IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARGE JARRELLS,

Plaintiff,

v.

SELECT PUBLISHING, INC.

Defendant.

ORDER

00-C-0433-C

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This is a civil action in which pro se plaintiff Marge Jarrells alleges that she was not hired by defendant Select Publishing, Inc. because of her age and race. Plaintiff seeks back pay and damages under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e, and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34.

On September 14, 2001, I granted defendant's motion to dismiss plaintiff's lawsuit for two independent reasons: (1) plaintiff's failure to timely and properly serve process on defendant pursuant to Wis. Stat. § 801.11(5) and (2) plaintiff's failure to amend her complaint properly under Fed. R. Civ. P. 10. See Order dated Sept. 14, 2001, dkt. #33. Defendant's motion was granted only after this court had told plaintiff repeatedly how to serve process and amend her complaint properly.

On May 7, 2002, the Court of Appeals for the Seventh Circuit reversed and remanded this court's Sept. 14 order. See Jarrells v. Select Publishing, Inc., 01-3723 (7th Cir. May 7, 2002) (unpublished) (citing Swierkiewicz v. Sorema, 534 U.S. 506 (2002)). The court of appeals held that plaintiff's amended complaint comported with the liberal pleading requirements under Fed. R. Civ. P. 8. Id. With respect to service of process deficiencies, the court of appeals stated, "On remand, plaintiff should be given an opportunity to perfect service through any manner authorized by Rule 4, unless the district court finds that this has already been satisfactorily accomplished." Id. at 3.

Plaintiff pointed out in her notice of appeal that this court had told her that when she filed her amended complaint, she was to start her lawsuit over from the beginning, as though she had never filed another complaint. This is correct. However, with respect to service of process, this court instructed plaintiff that she would have 30 days to serve defendant and that "[t]o avoid the pitfalls plaintiff previously experienced in serving her original complaint, plaintiff should refer carefully to the discussion about proper service set out in the May 4, 2001 order." See Order dated May 24, 2001, dkt. #21, at 3. The May 4 order instructed plaintiff that she was to have a third party serve her amended complaint on defendant personally and in compliance with Wis. Stat. § 801.11(5). See Order dated May 4, 2001, dkt. #20, at 6-8. The court also warned plaintiff in this order that serving defendant's receptionist may be improper under Wis. Stat. § 801.11(5) as interpreted in Horrigan v.

State Farm Ins., 106 Wis. 2d 675, 681, 317 N.W.2d 474, 477 (1982). See id. Notwithstanding this court's explicit instructions and warnings, plaintiff construed the May 4 and 24 orders as requiring her to request waiver of service from defendant again. As a result, plaintiff believed that defendant would have 20 days to respond to her waiver request and, if defendant failed to respond within 20 days, she then would serve defendant personally. See Notice of Appeal, dkt. #35, at 2. It is unclear how plaintiff came up with 20 days to respond to a request for waiver because the rule is clear: a defendant has at least 30 days from the date on which the request is sent to return the waiver. See Fed. R. Civ. P. 4(d)(2)(F). If a defendant does not waive service of process, it has 20 days to answer the personally served complaint rather than 60 days from the date waiver of service is sent. See Fed. R. Civ. P. 12(a)(1). Perhaps plaintiff confused defendant's time to answer when service of process has not been waived (20 days) with this court's instruction to serve her amended complaint personally within 30 days.

In any event, the chronology of service of process as to plaintiff's amended complaint is as follows: (1) plaintiff filed her amended complaint with the court on June 8, 2001; (2) plaintiff mailed another waiver of service form and her summons and amended complaint to defendant on June 23, 2001; and (3) plaintiff's process server delivered her summons and amended complaint personally to defendant's receptionist on July 25, 2001.

The "case law allows the district court to extend the time for service even if there was

no good cause for the plaintiff's missing the deadline." Coleman v. Milwaukee Board of School Directors, 01-3117, 2002 WL 1009651, at *1 (7th Cir. May 20, 2002) (collecting cases); see also Fed. R. Civ. P. 4(m). If there is justifiable delay, or "good cause," the extension is mandatory but in a case of "excusable neglect," it is permissive. Id. In this case, I construe plaintiff's untimely service of process as excusable neglect related to her failure to understand the court's order and the rules relating to service of process. Because defendant had actual notice of the suit and will suffer no harm as to its ability to defend the suit as a consequence of the delay in service, see id. at *2, I will exercise discretion to conclude that plaintiff's July 25, 2001 service of process was timely.

However, timeliness is not the only problem with plaintiff's service. In defendant's motion to dismiss, defendant pointed out that plaintiff served the summons and complaint personally on defendant's receptionist. See Dft.'s Mot. to Dismiss Amend. Cpt., dkt. #18, at 3. As this court told plaintiff in its May 4 order, under Wis. Stat. § 801.11(5)(a), plaintiff is required to serve process by "personally serving the summons upon an officer, director or managing agent of the corporation . . . In lieu of delivering the copy of the summons to the officer specified, the copy may be left in the office of such officer, director or managing agent with the person who is apparently in charge of the office." Defendant argues that the receptionist is neither "an officer, director or managing agent" nor a person "who is apparently in charge of the office." Thus, defendant asserts, this court lacks personal

jurisdiction over it because of improper service of process.

The Court of Appeals for the Seventh Circuit has held that "valid service of process is a prerequisite to a district court's assertion of personal jurisdiction." Swaim v. Moltan Co., 73 F.3d 711, 719-20 (7th Cir. 1996) (citing Omni Capital Int'l v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 103 (1987)). "Valid service of process comprises more than actual notice; it requires a legal basis for holding the defendant susceptible to service of the summons and complaint." Id. In a federal question case in which the statute giving rise to the cause of action does not prescribe rules for service of process on a corporation, service "is governed by the law of the state in which the district court is located." Id. (citing Fed. R. Civ. P. 4(h), 4(e)).

The Wisconsin Supreme Court has held that "when a statute prescribes how service is to be made, compliance with the statute is required for personal jurisdiction even where the defendant has actual notice of the summons and complaint." Horrigan, 106 Wis. 2d at 681, 317 N.W.2d at 477; see also 519 Corp. v. Dept. of Transportation, 92 Wis. 2d 276, 287, 284 N.W.2d 643 (1979). In Horrigan, the plaintiff's process server told the receptionist that he had a summons and complaint and that he needed to serve it on an officer or an agent. Horrigan, 106 Wis. 2d at 678; 317 N.W.2d at 476. The receptionist told the process server to "take a seat" and she would get someone to receive the papers. Id. at 678-79; 317 N.W.2d at 476. A short time later, a man came from an interior office into

the reception area. Id. at 679; 317 N.W.2d at 476. The process server handed the summons and complaint to the man who neither questioned the service nor denied that he was the appropriate person to receive it. Id. The process server never asked the man any questions. Id. In such a case, the Wisconsin Supreme court held that service of process was proper because it was not the process server's mistake to assume that the receptionist or the person accepting service was misleading him. Id. at 683; 317 N.W.2d at 478.

In this case, defendant submitted an affidavit of its receptionist, Rebecca Long. Long states that plaintiff's process server "set a large envelope down and asked [her] to sign a receipt. At the time, [she] was seated at the reception desk. The individual did not ask if [she] was in charge of the office and did not ask to speak with anyone else before asking [her] to sign for the envelope." Aff. of Rebecca Long, dkt. #29. Because plaintiff never submitted an affidavit from her process server, Cedric Harris, it is not possible to determine whether service of process was sufficient to comport with Wis. Stat. § 801.11(5). See Horrigan, 106 Wis. 2d at 683; 317 N.W.2d at 478 ("there must be more than the unsupported assumption of the process server"); see also Keske v. Square D Co., 58 Wis. 2d 307, 313, 206 N.W.2d 189, 192 (1973) ("The use of the word 'apparently' can only refer to what is apparent to the person actually serving the complaint."). As a result of this lack of information and because plaintiff is pro se, I will allow her to choose one of the two options listed below in order to attempt to comply with Wis. Stat. § 801.11(5):

OPTION 1: Plaintiff may have until June 19, 2002, to submit an affidavit from her process server, Cedric Harris, that describes in detail what went on when he served process on defendant's receptionist. This affidavit must be notarized. I will review Harris's affidavit to determine whether it was reasonable for Harris to conclude that Long was a "person who is apparently in charge of the office." See Horrigan, 106 Wis. 2d at 683; 317 N.W.2d at 478 ("Specifically, the process server's conclusion must be one that was reasonable under the circumstances."). Plaintiff should be aware that the fact that Long is defendant's receptionist will not be enough, in and of itself, to establish that Harris concluded reasonably that she was a person apparently in charge of defendant's office. Harris must describe the facts and conversation that led him to believe that Long was in charge of the office. Plaintiff should be aware that if she chooses this option and I find that Harris's conclusion that Long was apparently in charge of the office was not reasonable under the circumstances, plaintiff's amended complaint will be dismissed and she will not be allowed to attempt to serve process on defendant again in this lawsuit.

OPTION 2: Plaintiff may have until June 19, 2002, to serve defendant personally with the summons and amended complaint. To reiterate, plaintiff may not serve process herself. See Fed. R. Civ. P. 4(c)(2). The process server is to follow the requirements of Wis. Stat. § 801.11(5). See also Keske, 58 Wis. 2d at 313, 206 N.W.2d at 192 ("If an 'officer, director or managing agent of the corporation' cannot be personally served, then the

summons can be left 'with the person who is apparently in charge of the office.'"). Because defendant has not waived service of process, plaintiff is entitled to recoup her costs of serving process from defendant. See Fed. R. Civ. P. 4(d)(2)(G)(5). For this reason, plaintiff would be wise to hire a professional process server. I note that plaintiff's current process server, Harris (a computer operator), checked a box on the return of service form incorrectly, indicating that defendant had been served at its dwelling house when in fact he attempted to serve defendant at its business address. To be absolutely clear, if plaintiff chooses this option and fails to serve process properly, her case will be dismissed and she will not be allowed to attempt to serve process on defendant again in this lawsuit. If plaintiff serves defendant successfully, defendant will have 20 days in which to file an answer. See Fed. R. Civ. P. 12(a)(1)(A).

ORDER

IT IS ORDERED that plaintiff Marge Jarrells may have until June 19, 2002, to either (1) submit an affidavit from her process server, Cedric Harris, stating what happened when he served process on Rebecca Long, defendant's receptionist or (2) have a third party serve process on defendant personally and in compliance with Wis. Stat. § 801.11(5). If plaintiff

fails to do either of these two options by June 19, 2002, the clerk of court is directed to enter judgment in favor of defendant and close the case.

Entered this 5th day of June, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge