IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

LEA N. WHITE,

Plaintiff,

v.

OPINION AND ORDER

09-cv-755-bbc

STATE OF WISCONSIN
DEPARTMENT OF REVENUE,

Defendant.

- -

Pro se plaintiff Lea White alleges that her employer, defendant Wisconsin Department of Revenue, passed her over for three promotions because of her race and then retaliated against her when she complained about it by demoting her, among other things. Plaintiff did not include a legal theory in her complaint, but I concluded in the orders screening her complaint and supplements that she stated a claim under Title VII of the Civil Rights Act, which prohibits employment discrimination "because of" race, 42 U.S.C. § 2000e-2(a), and retaliation for "oppos[ing]" discrimination prohibited by statute. 42 U.S.C. § 2000e-3.

Defendant has filed a motion for summary judgment, which is ready for decision. Defendant advances two grounds in support of its motion: (1) plaintiff failed to comply with

the exhaustion requirements under Title VII by failing to file a valid complaint within the statutory deadline; and (2) plaintiff has not adduced sufficient evidence to prove that defendant discriminated against her because of her race or retaliated against her for complaining about discrimination. Although I conclude that plaintiff's complaint was timely, I am granting defendant's motion because plaintiff has failed to adduce any evidence in support of her claims.

OPINION

Under 42 U.S.C. § 2000e-(f)(1), a plaintiff must file "a civil action" under Title VII within 90 days of receiving notice from the Equal Employment Opportunity Commission of her right to sue. Neither side identifies when plaintiff received the right to sue letter, but it is dated September 17, 2009, which means that the court presumes plaintiff received it three days later, Baldwin County Welcome Center v. Brown, 466 U.S. 147, 148 n.1 (1984), or four in this case because September 20, 2009, was a Sunday.

Plaintiff filed this lawsuit on December 16, 2009, which was within the 90-day deadline. However, defendant argues that plaintiff's original complaint did not toll the limitations period because this court dismissed it for failing to comply with Fed. R. Civ. P. 8. In particular, when screening plaintiff's complaint under 28 U.S.C. § 1915, I assumed that plaintiff intended to bring a claim under Title VII because she described unfair

treatment she received at work and used the words "bias" and "discrimination," but I concluded that she had not given fair notice of her claim because she did not identify the *type* of discrimination she suffered, such as race or sex. Accordingly, I gave plaintiff an opportunity to amend her complaint to clarify her allegations. Ultimately, I allowed her to proceed on theories of race discrimination and retaliation, but not until well after the 90-day deadline.

As defendant points out, a plaintiff has not filed "a civil action" within the meaning of § 2000e-(f)(1) until she files a complaint that complies with Rule 8. Baldwin, 466 U.S. at 149-50. Thus, plaintiff's Title VII claims must be dismissed as untimely unless she is entitled to equitable tolling. Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982) (90-day deadline is not "jurisdictional prerequisite to filing a Title VII suit, but a requirement subject to waiver as well as tolling when equity so requires"). Somewhat surprisingly, defendant devotes nearly all of its brief to the well-established proposition that plaintiff's original complaint was insufficient, but it does not address the issue of equitable tolling.

In Baldwin, 466 U.S. at 150-52, the Court concluded that a pro se plaintiff was not entitled to equitable tolling when she filed her right to sue letter with the district court within 90 days of receiving it, along with a request for appointment of counsel, but she did not file a complaint that satisfied Rule 8 until much later. A broad reading of Baldwin would require dismissal in this case, but the Court of Appeals for the Seventh Circuit has rejected

a blanket approach. For example, in Brown v. J.I. Case Co., 756 F.2d 48, 49-51 (7th Cir. 1985), the court held that a request for appointment of counsel *can* toll the 90-day deadline, even when the plaintiff has not accompanied that request with a complaint that complies with Rule 8. The court reached this conclusion by interpreting Baldwin narrowly: "The Court in Baldwin County merely recognized, and we agree, that the request for appointment of counsel may not toll the running of the ninety-day period where the plaintiff has engaged in some inequitable conduct." Brown, 756 F.2d at 51. In particular, the court noted that the plaintiff in Baldwin ignored court deadlines and refused to comply with court orders to fix the problems with her pleadings. Id. (plaintiff "was told three times [by the court] what she must do to preserve her claim, and she did not do it").

The facts of this case are not identical to Brown because plaintiff did not file a motion for appointment of counsel. However, it is difficult to see why a request for counsel would trigger equitable tolling but a complaint would not. In Brown, 756 F.2d at 51, the court did not suggest that the particular document filed is important, but whether the plaintiff acted "in bad faith." See also Harris v. Brock, 835 F.2d 1190, 1194 n.9 (7th Cir. 1987) ("Jones [v. Madison Service Corp., 744 F.2d 1309, 1314 (7th Cir.1984)] however, supplies the proper standard for equitable tolling: a good faith error by the claimant.") In this case, plaintiff violated Rule 8 because she failed to use the magic words "because of race," but defendant does not suggest that the omission was anything but an unfortunate oversight.

After all, plaintiff already had given notice to defendant directly and through the EEOC proceedings that she believed that defendant had discriminated against her because of race and because she complained of race discrimination. It would not serve the interest of justice to dismiss a case with prejudice simply because a pro se plaintiff omitted three words from her complaint.

Unlike the employee in Baldwin, plaintiff complied with this court's orders asking for clarification of her claim and she missed no court deadlines. (In one instance, plaintiff asked for an extension of time, which the court granted.) Thus, I conclude that plaintiff is entitled to equitable tolling under Brown.

In addition, I note that I erred when screening plaintiff's complaint in failing to recognize that she stated a claim under 42 U.S.C. § 1981, which prohibits race discrimination in employment and retaliation for complaining about race discrimination. Thompson v. Memorial Hospital of Carbondale, 625 F.3d 394, 402-03 (7th Cir. 2010); Stephens v. Erickson, 569 F.3d 779, 786 (7th Cir. 2009). Although plaintiff did not identify § 1981 in her complaint, she was not required to do so. Hatmaker v. Memorial Medical Center, 619 F.3d 741, 743 (7th Cir. 2010) ("[P]laintiffs in federal courts are not required to plead legal theories. Even citing the wrong statute needn't be a fatal mistake."). Thus, even if I concluded that plaintiff had failed to comply with § 2000-e(f)(1), that would have no effect on a claim under § 1981, which does not include an exhaustion requirement. Fane v.

Locke Reynolds, LLP, 480 F.3d 534, 539 (7th Cir. 2007) ("Whether Fane exhausted her Title VII claims is immaterial, however, because Fane also sued under § 1981, which does not require a plaintiff to bring an EEOC charge before filing a claim in federal court.") Accordingly, I will proceed to the merits of the case.

Unfortunately for plaintiff, her procedural victory does not translate into a victory on the merits because she has failed to adduce any evidence in support of her claims. According to defendant, it did not give plaintiff any of the promotions because other candidates were more qualified. Dft.'s PFOF ¶¶ 41-84, dkt. #31. Although plaintiff says she disputes some of defendant's proposed findings of fact, she did not submit any evidence that contradicted defendant's proposed findings, despite multiple extensions of time she received from the court to respond to defendant's motion for summary judgment. Dkt. #45 and 53.

The only evidence plaintiff has submitted is a compact disc that she says is a recording of meetings she had with her supervisors. Defendant objects to the recording on the ground that plaintiff refused to produce it during discovery, but even if I assume that the recording is admissible, she fails to identify any specific portion of it that supports a finding of race discrimination. Plaintiff cannot simply cite generally to a lengthy recording and expect this court and defendant to determine whether something in it might be relevant to her claim. Hemsworth v. Quotesmith.Com, Inc., 476 F.3d 487, 490 (7th Cir. 2007) ("In considering a motion for summary judgment, the district court is not required to scour the

record in search of evidence to defeat the motion; the nonmoving party must identify with reasonable particularity the evidence upon which the party relies.").

The same is true of plaintiff's retaliation claim. In her complaint, plaintiff identified three allegedly retaliatory acts: (1) being subjected to additional scrutiny regarding her level of performance; (2) being "yelled at" by Diana Kiesling, a supervisor; and (3) being demoted. Defendant admits that it was evaluating plaintiff's productivity, but it is not reasonable to infer that defendant had a retaliatory motive for doing so because it began discussing with plaintiff concerns it had over her productivity long before she complained about alleged discrimination. Even if I assumed that defendant "ratchet[ed] up or increased" the scrutiny after she began complaining, Boumehdi v. Plastag Holdings, LLC, 489 F.3d 781, 793 (7th Cir. 2007), suspicious timing alone is not enough to support a finding of retaliation. Mobley v. Allstate Insurance Co., 531 F.3d 539, 549 (7th Cir. 2008).

Defendant denies that Kiesling "yelled" at plaintiff. It notes one incident in which Kiesling spoke "loudly" to plaintiff because plaintiff was wearing headphones at the time. That is simply not the type of conduct that gives rise to a federal civil rights claim. Crews v. City of Mt. Vernon, 567 F.3d 860, 869-70 (7th Cir. 2009) (negative comments not enough to support retaliation claim unless comments are severe or pervasive).

Defendant admits that it transferred plaintiff, but it says that it did so because she *requested* a transfer. Plt.'s PFOF ¶¶ 105 and 109, dkt. #31. In any event, the new position

paid the same as the old one. Id. at ¶ 108. Plaintiff points to no evidence that the new position was inferior in any way. Accordingly, that decision cannot constitute retaliation.

In sum, a reasonable jury could not infer from the evidence in the record that defendant discriminated against plaintiff because of her race or retaliated against her for complaining about race discrimination. Accordingly, I am granting defendant's motion for summary judgment.

ORDER

IT IS ORDERED that defendant State of Wisconsin Department of Revenue's motion for summary judgment, dkt, #50, is GRANTED. The clerk of court is directed to enter judgment in favor of defendant and close this case.

Entered this 3d day of May, 2011.

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