

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

BAHRI BEGOLLI,

Plaintiff,

v.

THE HOME DEPOT,

Defendant.

OPINION and ORDER

11-cv-380-bbc

Plaintiff Bahri Begolli is proceeding pro se on a claim that defendant The Home Depot violated his rights under Title VII of the Civil Rights Act by refusing to hire him because of his national origin. Now before the court is defendant's motion for summary judgment on its defense that plaintiff failed to exhaust his administrative remedies. Specifically, defendant contends that the complaints plaintiff filed with the Equal Employment Opportunity Commission (EEOC) and Wisconsin Equal Rights Division were untimely. Additionally, defendant contends that the Equal Rights Division's decision that plaintiff's complaint was untimely should be given preclusive effect in this court.

As an initial matter, I note that I am disregarding the majority of plaintiff's responses to defendant's proposed findings of fact. Most of plaintiff's responses are argumentative, written in the form of a question, do not cite to admissible evidence and or not address the

specific fact proposed by defendant. At the pretrial conference, plaintiff was provided instructions regarding the proper procedure for responding to motions for summary judgment. Helpful Tips for Filing a Summary Judgment Motion; Memorandum to Pro Se Litigants Regarding Summary Judgment Motions; Procedure to be Followed on Motions for Summary Judgment, attached to dkt. #19. He failed to comply with these procedures. Additionally, I will grant defendant's motion to strike plaintiff's sur-reply, dkt. #29, because plaintiff did not request leave to file a sur-reply. Moreover, plaintiff's sur-reply consists primarily of unsupported arguments and complaints about the administrative process. Such complaints are irrelevant to the issues before the court.

With respect to the merits of defendant's summary judgment motion, I conclude that the administrative law judge's determination regarding timeliness is not entitled to preclusive effect. Additionally, I conclude that there are genuine disputes of material fact regarding whether plaintiff's complaints with the Equal Rights Division and EEOC were filed within 300 days of his knowing that defendant was not going to hire him. Therefore, I will deny defendant's motion for summary judgment. I will hold an evidentiary hearing on March 5, 2012 to resolve the disputed facts regarding the timeliness of plaintiff's administrative complaints.

UNDISPUTED FACTS

A. Plaintiff's Application for Master Trade Specialist

Defendant Home Depot is the world's largest home improvement specialty retailer, with more than 2,200 retail stores worldwide. In spring 2007, defendant posted a position for an electrical master trade specialist to be hired at the West Madison retail store in Madison, Wisconsin. In June 2007, plaintiff applied for the position. Matt Spencer, the human resources manager for the West Madison store, interviewed plaintiff for the position on two occasions. On at least one occasion after the interview, plaintiff went to the West Madison store and asked to speak with the manager regarding the status of the hiring process. On August 22, 2007, plaintiff went to the West Madison store and gave a letter to the store manager, James Cooper, that explained his qualifications and questioned why he had not been hired. Plaintiff also wrote that he was "warn[ing]" defendant of "possible consequences" of not hiring plaintiff and that plaintiff was "for sure capable [of] protect[ing] [his] own legal rights in any case." Dkt. #1-1. He closed the letter by stating that he "would recommend this: don't turn down my candidacy without reasonable arguments in written form; otherwise [this] process might raise some unwanted issue for both sides." Id.

On August 27, 2007, Randi Kiel, defendant's regional human resource manager for the Madison district, received a copy of plaintiff's letter. Kiel believed that the letter was threatening. She spoke with Cooper and Spencer and they all agreed that plaintiff would not be selected for the master trade specialist position.

The parties dispute whether Kiel called plaintiff on August 27, 2007. Plaintiff denies that Kiel called him on this day or ever. Kiel says that she called plaintiff and told him that he would not be hired for the electrical master trade specialist position. She states that she told plaintiff that the job had an important customer service component and that Cooper and Spencer did not feel that plaintiff's customer service skills were at the required level. Also, Kiel says she told plaintiff that he was not being hired because of his behavior in the store during the hiring process and the threatening letter he sent to Cooper. Kiel says that plaintiff responded by telling Kiel that she was "improper and cowardly," that he did not care about the authority of her position, that he would see her in court and that he was going to notify the CEO of the company. Kiel says that she sent emails to Cooper and Spencer later that day describing her phone conversation with plaintiff.

On September 15, 2007, plaintiff wrote another letter to defendant, asking "what [was] wrong with [him] as a candidate" and why he had not been hired. Dkt. #1-1.

B. Plaintiff's Complaint with the EEOC and Wisconsin Equal Rights Division

On June 26, 2008, plaintiff filed complaints with the EEOC and the Wisconsin Equal Rights Division, contending that defendant discriminated against him on the basis of his national origin or ancestry. On September 15, 2008, the Equal Rights Division investigator issued an initial determination concluding that there was "no probable cause" to believe that defendant had violated the Wisconsin Fair Employment Act. Plaintiff filed a timely appeal

and a hearing was held before an administrative law judge on January 19, 2010. After plaintiff presented testimony at the hearing, defendant requested the opportunity to present a witness to support a motion to dismiss on the grounds that plaintiff's complaint was untimely. The administrative law judge granted defendant's request and the company presented the testimony of Randi Kiel. Kiel testified about the letter plaintiff had written on August 22, 2007, in which plaintiff mentioned his legal rights and warned of consequences of not hiring him. Kiel also testified that she had a conversation with plaintiff on August 27, 2007, in which she clearly told plaintiff that he was not being hired by defendant.

At the hearing, plaintiff denied that Kiel called him on August 27, stating that he was visiting family in Detroit at that time. Plaintiff presented two witnesses to support his testimony that he was visiting Detroit on August 27. He stated that he was not sure that defendant had rejected his application until sometime in September or October.

At the end of hearing, defendant moved to dismiss plaintiff's claim on the ground that plaintiff knew that he was not being hired by defendant on or before August 27, 2007, which was more than 300 days before he filed his Equal Rights Division and EEOC complaints. The administrative law judge granted defendant's motion, concluding that plaintiff's testimony that he had not talked with Kiel was not credible.

Plaintiff appealed the administrative law judge's decision to the Labor Industry Review Commission. The commission affirmed the decision, concluding that:

Under all the circumstances, the commission agrees with the administrative law judge that, as of August 27, 2007, the complainant knew that he was not going to be hired. Consequently, the complaint filed on June 26, 2008, was outside of the 300-day statute of limitations and properly dismissed as untimely.

Dkt. #14-6. On March 2, 2011, the EEOC issued a dismissal and notice of rights to plaintiff, closing plaintiff's charge because his charge was not timely filed with the EEOC.

Dkt. #14-7.

OPINION

A. Administrative Exhaustion of Title VII Claims

Before bringing a lawsuit under Title VII, plaintiff was required to file a charge of discrimination with the EEOC. 42 U.S.C. § 2000e-5(e)(1). Because Wisconsin has a state agency with enforcement powers parallel to those of the EEOC, plaintiff had 300 days from the alleged unlawful employment practice to file a timely charge with the EEOC. Id.; 29 C.F.R. § 1601.74(a) n.12. Defendant contends that plaintiff cannot proceed with his Title VII claim because he did not file his complaint with the Equal Rights Division or EEOC until June 26, 2008, which was more than 300 days after he knew that defendant was not going to hire him. "Failure to timely file an administrative charge is an affirmative defense, and the burden of proof at summary judgment therefore rests on the defendant." Laouini v. CLM Freight Lines, Inc., 586 F.3d 473, 475 (7th Cir. 2009).

A. Issue Preclusion

As an initial matter, defendant contends that the Equal Rights Division's determination that plaintiff's administrative complaint was untimely bars him from relitigating the timeliness issue in this court. However, the Supreme Court explained in University of Tennessee v. Elliott, 478 U.S. 788 (1986), that state administrative proceedings that have not been judicially reviewed do not have preclusive effect on Title VII claims. Id. at 795-96 ("Congress did not intend unreviewed state administrative proceedings to have preclusive effect on Title VII claims."). See also Harper v. Godfrey Co., 45 F.3d 143, 149 (7th Cir. 1995) ("Title VII permits plaintiffs to pursue their claims in federal court *de novo* after they have pursued their claims in state proceedings."). Under the rule in Elliott, the dismissal of plaintiff's complaints as untimely by the EEOC and Equal Rights Division does not preclude consideration of the timeliness issue by this court.

The cases cited by defendant are not to the contrary. Defendant cites Waid v. Merrill Area Public Schools, 91 F.3d 857 (7th Cir. 1996), in which the court of appeals held that a state administrative agency's factual determination that the defendant school district engaged in sex discrimination was entitled to preclusive effect in the claimant's subsequent federal lawsuit under Title IX of the Education Amendments of 1972. Id. at 866-67. In so holding, the court noted that unlike Title VII of the Civil Rights Act of 1964, Title IX "does not disclose any specific congressional intent about how federal courts should treat unreviewed decisions by a state agency that pertain to a lawsuit under Title IX." Id. at 864. Because the

court found no congressional intent to limit the preclusive effect of state administrative proceedings in Title IX, the preclusion issue was governed by federal common law, which counsels deference to state law. Id. Because Wisconsin courts would give preclusive effect to the unreviewed decision of an administrative agency in other proceedings, the court held in Waid that it would not be unfair to hold the school district in the plaintiff's Title IX case to the factfinding conducted by the Equal Rights Division. Id. at 866-67. The holding in Waid does not apply to plaintiff's Title VII claim in this case.

