IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BRANDI LYNN WEIGEL,

OPINION AND ORDER

Plaintiff,

07-C-0005-C

v.

QUICKSILVER BROADCASTING,

Defendant.

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This is a civil case for money damages in which plaintiff Brandi Lynn Weigel alleges that she was constructively discharged from her job with defendant QuickSilver Broadcasting after defendant refused to accommodate her medical problems, in violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12300. Plaintiff is proceeding pro se. Her case is before the court on defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) on the ground that plaintiff did not file a timely charge of discrimination with the Equal Employment Opportunities Commission.

Before turning to the merits of defendant's motion, I note that ordinarily such a motion must be brought as one for summary judgment if it rests on a factual matter outside the scope of the complaint, such as the date on which plaintiff filed her charge of

discrimination. In this instance, however, plaintiff has attached to her complaint a copy of the charge she filed with the Equal Opportunity Commission, showing a filing date of September 12, 2006, and alleging that the date on which the discriminatory act took place was either September 15, 2005 or October 7, 2005. In effect, plaintiff has pleaded these dates as part of her complaint; therefore, they are her admissions and may be accepted as true for the purpose of deciding the motion. Fed. R. Civ. P. 10(c) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.").

Also attached to plaintiff's complaint is a document titled Complainant Information, which may be a copy of information obtained over the telephone from plaintiff and recorded by the Wisconsin Equal Rights Division. This document shows a date of August 7, 2006. It is not necessary to decide whether August 7, 2006 or September 12, 2006 is the actual filing date of plaintiff's claim or whether the date of the last allegedly discriminatory act was September 15 or October 7 of 2005. Whatever the dates, plaintiff's filing was late by at least four days. I turn then to the motion itself.

The Americans with Disabilities Act prohibits a "covered entity" from discriminating against a qualified individual with a 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 sole purpose of deciding this motion, I will assume that defendant is a covered entity.) The

Act's enforcement provision expressly incorporates § 2000e-5 of Title VII, which governs the enforcement of claims for various kinds of discrimination. In Wisconsin, which has an agency to enforce discrimination law, claims of discrimination must be filed either with the state agency or with the Equal Opportunity Commission within 300 days "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1), incorporated by 42 U.S.C. § 12117(a); see also Davidson v. Board of Governors of State Colleges and Universities, 920 F.2d 441, 442 (7th Cir. 1990). This filing provision is not jurisdictional, so it is subject to equitable tolling. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394 (1982).

Plaintiff does not deny that her filing was late. Instead, her arguments in her brief in opposition to defendant's motion to dismiss suggest that she can establish her entitlement to equitable tolling or equitable estoppel because of continuing violations by defendant and her own mental and physical impairments.

Plaintiff alleges that she was forced to sign an exit form in order to receive her commissions and that the exit form did not lead her to believe that she could file a discrimination claim. She adds that she called the "Americans with Disabilities Act" immediately after "constructively discharging her employment," Plt.'s Br. in Opp., dkt. #10, at 5, on October 7, 2005. (It appears from the attachments to her brief that she is referring to the DBTAC Great Lakes ADA Center, an institution that, according to its letter,

"provides informal technical guidance, training and material on the Americans with Disabilities Act"). Plaintiff alleges that she received a packet of information from the ADA Center on October 12, 2005, and that she obtained information about her rights from the Americans with Disabilities Act and the Wisconsin Coalition for Advocacy in November 2005. Also, she alleges that she encountered tremendous stress and severe depression after ending her employment, that coping with various medical problems, including a new diagnosis of multiple sclerosis delayed reasonable thinking about a discrimination claim, and that she was confused about the filing time because she has a learning disability in the area of mental processing in mathematics that caused her to calculate the filing period incorrectly. Plaintiff goes on to say that she was diagnosed with attention deficit hyperactivity disorder, that she is being treated for psychiatric problems that at times have included extreme stress and severe depression, along with a perceived bi-polar disorder and alcohol dependence and that these problems contributed to her delay in filing. Finally, plaintiff says that she was unaware of her right to sue because defendant violated its obligations to post the necessary information that would have alerted her to the need to file promptly.

I will start with plaintiff's assertion of equitable estoppel. This doctrine applies if defendant took some action intended to prevent plaintiff from suing within the 300-day limitations period. It would encompass her allegations that the exit form she signed did not lead her to believe she could file a discrimination claim and that defendant did not post the

information she needed to know that she was obligated to file promptly. There is no requirement that an employer include in its exit forms any notice of the time period for filing a discrimination claim, which disposes of plaintiff's first allegation, but employers subject to federal discrimination laws are required to post information about those laws.

The problem for plaintiff is that the day after she was allegedly constructively discharged she called an institution providing technical guidance on the Americans with Disabilities Act. She sought and obtained information from this institution, as well as from the Wisconsin Coalition for Advocacy. Thus, even if she is correct about defendant's failure to comply with a legal obligation to post signs, she cannot show that her failure to file a timely claim can be attributed to defendant.

The bulk of plaintiff's allegations relate to equitable tolling, a different concept from equitable estoppel. Equitable tolling gives a claimant extra time if "despite all due diligence he is unable to obtain vital information bearing on the existence of his claim." Cada v. Baxter Healthcare Corp., 920 F.2d 446, 451 (7th Cir. 1990). It could give a claimant extra time if factors beyond the claimant's control prevented him from filing, although there is no absolute rule requiring tolling for mental disability. See Lopez v. Citibank, N.A., 808 F.2d 905 (1st Cir. 1987) (collecting cases and concluding that even in discrimination actions against non-governmental entity, application of tolling for mental disability requires a "case-specific analysis").

In a later First Circuit case, the court suggested that tolling would require a showing that "the particular plaintiff's illness rendered him 'unable to protect his legal rights because of an overall inability to function in society,' or . . . unable to manage his business affairs, or to comprehend his legal rights and liabilities." Nunnally v. MacCausland, 996 F.2d 1, 5 (1st Cir. 1993) (quoting Decrosta v. Runyon, 1993 WL 117583 (N.D.N.Y. 1993)). As a standard similar to those used by states for determining incompetence, this seems to strike the right balance in protecting the rights of plaintiffs claiming tolling for a debilitating mental impairment.

Nothing in plaintiff's allegations or in the 47 exhibits she filed in support of her brief in opposition to defendant's motion to dismiss supports a conclusion that she could not have filed a claim with the EEOC promptly after she left her employment. In fact, in her exhibit 15, a psychotherapist who had been seeing plaintiff wrote on March 7, 2007, that in early 2006 she was doing well, that she had "a passion for employment" and that she promoted a local fund raising event for the Multiple Sclerosis Society. (The therapist does not say when the fund raising event took place.)

Nevertheless, because plaintiff is proceeding pro se and would not necessarily have understood the showing she would have to make for equitable tolling to apply, I will give her three weeks in which to submit information tending to support a conclusion that she was disabled from filing her claim for the entire 300-day period provided her under the law.

Plaintiff should be aware that showing that there were periods of time within the 300 days when she was unable to function will not automatically extend the filing time by the length of the time she was disabled. In other words, that plaintiff might have been unable to file for a few months during the almost ten-month filing period does not mean that she is entitled to an extension equal to the tolled period. Cada, 920 F.2d at 452-53 ("We do think equitable tolling should bring about an automatic extension of the statute of limitations by the length of the tolling period or any other definite term. It is, after all, an equitable doctrine."). Only if plaintiff can show that she was unable at any time during the 300-day period to undertake the relatively simple chore of filing a claim of discrimination will she be entitled to tolling.

ORDER

IT IS ORDERED that a ruling on defendant QuickSilver Broadcasting's motion to dismiss is RESERVED; plaintiff Brandi Weigel may have until June 4, 2007, in which to serve and file any information she has to support an assertion that she was disabled from filing for the full 300-day period in which filing was required. If she does not file such information or if it appears on its face to be inadequate, I will enter an order granting defendant's motion; if it appears that it may be adequate, I will schedule an evidentiary

hearing on the motion.

Entered this 11th day of May, 2007.

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