolous claims in the future. Rule 11(c)(4).

BACKGROUND

Plaintiff Darlene Marie Archibald worked in various positions (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. from January 1, 2002 until she was terminated on July 17, 2008. She believes that defendants discriminated against her in a number of ways because she persisted in using phrases such as "I'll pray for you" and "God Bless You," even when she was asked not to by her supervisors.

Plaintiff initiated this suit on September 28, 2010 with a 68-page complaint to which she attached 33 exhibits. The complaint included 55 pages of discussion of defendants' treatment of plaintiff, but said nothing about whether plaintiff had ever filed a discrimination charge with the Equal Employment Opportunity Commission, and if so, when she had filed and what claims she had raised in the charge. She did, however, attach a copy of the administrative charge, dated May 28, 2008. Dkt. #2, exh. A, at 3-4. (This exhibit includes a letter from an EEOC investigator, explaining that the investigation of plaintiff's claims had failed to substantiate her claims of being discharged because of her religion or for opposing a religious practice and that her allegations of being disciplined because of her religion were untimely.)

Plaintiff alleged seven claims for relief in her initial complaint: counts 1-5 were alleged under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, and the Wisconsin Fair Employment Act and included religious discrimination; disparate treatment; hostile work environment; failure to accommodate; and retaliation. Count 6 alleged a violation of 42 U.S.C. § 1985(3) (conspiracy to prevent plaintiff from freely associating with others and freely exercising her right to speak about her faith). Count 7 (mislabeled count 6) alleged various Wisconsin state law claims.

Defendants moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6) on December 3, 2010 and served a Rule 11 motion on plaintiff on December 18, 2010, pointing

out a number of legal deficiencies in the initial complaint. Shortly thereafter, plaintiff filed an amended complaint that eliminated all of her Wisconsin Fair Employment Act claims, but now ran to 71 pages and was no easier to follow (or to respond to) than her first one. For example, plaintiff alleged on page 2 that defendants had subjected her to the common law tort of intentional false imprisonment motivated by animus against Catholic Christians, but she never included this allegation as a claim for relief.

In the new complaint, plaintiff enlarged upon her § 1985(3) claim, alleging not only that defendants had deprived her of her rights of free speech and association but that defendants had "placed the badges and incidents of slavery, or that of an indentured servant, upon a free woman by limiting her ability to travel freely to any place where a patient/client might be or by causing Plaintiff to remove herself from any place where a patient/client might be or face employment termination." Dkt. #17 at 66-67. At a Rule 26(f) conference, plaintiff's counsel advised defendants that all but one of the state law claims asserted in the amended complaint were limited to post employment acts by defendants.

On January 28, 2011, defendants served a renewed Rule 11 motion on plaintiff and also moved to dismiss the first five claims of plaintiff's amended complaint (with the exception of that part of the discrimination claim that related to conduct occurring on or after July 15, 2008); the § 1985(3) claim, primarily for lack of any showing of state action; and the state law claims. Dkt. #18. The motion to dismiss was granted in all but one

respect because plaintiff's claims were either filed after the running of the 300-day time permit for filing a claim of discrimination with the EEOC, were not included in the claim that was filed or were without legal merit. Apr. 13, 2011 Order, dkt. #39. Plaintiff was allowed to continue on her claim that defendant Austin had interfered intentionally with plaintiff's at-will employment contract, as well as her claim that she was terminated unlawfully on July 17, 2008.

OPINION

As defendants recognize in asking for sanctions, not all of plaintiff's claims are without merit. She is going forward on her claim of discriminatory discharge and an additional claim of intentional interference with her at-will employment that survived the motion to dismiss. However, the remainder of her claims were clearly foreclosed when she asserted them.

A. Untimeliness of Claims

In her original complaint, plaintiff said nothing about when she had filed a claim of discrimination with the Equal Employment Opportunity Commission but she attached an exhibit to her complaint that appears to be a copy of a Charge of Discrimination filed with the Wisconsin Equal Rights Division and signed by plaintiff on May 28, 2009. Dkt. #2-9,

exh. A. Although it is defendants' burden to show that plaintiff failed to file a timely charge of discrimination with the proper agency and that she failed to exhaust her administrative remedies as to every claim she raises in her complaint, Salas v. Wisconsin Department of Corrections, 493 F. 3d 913, 922 (7th Cir. 2007), it is not unreasonable for a defendant to rely upon statements set forth in a plaintiff's complaint or attached exhibit. From the exhibit attached to plaintiff's original complaint, defendants would have believed that the cutoff date for any acts of discrimination was 300 days before May 28, 2009, which would have been after plaintiff 's termination date of July 17, 2008.

Plaintiff clarified the cutoff date in her amended complaint. She alleged that she had filed an unperfected claim of religious discrimination and retaliation with the Equal Employment Opportunity Commission on May 11, 2009, which was within 300 days of her July 17, 2008 termination date. Defendants did not dispute the allegation. Accepting it as true on defendants' motion to dismiss, I found that defendants' decision to discharge plaintiff fell within Title VII's 300-day statute of limitations, but that none of the other actions alleged in the Title VII claims did, with the exception of plaintiff's claim of hostile environment, which is considered to encompass a single unlawful employment practice. National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 115 (2002).

Plaintiff's counsel argues that the "unique" facts in her case provided her a good faith basis for believing that Morgan was inapplicable, but this argument is unpersuasive. The facts

in Morgan were almost exactly the same as those in this case. Plaintiff Morgan had alleged ongoing violations consisting of consistent harassment and harsher discipline than white employees. The Court held that any of these alleged violations that were not the subject of claims filed with the EEOC within 300 days of their occurrence were barred under § 2000e-(5)(e)(1). The Court made it plain that courts could not consider conduct that would ordinarily be time barred just because the untimely incidents represented an ongoing unlawful employment practice. Id. at 114. It pointed out that discrete acts such as termination or failure to promote are easy to identify. Id.

The holding in Morgan is broad enough to encompass the allegedly unique actions in this case. Using a progressive disciplinary system in which each disciplinary action moves an employee closer to termination is not unique but common in employment situations. Even if the actions are linked, they are discrete for purposes of the law. The reason is fairly obvious. Unlike the situation in which a plaintiff is subject to a series of harassing actions that may not amount to discrimination by themselves but only in combination, an employee who is disciplined or even threatened with discipline for a constitutionally protected act or status knows what has happened. This is obviously true with plaintiff, who knew early in her employment with defendants that she was not going to be allowed to express her religious views as she wished. Plt.'s cpt., dkt. #17, at 18 (alleging that she learned at in-service training session that she could not express her faith at work).

Plaintiff's assertion of her claims of pre-July 15, 2009 discrimination, retaliation and disparate treatment was not warranted by existing law or by a good faith, non-frivolous argument for reversing existing law, as even a cursory reading of Morgan should have told plaintiff's counsel. Those claims were barred because they were not brought within 300 days of their occurrence. Moreover, plaintiff's claim of disparate treatment was subsumed in her claim of discrimination because she never alleged that she was treated differently from anyone else in the work place.

Neither Morgan nor Delaware State College v. Ricks, 449 U.S. 250 (1980), which plaintiff also cited, provided any support for her argument that defendants' use of a progressive disciplinary system was a reason why plaintiff's claims were not barred by the 300-day limitations period. In Ricks, a professor argued that he had been denied academic tenure because of his national origin, but he had not filed a discrimination charge within 300 days of having been notified that he was denied tenure. Instead, he filed within 300 days of his actual termination from the college. The Supreme Court held that his filing was untimely, holding that "[m]ere continuity of employment without more is insufficient to prolong the life of a cause of action for employment discrimination." Id. at 257.

Plaintiff drew from Ricks only the possibility that the "something more" would cover a progressive disciplinary system. She provided no explanation why any court would interpret the language to apply to the facts in this case and she did not cite any cases in which other

courts had applied the language to cover an exception to Morgan.

Rule 11 does not bar lawyers from making non-frivolous arguments for extending existing law or for making reasoned and coherent arguments why a particular case does not apply to a particular factual situation at issue, but plaintiff's argument fits into neither of these categories. She offered nothing to support her Ricks argument other than her same theory that the progressive nature of the discipline meted out to plaintiff made all the incidents of discipline one continuing violation. That argument circles back to Morgan, which made it clear that the theory cannot succeed.

Defendants are entitled to sanctions for having to defend against the claims of discrimination asserted by plaintiff in her amended complaint: defendants' failure to accommodate plaintiff's religious beliefs, disparate treatment and retaliation. Because plaintiff did not allege that she was subjected to any of these allegedly discriminatory acts after July 15, 2008, except as to post termination retaliation, she had no good faith basis for asserting them.

B. Failure to Exhaust Remedies

The claim of discrimination that plaintiff filed with the EEOC on May 11, 2009 was limited to her discriminatory discharge and to retaliation. Thus, these were the only claims that she exhausted. Again, this is an affirmative defense, but the exhibits attached to

plaintiff's complaint show what she included in her charge of discrimination filed with the EEOC and she did not argue in her brief in opposition to defendants' motion to dismiss the amended complaint that her charge encompassed more than her discharge and retaliation.

Oddly enough, in her brief in response to defendants' motion for sanctions, plaintiff's counsel says that she filed an eight-page letter with the EEOC on May 11, 2009, dkt. #56-1, exh. QQ, in which she advised the commission that defendants had discriminated against plaintiff, retaliated against her, subjected her to a hostile work environment and failed to accommodate her religion. The letter is headed: "Re: DARLENE MARIE ARCHIBALD, RELIGIOUS DISCRIMINATION, HARASSMENT & RETALIATION." Id. at 3. One of the headings in the letter was "Religious Accommodation." Id. at 10. The only reference to hostile work environment was in the body of the letter. Id. at 4. In a cover page to the fax transmission, plaintiff's counsel described the letter as "a summary & analysis of [her] own investigation into [plaintiff's] claim of discrimination & harassment & retaliation against her former employer Aspirus, Inc." Id. at 2. Plaintiff's counsel never mentioned this letter in her amended complaint or in her brief in opposition to defendants' motion to dismiss. She takes a different tack in her brief in opposition to the sanctions motion, arguing that defendants are wrong in saying that the administrative charge contained no mention of a hostile work environment or a failure to reasonably accommodate plaintiff's religious beliefs. Rather, she says, she has presented evidence that all of the claims were in the "'predicate charge' by virtue

of Plaintiff's counsel's statement to the EEOC on May 11, 2009 which was then incorporated into Plaintiff's charge." Dkt. #56 at 21.

In fact, plaintiff's charge included nothing more than the claims of religious discrimination and retaliation, as demonstrated by the exhibits attached to her complaints. Dkt. #2-9 (attached to original complaint); dkt. #14-5, exh. KK (attached to amended complaint). I cannot tell whether this is because the commission never received the May 11, 2009 letter from plaintiff's counsel or received it and took it at face value as simply investigative information to support plaintiff's claims of religious discrimination, harassment and retaliation. In any event, plaintiff's counsel had both exhibits A and KK, so she knew before she drafted either version of the complaint that in the commission's view, plaintiff had not raised any other claims and therefore, those claims were not exhausted. Also, although plaintiff alleged retaliation in her charge of discrimination, she said nothing about post termination retaliation, so that claim was not exhausted.

I conclude that defendants are entitled to sanctions for having to defend against plaintiff's unexhausted claim of hostile environment and post termination retaliation.

C. Section 1985(3) Claim

Plaintiff had no basis for bringing either of her § 1985(3) claims. Her claim that defendants had suppressed her rights of free speech and free association was a non-starter

from the beginning because plaintiff never alleged any state involvement. Her claim that defendants had violated her rights under the Thirteenth Amendment was without apparent support and she never explained exactly how it might apply to her situation. She conceded the First Amendment problem implicitly by failing to dispute defendants' motion to dismiss that claim, but she persisted on her Thirteenth Amendment claim. To mount an argument as novel as the one plaintiff asserted would require a careful analysis of the amendment, its history and the various reasons why it could logically and legally be extended to cover very different conduct from that contemplated by Congress. Plaintiff's counsel should not have asserted this claim without undertaking the required analysis. Doing so makes her subject to sanctions.

D. State Law Claims

I will not impose any sanctions against plaintiff or her counsel for the state law claims that plaintiff asserted. It is true that they were not presented well. Plaintiff did not even make clear in her amended complaint which of the state law claims from the original complaint she was re-asserting. Her arguments in support of the claims were not persuasive. On the other hand, defendants' arguments in opposition to one of the claims were equally unpersuasive, so it seems fair to call the state law claims a draw.

E. Summary

It is unfortunate that in her zeal to help plaintiff, plaintiff's counsel did not take more time to consider and to analyze the viable claims that plaintiff could assert against defendants. This is a difficult way to learn the importance of paring down a complaint to its essentials and asserting only those claims on which there is at least a reasonable chance of prevailing.

ORDER

IT IS ORDERED that the motion for sanctions under Fed. R. Civ. P. 11, dkt. #48, filed by defendants Aspirus, Inc., Aspirus VNA Home Health, Inc., Aspirus VNA Extended Care, Inc. and Barbara Moskonas Austin is GRANTED. Sanctions will be imposed on plaintiff's counsel. Defendants may have until June 23, 2011 in which to advise the court of what specific sanction they are seeking. If it is reimbursement of fees and costs incurred in defending against plaintiff Darlene Marie Archibald's federal claims other than her claim of discriminatory discharge, they must also submit an itemized statement of fees and costs

actually incurred. Plaintiff's counsel may have until July 11, 2011 in which to respond.

Entered this 13th day of June, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB