

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

MICHELLE S. DAHLKE,

Plaintiff,

v.

CLIFTONLARSONALLEN, LLP,

Defendant.

OPINION AND ORDER

12-cv-669-bbc

Plaintiff Michelle Dahlke is alleging in this civil suit that her former employer, defendant CliftonLarsonAllen, LLP, paid her less than similarly situated male employees, in violation of Title VII of the Civil Rights Act and the Equal Pay Act. Defendant has filed a motion to dismiss the complaint as to the Title VII claim because plaintiff has not exhausted her administrative remedies. (The Equal Pay Act does not include an exhaustion requirement. Tamayo v. Blagojevich, 526 F.3d 1074, 1089-90 (7th Cir. 2008).)

In her response, plaintiff admits that she filed this lawsuit before she finished proceedings with the Equal Employment Opportunity Commission. In fact, she says that she still has not yet received her right to sue letter. However, she says she jumped the gun because she was worried that the statute of limitations would expire on her claim under the Equal Pay Act while she was exhausting her administrative remedies for her Title VII claim. She asks the court to stay her Title VII claim until she receives a right to sue letter or, in the

alternative, dismiss her Title VII claim without prejudice to her refiling it later in the same case.

Neither of these is a viable option. I cannot stay plaintiff's Title VII claim because "Title VII does not authorize the filing of suit until the plaintiff has exhausted his administrative remedies." Hill v. Potter, 352 F.3d 1142, 1145 (7th Cir. 2003). Plaintiff was required to exhaust her administrative remedies *before* she filed her lawsuit; she cannot complete the exhaustion process while her case is pending. Cf. Ford v. Johnson, 362 F.3d 395, 401 (7th Cir. 2004) (when prisoner brings lawsuit before completing exhaustion process, case must be dismissed without prejudice, even if prisoner has finished process since filing lawsuit).

Plaintiff's second suggestion, to dismiss the Title VII claim with leave to refile it later in this case, is no better. Plaintiff admits in her response that she does not know when the EEOC will resolve her administrative claim, which means it is possible that plaintiff would be seeking leave to amend her complaint after the case has reached an advanced stage. It would be unfair to defendant to allow plaintiff to assert a new claim if trial were imminent or after defendant filed a motion for summary judgment. Further, if plaintiff's Equal Pay Act claim were resolved before she received a right to sue letter, the judgment could have a preclusive effect on her Title VII claim. Herrmann v. Cencom Cable Associates, Inc., 999 F.2d 223, 225 (7th Cir. 1993).

Another option would be to dismiss *both* claims without prejudice and allow plaintiff to refile both of them at the same time after plaintiff finished the exhaustion process.

However, the Supreme Court has held that proceedings before the EEOC do not toll the limitations period for other discrimination claims. Johnson v. Railway Exp. Agency, Inc., 421 U.S. 454 (1975).

This leaves plaintiff with two options. First, she may dismiss her Title VII claim *with* prejudice and proceed with her claim under the Equal Pay Act. Alternatively, I will dismiss the Title VII claim without prejudice and administratively close the case as to the Equal Pay Act claim. Once plaintiff receives her right to sue letter, she may file a motion to reopen the case and file an amended complaint that includes both claims. Cf. Herrmann, 999 F.2d at 225 (employee in plaintiff's situation "can sue on his other claims" [not subject to exhaustion], ask the court . . . to stay the proceedings until the Title VII administrative process is complete, and then if the process does not end in a way that satisfies him amend his complaint to add a Title VII count").

ORDER

IT IS ORDERED that a decision on defendant CliftonLarsonAllen, LLP's motion to dismiss is STAYED. Plaintiff Michelle Dahlke may have until February 18, 2013 to inform the court whether she wishes to: (1) dismiss her claim under Title VII with prejudice and proceed with her Equal Pay Act claim; or (2) dismiss her claim under Title VII without prejudice and administratively close the case pending the resolution of the proceedings

before the EEOC.

Entered this 8th day of February, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge