

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

LORI BENSON,

Petitioner,

v.

PER MAR SECURITY; DALE STEFFINS; and
GARY PEPPIN,

Respondents.

ORDER

06-C-198-C

In an order dated April 13, 2006, I stayed a decision on petitioner Lori Benson's request for leave to proceed in this action and asked her to supplement her affidavit of indigency so that I could determine how she provides for food, clothing and shelter. Petitioner has complied with that order. She states that she and her husband receive food stamps from the Green County Human Services agency, that they live with her parents and that she and her husband just recently began working part-time jobs, hers at Greenco Industries in Monroe, Wisconsin and his at Deiningers Restaurant in New Glarus, Wisconsin. She is expecting a baby, although she does not say how soon. Based on this information, I am satisfied that petitioner is financially eligible to proceed in forma pauperis.

In addition to insuring petitioner's financial eligibility for pauper status, I must read the allegations in her complaint liberally, Haines v. Kerner, 404 U.S. 519, 521 (1972), and

grant her leave to proceed if there is an arguable basis for her claim in fact or law. Neitzke v. Williams, 490 U.S. 319 (1989). However, if petitioner's action is frivolous or malicious, fails to state a claim upon which relief may be granted or seeks monetary relief against a defendant who is immune from such relief, the case must be dismissed pursuant to 28 U.S.C. § 1915(e)(2).

In her complaint, petitioner alleges that a co-worker, respondent Gary Peppin, subjected her to sexual harassment on the job. After she complained to her supervisors about Peppin, she was told she would not have to work with Peppin again. In addition, respondent Dale Steffins, Per Mar's General Manager, gave Peppin a written warning as soon as he learned of the harassment. Later, however, petitioner was told to work with Peppin on the same shift. She became so anxious she had to be taken to the emergency room. When she was released from the hospital, she was given a three-day leave from her job. Petitioner alleges that subsequently, she was subjected to a constructive discharge.

There is no apparent jurisdictional basis for petitioner's lawsuit against respondents Dale Steffins and Gary Peppin. Federal courts are courts of limited jurisdiction. They may entertain lawsuits alleging a violation of a petitioner's constitutional or federal rights and lawsuits alleging a violation of state law if the petitioner and all of the respondents are citizens of different states. Petitioner's complaint against Steffins and Peppin does not appear to have been brought under the diversity statute. Petitioner does not allege that these respondents violated her rights under state law and that she is a citizen of one state and they

and respondent Perl Mar Security are citizens of a different state. Moreover, I cannot construe petitioner's complaint to allege a constitutional violation against the respondents. Only "state actors" may be sued for constitutional violations, and none of the respondents petitioner names are state officials. The only possible jurisdiction basis for petitioner's claim is federal law. 28 U.S.C. § 1331 permits petitioner to sue Per Mar Security for alleged violations of her rights under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e. Under Title VII, the only proper respondent is the petitioner's employer. She may not sue her employer's supervisors or co-workers. Therefore, on the court's own motion I will dismiss respondents Dale Steffins and Gary Peppin from this action for lack of jurisdiction.

Finally, I note that petitioner has not submitted a right-to-sue letter from the Equal Employment Opportunities Commission with her complaint. Ordinarily, a petitioner suing under Title VII must exhaust her administrative remedies with the EEOC and obtain a right-to-sue letter before the merits of her claims may be heard in federal court. However, in Gibson v. West, 201 F.3d 990 (7th Cir. 2000), the Court of Appeals for the Seventh Circuit held that because exhaustion of administrative remedies in a Title VII action is a precondition to suit as opposed to a jurisdictional requirement, the requirement is subject to waiver, estoppel and equitable tolling. This means that if petitioner did not exhaust her administrative remedies and respondent does not challenge the failure on a motion to dismiss, her suit may proceed in this court.

ORDER

IT IS ORDERED that petitioner Lori Benson is GRANTED leave to proceed in forma pauperis in this action against respondent Per Mar Security.

Further, IT IS ORDERED that petitioner's request for leave to proceed in forma pauperis against respondents Dale Steffins and Gary Peppin is DENIED and these respondents are DISMISSED from this action.

The clerk of court is requested to arrange for the United States Marshal to serve petitioner's complaint on respondent Per Mar Security.

Entered this 20th day of April, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge