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

LUZ LOOPER,

Plaintiff,

v.

UNIVERSITY OF WISCONSIN
HOSPITAL AND CLINICS AUTHORITY,

Defendant.

OPINION & ORDER

12-cv-393-wmc

Pro se plaintiff Luz Looper brings this proposed civil action against the University of Wisconsin Hospital and Clinics Authority ("UWHCA"), alleging that she was given more work to do than her male predecessor for which she was not compensated, nor were the extra hours she worked recorded. As a result, she alleges, her employee benefits were adversely affected. Looper has been granted leave to proceed *in forma pauperis* without prepayment of fees or costs. Because she is proceeding *in forma pauperis*, the court must now screen her complaint to determine whether her case: (1) is frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B). The court concludes that Looper has stated a claim sufficient to pass screening under Title VII, 42 U.S.C. § 2000e *et seq.*; the Equal Pay Act of 1963, 29 U.S.C. § 206(d); the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*; and the Rehabilitation Act, 29 U.S.C. § 794(a). Accordingly, she may proceed with those claims beyond the pleading stage.

ALLEGATIONS OF FACT[1]

Looper began work as a custodian at UWHCA on May 27, 2008. She later accepted a position at the Mendota Market Area H6/J3/1 position area #7069, which was the same position and area that her predecessor, Scott Gatarowicz, had worked. Looper spoke to Gatarowicz before UWHCA let him go. During those conversations, she learned that he was employed for 38 hours per week and had particular job duties.

When Looper started work at the position, she used Gatarowicz's daily worksheet as her list of daily job duties. She was later issued her own daily worksheet H6/J3/1, which added more areas to her workload, including the J3/1 cubicles and areas J3/111, J3/113, J3/115, J3/117, J3/119, J3/121, J3/123, J3/125, J3/131, J3/141, H6/169 and, even later, H6/135 and H6/136. This additional work required her to work 40 hours a week, but UWHCA continued to classify her at 38 hours per week. Even though she and Gatarowicz were equal in skill and effort, therefore, she was given more tasks and required to work more hours without commensurate benefits.[2]

In March 2009, Looper was injured at work; only then did she discover that even though she had been working 40 hours per week, she was only classified at 38 hours per week as a 95% employee. (*See* Compl. Ex. 8 (dkt. #1-2) 8.) Because of this classification,

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[1] In addressing any pro se litigant's complaint, the court must read the allegations generously and hold the complaint to "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 521 (1972). Looper alleges, and the court accepts as true for screening purposes, only the following facts.

[2] Looper's pleading states that her employer "calculated [her] pay to be more than 38 hours a week," but it also states that "[her] Employer underestimated [her] income." (*See* Compl. (dkt. #1) 4.) Because her plea for relief includes a request that her employer "retroactively pay for the underestimating of [her] earnings," the court will infer for screening purposes that she was only paid for 38 hours of work. Obviously, Looper's claim becomes substantially weaker if she was paid for any additional work required of her, although it cannot preclude a possible recovery for reduced benefits at this stage.

Income Continuation Insurance (ICI) refused to pay her the difference between what she would receive for ICI (75%) and her worker's compensation (66%).

On May 13, 2009, Looper received a letter indicating that she had exhausted her FMLA and that she was being removed from her custodial position. The letter also stated she was considered a displaced worker pursuant to Displaced Worker Policy 9.67. Accordingly, the letter advised, when Looper was released with no restrictions or when a physician determined she required permanent restrictions, Looper would be scheduled for a displaced worker meeting, at which time UWCHA would review vacant positions with her and attempt to determine if she could be placed in such a position. That meeting never occurred.

Apparently, Looper's employment with UWHCA did not terminate after that letter: in June 2009 and February 2010, Looper received two raises. In July 2009, she returned to work as a custodian in Environmental Services at UWHCA. In January 2010, she "was off work … [due to] work injury," but was sent back on January 22, 2010 with some work restrictions. On January 30, 2010, Looper was helping to take apart blood containers and blood from one of the containers splashed onto her arm. She was neither checked out after that incident, nor informed whether the blood was contaminated.

In March of 2010, Looper's doctor released her back to work full time "as tolerated." Looper was then placed in the kitchen area, where she had to lift about 30 heavy mats, take them down and spray them off on both sides, then sweep and mop the floors, place the mats back in their original positions, and take out the trash. Looper reinjured her arm after a week of this work and visited an urgent care doctor, who placed her back on an "every

other day" work restriction until she could see the doctor who had given her the restriction of full time as tolerated.

On March 30, 2010, she saw that doctor and was placed back on restrictions of lifting just five pounds with her left arm and working three days a week for two months. Around the same time, ICI and Worker's Compensation cut off her benefits. On May 3, 2010, she received a letter from UW Hospital and Clinics Environmental Services verifying that they would not be accommodating her restrictions, confirming her Worker's Compensation denial, and asking her if she wanted to resign. At that point, Looper had still not received any notice of her "displaced worker" meeting referred to back in May of 2009.

Looper had to appeal the ICI denial through the Department of Employee Trust Funds, which stated that they had to rely on her employer-reported earnings. Following March 2010, Looper was also required to submit payments to keep her benefits, although they left her without an income. As a result, Looper was without income until about December of 2010.

In addition, Looper's health insurance coverage was terminated on September 30, 2010, because she was unable to afford the full premium. She asked about COBRA numerous times, but was "denied and ignored."

In June 2011, UWHCA "medically terminated" Looper and offered her COBRA continuation coverage. At that time, Looper also discovered by calling UW Employees Inc. that her life insurance policy had been terminated on March 31, 2010, the same time they refused to accommodate her disability. Under COBRA, Looper alleges, she should have been permitted to pay 35% of her premiums.

Looper alleges in this lawsuit that UWHCA discriminated against her under the Equal Pay Act of 1963.[3] She also alleges that UWHCA failed to accommodate her disability and discriminated against her by denying her "COBRA and any [and] all benefits." Looper requests that UWHCA be made to pay for her benefits, compensate her for emotional distress damages, and restore her underestimated, past earnings based on full-time work status and equal pay.

OPINION

I. Title VII and the Equal Pay Act

At least on the face of her pleading, Looper's central claim appears to be one for sex discrimination under Title VII, 42 U.S.C. § 2000e *et seq.*, and the Equal Pay Act of 1963, 29 U.S.C. § 206(d). Specifically, she alleges that: (1) she was hired for a particular position, H6/J3/1 position area #7069; (2) her predecessor in that position, Scott Galarowicz, was male; (3) Galarowicz and she were equal in skill and put in equal effort; and (4) Galarowicz and she were both recorded as working 38 hours per week, even though Looper was assigned additional work and thus had to work more without the benefit of additional pay and a full-time work classification. Although Looper does not explicitly state as such, the court infers that she is alleging that her sex was the cause of this unequal treatment. (*See* Compl. (dkt. #1) 3 ("At 38 hours a week Scott Galarowicz (male) and I, Luz Looper (female) had common core, equal skill and equal effort on the job duties . . . for the position/area #7069, but when I was given my daily worksheet and the position/area #7069 was changed and the work area was substantially more[.]").)

[3] Looper has submitted her right to sue letter from the EEOC. (See dkt. #1-1.)

Title VII provides in pertinent part that:

> It shall be an unlawful employment practice for an employer – (1) to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). Based on this plain language, Title VII "does not forbid every act of invidious discrimination that an employer might commit against an employee." *Herrnreiter v. Chi. Housing Auth.*, 315 F.3d 742, 743 (7th Cir. 2002). Rather, the plaintiff must allege a "tangible" or "materially adverse" employment action was the result of invidious discrimination. *Id.* at 744. The Seventh Circuit has held that this criterion is satisfied in "[c]ases in which the employee's compensation, fringe benefits, or other financial terms of employment are diminished." *Id.*

Here, Looper alleges that she regularly was required to work 40 hours per week but was classified as a 95% employee and accordingly paid for only 38 hours, while her male predecessor in the same position had fewer job duties and was paid the same amount. She also alleges that this classification negatively affected not only her compensation, but also her benefits, both of which constitute a "tangible" or "materially adverse" employment action under the Seventh Circuit's formulation of Title VII. *Id.* This is enough, at least at the screening stage, to support a claim under Title VII.

Looper also invokes the Equal Pay Act ("EPA") in her pleadings, which reads in relevant part:

> No employer having employees subject to any provision of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex[.]

29 U.S.C. § 206(d).

To state a *prima facie* claim under the EPA, a plaintiff must show: (1) she was compensated differently than a male employee; (2) her male employee performed equal work as she, requiring equal skill, effort, and responsibility; and (3) they had similar working conditions. *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781, 793 (7th Cir. 2007). Superficially, Looper would appear to have pled herself out of an EPA claim, since she alleges having performed *more* work than her male predecessor, but the Seventh Circuit has held that "an employer cannot avoid the [Equal Pay] Act by the simple expedient of loading extra duties onto its female employees -- unless it pays them more." *Riordan v. Kempiners*, 831 F.2d 690, 699 (7th Cir. 1987) (citing *Hein v. Ore. Coll. of Educ.*, 718 F.2d 910, 917 (9th Cir. 1983)).

Given this clarification, the court concludes that Looper states an EPA claim under the low threshold for screening purposes. *First,* Looper alleges that she was compensated "differently" insofar as she was given additional duties for which she was not paid, making her actual hourly rate lower than her otherwise comparable male predecessor's rate. *Second,* Looper alleges that Galarowicz and she performed equal work. "The crucial finding ... is

whether the jobs to be compared have a 'common core' of tasks." *Fallon v. State of Ill.*, 882 F.2d 1206, 1209 (7th Cir. 1989) (citing *Brewster v. Barnes*, 788 F.2d 985, 991 (4th Cir. 1986)). Looper has attached daily work sheets that show both Galarowicz and she were required to "clean" and "detail" a substantial number of the same areas, with Looper's extra duties being the main difference between the positions. (*See* Compl. Exh. 2 (dkt. #1-2) 2-3.) *Third*, nothing in the pleadings demonstrates that their working conditions were different. Accordingly, the court will infer for the purposes of screening that their working conditions were also similar.

II. Americans with Disabilities Act and Rehabilitation Act

Looper separately alleges that UWHCA discriminated against her by failing to accommodate her disability, a claim which would fall under the ADA, 42 U.S.C. § 12101 *et seq*.[4] Specifically, she points to the UWHCA's May 3, 2010, letter refusing to accommodate work restrictions of only three days per week and no more than five pounds of lifting with her left arm.

The ADA states in relevant part:

> No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a). For the purposes of the ADA, the phrase "discriminate against a qualified individual" includes "not making reasonable accommodations to the known

[4] Although Title I of the ADA does not abrogate sovereign immunity, the Seventh Circuit has held that the University of Wisconsin Hospital and Clinics Authority is not a state entity entitled to sovereign immunity for Title I purposes. *See Takle v. Univ. of Wis. Hosp. & Clinics Auth.*, 402 F.3d 768 (7th Cir. 2005).

physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee," unless the entity can establish the accommodation would impose an undue hardship on its business. *Id.* at § 12112(b)(5)(A).

As a threshold for a failure-to-accommodate claim under the ADA, Looper must establish that she has a "disability," defined in part as a "physical or mental impairment that substantially limits one or more of [her] major life activities." *Id.* at § 12102(1)(A). The alleged injury to her left arm would appear to satisfy the requirement of a physical impairment that substantially limits her ability to lift, which is included in the ADA's definition of "major life activities." *Id.* at § 12102(2)(A). While temporary impairments may not constitute "disabilities" under the ADA,[5] the court will infer for screening purposes that Looper's arm problems are chronic, rather than temporary. Looper must also allege that she is a "qualified individual," which means she must satisfy the prerequisites for the position and can perform its essential functions, with or without reasonable accommodation. *Hoffman v. Caterpillar, Inc.*, 256 F.3d 568, 572 (7th Cir. 2001). For screening purposes, the court will also infer from her pleadings that Looper meets these prerequisites for the job, given that she was actually hired for the position and apparently could have performed its functions had she been given a reasonable accommodation. One of the letters Looper attached to her pleading also states that UWHCA was aware of Looper's disability and refused to accommodate the schedule and lifting restrictions placed