The same holds for the decision of this court in Jakob-Anderson v. City of Madison, No. 03-C-455, 2004 WL 1774655 (W.D. Wis. July 21, 2004), also cited by defendant. Applying Elliott and Waid, this court granted preclusive effect to the unreviewed findings of the Equal Rights Division on the plaintiff's claims under 42 U.S.C. §§ 1981 and 1983. Id. at *4. However, this court did not dismiss the plaintiff's Title VII claims on the basis of issue preclusion, noting that "the language and legislative history of [Title VII] demonstrated Congress's intent to permit relitigation of unreviewed administrative decisions of Title VII claims." Id. at *2 (citing Elliott, 478 U.S. at 797). Similarly, although defendant cites Fair v. Basic Metals, Inc., No. 06-C-1072, 2007 WL 1847282 (E.D. Wis. June 26, 2007) in support of its preclusion argument, in Fair, the court stated explicitly that the decision by an administrative law judge cannot be used as the basis for issue preclusion in a Title VII claim. Id. at *6 (citing Elliott, 487 U.S. at 796).

B. Disputed Facts Related to the Timeliness of Plaintiff's Administrative Complaints

Defendant contends that even if issue preclusion does not apply, the facts establish that plaintiff's complaints with the Equal Rights Division and EEOC were untimely. In particular, defendant contends that plaintiff knew that he had a potential claim on August 22, 2007, the date on which he delivered a letter to store manager James Cooper, warning Cooper about possible consequences of not hiring plaintiff. That letter was delivered 309 days before plaintiff filed his complaint. Additionally, defendant contends that the very latest plaintiff could have known about defendant's decision not to hire him was on August 22, 2007, the date on which Randi Kiel told plaintiff that he would not be selected for the master trade specialist position. The alleged phone call from Kiel to plaintiff occurred 304 days before plaintiff filed his discrimination complaints.

However, summary judgment is appropriate only if there are no genuine factual disputes regarding whether plaintiff's administrative complaint was timely filed. In this case, plaintiff denies having a telephone conversation with Kiel on August 27, 2007. Additionally, he denies knowing that defendant had made a final decision to hire him until sometime in September or October 2007. Thus, there are genuine factual disputes regarding this issue that make summary judgment improper at this stage.

Although I cannot resolve the exhaustion issue on the record before the court, this does not mean that the exhaustion question may be put aside. Although Title VII's requirement that claimants file timely discrimination charges with the EEOC before filing a civil action in

federal court is not a jurisdictional requirement, it is a prerequisite to filing suit. Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1246 (2010). The court of appeals has instructed district courts that in most cases, the issue of exhaustion should be resolved before turning to the merits. Pavey v. Conley, 544 F.3d 739, 742 (7th Cir. 2008). Additionally, if a factual dispute arises with respect to an exhaustion claim, the district court must hold an evidentiary hearing during which the judge will make a factual determination regarding the disputed facts. Id.

Pavey considered the issue of factual disputes related to exhaustion in the context of prisoner complaints subject to the exhaustion requirements of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a). However, I see no reason why the court's discussion would not apply to the administrative exhaustion requirements of Title VII. Thus, to resolve the factual disputes in this case, I will hold an evidentiary hearing in accordance with Pavey. Each side may present evidence and witnesses related to when plaintiff knew or should have known that defendant had decided not to hire him. Upon hearing the proffered testimony and evidence I will make a factual finding on the timeliness of plaintiff's administrative complaint. If I find that plaintiff's complaint was timely, my ruling on summary judgment will stand. If I find that plaintiff's complaint was untimely, I will dismiss this case for plaintiff's failure to file a timely complaint with the EEOC.

ORDER

IT IS ORDERED that

1. Defendant Home Depot's motion for summary judgment, dkt. #12, is DENIED.
2. Defendant's motion to strike plaintiff Bahri Begolli's sur-reply, dkt. #29, is GRANTED.
3. An evidentiary hearing will be held on March 5, 2012 at 9:00 a.m., to determine whether plaintiff's June 26, 2008 complaints filed with the Equal Employment Opportunity Commission and the Wisconsin Equal Rights Division were filed within 300 days of when plaintiff knew or should have known that defendant had failed to hire plaintiff.

Entered this 31st day of January, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge