IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MICHAEL J. OLSEN,

Plaintiff,

v.

MARSHALL & ILSLEY CORPORATION,
PAUL SCHALLER, and M&I MID-STATE BANK,

Defendants.

OPINION AND ORDER

99-C-0774-C

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In this civil action plaintiff Michael J. Olsen alleges that defendants Marshall & Ilsley Corporation, Paul Schaller, and M&I Mid-State Bank violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, by terminating him because of his sex and by retaliating against him for opposing a discriminatory practice. Plaintiff also alleges a state common law contract interference claim. Presently before the court is defendant M&I Mid-State Bank's motion to dismiss the amended complaint for plaintiff's failure to comply with the deadline set by the magistrate judge for filing amended pleadings or alternatively, for plaintiff's failure to serve the amended complaint on defendant M & I Mid-State Bank before the running of the applicable statute of limitations. I conclude that plaintiff's amended complaint was not filed after the

magistrate judge's deadline. In addition, I conclude that plaintiff's failure to serve defendant M&I Mid-State Bank with his complaint until after the statute of limitations had expired qualifies as a "mistake" under Fed. R. Civ. P. 15(c)(3). Therefore, the amended complaint naming defendant M&I Mid-State Bank as a defendant relates back to the date plaintiff served and filed his original complaint against defendant Marshall & Ilsley Corporation and Paul Schaller, which was within the applicable limitations period.

ALLEGATIONS OF FACT

On July 20, 1999, plaintiff received a Notice of Right to Sue from the Equal Employment Opportunities Commission. On October 15, 1999, plaintiff filed suit in state court against Marshall & Ilsley Corporation and Paul Schaller. On December 8, 1999, defendants removed the suit to this court.

Plaintiff alleged in his complaint that Marshall & Ilsley Corporation was plaintiff's employer and that M & I Mid-State Bank was an office maintained by Marshall & Ilsley Corporation. For several reasons, plaintiff believed that the proper legal entity to sue in a Title VII action was Marshall & Ilsley Corporation and not M & I Mid-State Bank. First, Marshall & Ilsley Corporation had responded to plaintiff's Wisconsin Equal Rights Division discrimination charge even though M & I Mid-State Bank had been named as the respondent.

Second, plaintiff's employment documents contained the name "Marshall & Ilsley Corporation," not "M & I Mid-State Bank." Finally, plaintiff's counsel believed, from an inquiry he had made to the Wisconsin Department of Financial Institutions, that Marshall & Ilsley Corporation was the official name of the only "M & I" entity and thus the proper defendant for this Title VII action.

On December 21, 1999, defendant Marshall & Ilsley Corporation answered plaintiff's original complaint, alleging affirmatively that it was not plaintiff's employer and denying that M & I Mid-State Bank was an office of Marshall & Ilsley Corporation. Plaintiff's counsel's subsequent re-check with the Wisconsin Department of Financial Institutions verified that M & I Mid-State Bank was listed as a separate entity within Marshall & Ilsley Corporation's banking division. At this point it became clear to plaintiff that M & I Mid-State Bank was a wholly owned subsidiary of Marshall & Ilsley Corporation and that M & I Mid-State Bank should be a defendant in this action. On January 13, 2000, in an attempt to notify M & I Mid-State Bank of the lawsuit, plaintiff had the deputy sheriff of the Portage County Sheriffs department serve a copy of the original summons and complaint upon M & I Mid-State Bank at 1245 Main Street, Stevens Point, WI. Curiously, however, plaintiff named Marshall & Ilsley Corporation rather than M & I Mid-State Bank on the certificate of service and did not amend the complaint to add M & I Mid-State Bank to the caption as a defendant. On January 28,

2000, the same lawyer representing the original defendants requested and received an extension from plaintiff to file a response to the original complaint on behalf of M & I Mid-State Bank. Acceptance of the original compliant served as notice of the lawsuit.

At the February 3, 2000 preliminary pretrial conference, Magistrate Judge Stephen Crocker set a deadline of March 17, 2000, for filing and serving amendments to the pleadings. On March 17, 2000, plaintiff filed a motion for leave to amend the complaint, this time submitting a proposed amended complaint naming M & I Mid-State Bank as a defendant along with the original defendants, Marshall & Ilsley Corporation and Paul Schaller. Plaintiff served a copy of the amended complaint by mail on the attorney for all defendants on March 17, 2000. The magistrate judge granted plaintiff's motion for leave to file the amended complaint on March 21, 2000. Subsequently, defendant M & I Mid-State Bank objected to not having been served with a summons. Plaintiff issued the summons to M & I Mid-State Bank on March 29, 2000. Defendant M & I Mid-State Bank acknowledged receipt of service of the summons and amended complaint on March 31, 2000. Original defendants Marshall & Ilsley Corporation and Paul Schaller answered the amended complaint on March 30, 2000. Defendant M & I Mid-State Bank filed this motion to dismiss on April 19, 2000.

OPINION

After receiving a Notice of Right to Sue letter from the Equal Employment Opportunities Commission, a plaintiff must bring a Title VII civil action against the defendants within 90 days. See 42 U.S.C. 2000e-5 (f) (1); St. Louis v. Alverno College, 744 F.2d 1314, 1316 (7th Cir. 1984). Thus, plaintiff had until October 18, 1999, 90 days after he received notice of his right to sue on July 20, 1999, in which to file his complaint. Plaintiff filed his original complaint naming Marshall & Ilsley Corporation and Paul Schaller as defendants within the period set by the statute of limitations. However, he did not file his complaint against defendant M&I Mid-State Bank until March 21, 2000, when the magistrate judge granted him leave to file an amended complaint adding this defendant. Plaintiff cannot maintain his lawsuit against defendant M&I Mid-State Bank unless his amended complaint relates back to the date his original complaint was filed. See Fed. R. Civ. P. 15(c); See also Wood v. Woracheck, 618 F.2d 1225, 1229 (7th Cir. 1980).

Fed. R. Civ. P. 15(c) provides in pertinent part:

> An amendment of a pleading relates back to the date of the original pleading when
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> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to

> be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Because plaintiff sought to add a party, M & I Mid-State Bank, subsection (3) of Fed. R. Civ. P. 15(c) is applicable. (Neither side argues that the claim against M & I Mid-State Bank involves a different occurrence from the one set forth in the original pleading.) Part A of this subsection is satisfied. The new party, M & I Mid-State Bank, received notice on January 13, 2000, well within the 120 days of the filing of the original complaint that would have elapsed on February 14, 2000. Furthermore, counsel for the new defendant M & I Mid-State Bank is the same counsel as the other two defendants, making prejudice highly unlikely.

Part B of subsection (3) has two requirements. First, the new party either knew or should have known that it could have been a party in the initial suit. This requirement is satisfied. M & I Mid-State Bank was the named respondent in the Notice of Right to Sue from the Equal Employment Opportunities Commission. Therefore, it had notice that plaintiff might file suit against it. The second, determinative issue in this case is whether the failure to name M & I Mid-State Bank as a party in the original complaint constitutes a "mistake" under Rule 15(c)(3)(B).

A deliberate, conscious choice not to name a party that benefits the plaintiff does not

qualify as a mistake. See Worthington v. Wilson, 8 F.3d 1253, 1258 (7th Cir. 1993). In Worthington, the original defendants were "unknown police officers." A conscious choice to sue "unknown police officers" was made because the statute of limitations was about to expire. Amending the complaint under those circumstances would have been prejudicial to the defendants, who had not been notified that they might be sued. The court ruled that lack of knowledge of who the defendants were did not constitute a "mistake."

In this case, there is no reason to believe that plaintiff left defendant M & I Mid-State Bank out of the lawsuit deliberately because it would benefit him. Rather, plaintiff believed that Marshall & Ilsley Corporation was the proper party to sue and made a "mistake" by not naming M & I Mid-State Bank initially.

The classic "mistake" is a misnomer. It occurs where the correct party is sued under the wrong name. See Wood, 618 F.2d at 1229; 3 James Wm. Moore, et al., Moore's Federal Practice § 15.19[3][d], at 15-90 (3d ed. 1997). However, mistakes at law also qualify, such as when a plaintiff sues an entity with immunity rather than employees in their individual capacities. See Woods v. Indiana Univ.-Purdue Univ. at Indianapolis, 996 F.2d 880, 887 (7th Cir. 1993). Another common mistake is one based on the relationship between two potential parties when they share an "identity of interest." See Staren v. American Nat. Bank & Trust Co. of Chicago, 529 F.2d 1257, 1263 (7th Cir. 1976). See also Norton v. International

Harvester Co., 627 F.2d 18, 21-22 (7th Cir. 1980). "The identity of interest principle is often applied where the original and added parties are a parent corporation and its wholly owned subsidiary, two related corporations whose officers, directors, or shareholders are substantially identical and who have similar names . . . ." Hernandez Jimenez v. Calero Toledo, 604 F.2d 99, 102-03 (1st Cir. 1979). Although not binding, this definition of "identity of interest" is illustrative. The "identity of interest" principle recognizes that some substitutions or additions are "merely formal." See Staren, 529 F.2d at 1263. In Staren, the substitution of a corporation for "its president and his business associate" was not prejudicial because the corporation already had notice. See id.

Plaintiff's omission of M & I Mid-State Bank qualifies as a "mistake" pursuant to Rule 15 (c) (3). The original decision not to sue M & I Mid-State Bank was not a deliberate choice made to benefit the plaintiff. It was reasonable for plaintiff to believe that Marshall & Ilsley Corporation was the proper legal entity to sue. The actions of Marshall & Ilsley Corporation on behalf of M & I Mid-State Bank and the use of the parent corporation's name on the subsidiaries' official documents indicate the identity of interest between Marshall & Ilsley Corporation and M & I Mid-State Bank.

Regarding defendant's alleged violation of court imposed deadlines, I conclude that plaintiff's amended complaint was not filed after the magistrate judge's deadline. The

preliminary pretrial conference order required amendments to the pleadings to be filed and served no later than March 17, 2000. Also, in absence of a stipulation, a motion for leave to amend the complaint was to accompany the proposed amendment. Plaintiff filed the motion for leave to amend the complaint to add defendant M & I Mid-State Bank and the amended complaint on March 17, 2000.

Defendant M & I Mid-State Bank contends that plaintiff did not meet the deadline because it was not *served* with a summons by March 17, 2000. The requirement to "file and serve" amendments to the pleadings does not refer to service of the amended complaint and summons on any new party added through the amendment. Logically, a plaintiff cannot issue a summons upon a new party until the court has granted the motion for leave to amend the complaint to add that new party. The magistrate judge granted the motion for leave to amend on March 21, 2000. Therefore, defendant's motion to dismiss the amended complaint for plaintiff's failure to comply with the court's deadline will be denied.

ORDER

IT IS ORDERED that:

1. The motion of defendant M & I Mid-State Bank to dismiss the complaint against it, is DENIED.

Entered this ____________ day of July, 2000.

BY THE COURT:

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BARBARA B. CRABB
District Judge