[5] *See Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 198 (2002) (holding that an impairment's impact must be "permanent or long term" to constitute a disability). The Court's ruling in *Toyota Motor Manufacturing* has been superseded in some respects by amendments to the ADA, but those amendments do not mention the "permanent or long-term" requirement. *See* 9 Lex K. Larson, *Employment Discrimination* § 153.07[4][a], at 153-55 (2d ed. 2013).

on her as a result. (*See* Compl. Ex. 2 (dkt. #1-2) 19.) She has, therefore, stated a claim for failure to accommodate her disability under the ADA, at least for screening purposes.

The Rehabilitation Act also prohibits discrimination against qualified individuals with disabilities solely by reason of their disabilities. 29 U.S.C. § 794. Courts in the Seventh Circuit "look[] to the standards applied under the [ADA] to determine whether a violation of the Rehab Act occurs in the employment context." *Peters v. City of Mauston*, 311 F.3d 835, 842 (7th Cir. 2002) (internal citation omitted). Thus, to the extent the court has found Looper has satisfactorily alleged that she is a "qualified individual with a disability" for screening under the ADA, so, too, does it accept her allegations as sufficient for screening of a Rehabilitation Act claim.

Additionally, to state a claim under the Rehabilitation Act, the defendant must be in a "program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). Looper does not allege that the UWHCA receives this assistance, but the court notes that "[t]he law applies to programs or entities which receive Medicare and Medicaid funds for the provision of medical services to patients." *Rose v. Cahee*, 727 F. Supp. 2d 728, 736 (E.D. Wis. 2010). In the absence of evidence to the contrary, the court will presume for screening purposes only that UWHCA is such an entity. Accordingly, Looper may proceed with a claim under the Rehabilitation Act as well.

III. Fair Labor Standards Act ("FLSA")

Finally, Looper appears to claim that she was not paid for certain work performed for UWHCA, which at least implicates a claim under the FLSA. Specifically, the FLSA requires that employers pay employees a minimum wage of $7.25 per hour for all hours worked. *See*

29 U.S.C. § 206(a)(1)(C). The FLSA generally defines minimum wage violations by the actual pay received divided by the hours worked. *See, e.g., Condo v. Sysco Corp.*, 1 F.3d 599, 605 n.7 (7th Cir. 1993) (noting that a fixed salary "must, of course, be sufficiently large to ensure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage under the FLSA"); *Espenscheid v. DirectSAT USA, LLC*, No. 09-cv-625-bbc, 2011 WL 10069108, at *11 ("[I]f an employee's average wage exceeds the legal minimum, then no minimum wage violation has occurred.") (W.D. Wis. April 11, 2011) (citations omitted). From the documents that Looper attaches to her complaint, her base hourly rate, at the lowest point, was $10.47 per hour. (*See* Compl. Exh. 2 (dkt. #1-2) 30 ("The paystub dated 12/30/08 that you attached to your appeal letter indicated that your base hourly rate was $10.47.").) Even if she was paid for only 38 of every 40 hours she worked, she was still paid more than minimum wage on average. Accordingly, she does not state a minimum wage claim under the FLSA.

ORDER

IT IS ORDERED that:

1) Plaintiff Luz Looper is GRANTED leave to proceed on her claims under Title VII, the Equal Pay Act, the ADA and the Rehabilitation Act.

2) Plaintiff is DENIED leave to proceed on any other claims.

3) The summons and complaint are to be delivered to the U.S. Marshal for service on defendant.

4) For the time being, plaintiff must send defendant a copy of every paper or document she files with the court. Once plaintiff has learned what lawyer will be representing defendant, she should serve the lawyer directly rather than defendant. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that she has sent a copy to defendant or to defendant's attorney as required above.

5) Plaintiff should keep a copy of all documents for her own files. If plaintiff does not have access to a photocopy machine, she may send out identical handwritten or typed copies of her documents.

Entered this 27th day of February, 2014.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge