

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

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EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION,

Plaintiff,

v.

LEE'S LOG CABIN, INCORPORATED,

Defendant.  
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OPINION AND  
ORDER

05-C-0507-C

Plaintiff Equal Employment Opportunity Commission has brought this action against defendant Lee's Log Cabin, Incorporated, on behalf of Korrin Krause. Plaintiff contends that defendant refused to hire Krause because she is HIV positive, in violation of Title I of the Americans with Disabilities Act, 42 U.S.C. § 12112(a) and (b). On March 22, 2006, defendant filed a motion for summary judgment. On April 20, 2006, defendant filed a reply brief in support of its motion for summary judgment, even though plaintiff had not filed a response to the motion.

This matter is presently before the court on plaintiff's motion to strike defendant's

motion for summary judgment. Plaintiff contends that it was not properly served with defendant's motion. Although I conclude that on March 23, 2006, defendant failed to follow the requirements for proper service under Fed. R. Civ. P. 5(b), for the reasons explained below I conclude that it is not necessary to strike defendant's motion for summary judgment. Therefore, plaintiff's motion to strike will be denied.

On March 22, 2006, defendant electronically filed a motion for summary judgment in this court, together with a brief and accompanying affidavits. Defendant contends that the following day it emailed the same documents to plaintiff's attorney, thereby accomplishing service of process in compliance with Fed. R. Civ. P. 5(b)(2)(D), which permits service by electronic means. Plaintiff's attorney contends that he did not receive defendant's alleged email of March 23. According to plaintiff's attorney, the first he heard of defendant's motion for summary judgment was on April 21, 2006, when the parties held a mediation conference (at which time defendant hand-delivered a copy of the motion for summary judgment and accompanying documents to plaintiff's attorney).

At this juncture, the court has no way of determining whether defendant actually sent the March 23 email and whether plaintiff's attorney in fact did not receive the email. However, one thing is clear: even if defendant emailed the motion to plaintiff, defendant did not meet all of the requirements of Fed. R. Civ. P. 5(b)(2)(D) because it did not have, nor did it subsequently obtain, plaintiff's written consent for electronic service. If defendant had

not properly served plaintiff the motion and accompanying documents in person at the April 21 meeting, I would grant plaintiff's motion to strike. However, because plaintiff has in fact been properly served as of April 21, striking defendant's motion would achieve nothing but undue delay in this case. Presumably, if I struck its motion for summary judgment, defendant would file a motion to extend the deadline for filing dispositive motions (which was March 24, 2006), which the court would grant (in the interest of not letting a case proceed to trial unnecessarily if it could potentially be resolved on summary judgment), then re-file and re-serve the motion for summary judgment. There is no need to go through this ritual. Instead, I will give plaintiff twenty-one days from the date of this order to respond to defendant's motion for summary judgment. Defendant will then have ten days in which to file and serve a reply (defendant's reply brief of April 20, 2006, will be stricken).

#### ORDER

IT IS ORDERED that

1. Plaintiff Equal Employment Opportunity Commission's motion to strike defendant's motion for summary judgment is DENIED.

2. Plaintiff Equal Employment Opportunity Commission may have until May 30, 2006, to file a response to defendant Lee's Log Cabin's motion for summary judgment. Defendant may have until June 9, 2006, to file a reply to plaintiff's response.

3. Defendant's reply brief of April 20, 2006 is stricken.

Entered this 9th day of May, 2006.

BY THE COURT:  
/s/  
BARBARA B. CRABB  
District Judge