

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

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PAMELA GIBSON,

ORDER

Plaintiff,

10-cv-246-bbc

v.

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Defendant.  
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Plaintiff Pamela Gibson has filed a timely motion under Fed. R. Civ. P. 59(e) in which she seeks reconsideration of the conclusion in an opinion and order dated January 3, 2011, dkt. #46, that her claim for long-term disability benefits under the Employee Retirement Income Security Act must be dismissed for her failure to exhaust her administrative remedies. She raises two arguments: (1) defendant waived an exhaustion defense by failing to raise it before summary judgment; and (2) defendant should have treated as an administrative appeal materials she sent them on May 26, 2009 and July 27, 2009.

The first argument is a nonstarter because plaintiff gives no reason why she failed to raise it in her brief in opposition to defendant's motion for summary judgment. As I noted in the January 3 opinion, plaintiff did not make *any* argument in opposition to defendant's

exhaustion defense. A waiver argument, like anything else other than jurisdiction, is itself subject to principles of waiver and forfeiture. Westefer v. Snyder, 422 F.3d 570, 584 (7th Cir. 2005) (“[A] defense of waiver may itself be waived if not raised.”). As the Court of Appeals for the Seventh Circuit has stated many times, a Rule 59 motion is not a vehicle for raising issues “that could or should have been presented to the court prior to judgment.” United States v. 47 West 644 Route 38, Maple Park, Illinois, 190 F.3d 781, 783 (7th Cir. 1999). See also Frietsch v. Refco, Inc., 56 F.3d 825, 828 (7th Cir. 1995) (“It is not the purpose of allowing motions for reconsideration to enable a party to complete presenting his case after the court has ruled against him. Were such a procedure to be countenanced, some lawsuits really might never end, rather than just seeming endless.”). If plaintiff believed that defendant was procedurally barred from raising an exhaustion defense, she could have raised this argument in her summary judgment briefs. It is too late to raise the argument now.

In a footnote, plaintiff suggests that defendant “abandoned” its exhaustion argument in its reply brief. Plt.’s Br., dkt. #51, at 7 n.1. Not so. Defendant pointed out on the first page of its reply brief that plaintiff “does not dispute (or even respond) to Unum’s argument that she failed to exhaust her administrative remedies.” Dft.’s Br., dkt. #44, at 1. It is true that defendant did not develop any additional argument related to exhaustion, but defendant cannot be faulted for that because plaintiff offered nothing to which defendant could respond.

I considered and rejected in the January 3 opinion the possibility that materials plaintiff filed with defendant in May and July 2009 were sufficient to trigger an appeal. Plaintiff's motion does not challenge the law or the facts on which I relied to reach that conclusion. It is undisputed that plaintiff told defendant in its May 26 letter to "not take any action to consider the appeal until such time as we have had an opportunity to both review the current Administrative Record, and to supplement the record with additional documentary evidence to support Ms. Gibson's claim," dkt. #24-4, at 8-9, and that, in July 2009, when defendant asked plaintiff whether she wished to "commence the appeal," counsel stated that he "will review the file and let [defendant] know." Dkt. #35, exh. A, at UA-CL-LTD-974. It was not until December 2009, several months after the time for appealing expired, that plaintiff asked defendant to begin review of the appeal. Dkt. #24-4, at 13. Accordingly, I adhere to the conclusion in the January 3 opinion that, "[u]nder these circumstances, plaintiff cannot argue plausibly that she did not have adequate notice of her obligations under the plan or that she acted diligently in pursuing her administrative remedies." Dkt. #46, at 14.

#### ORDER

IT IS ORDERED that plaintiff Pamela Gibson's motion to alter or amend the judgment under Fed. R. Civ. P. 59, dkt. #46, is DENIED.

Entered this 13th day of January, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge