

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

ELIZABETH ERICKSON,

Plaintiff,

OPINION AND ORDER

v.

15-cv-320-wmc

DEPARTMENT OF WORKFORCE
DEVELOPMENT, DIVISION OF
VOCATIONAL REHABILITATION OF
THE STATE OF WISCONSIN, MICHAEL
GRECO, JOHN HAUGH, and PATRICIA
NOLAND,

Defendants.

Before the court is defendants' emergency motion for clarification of this court's motion for summary judgment. (Dkt. #75.) In particular, defendants seek "clarification" of references in the court's summary judgment opinion to this case proceeding to a jury trial. Defendants correctly point out that neither party made a timely demand for a jury trial under Federal Rule of Civil Procedure 38(b). Indeed, not only did plaintiff omit any demand in her complaint, on the JS-44 form submitted with her complaint, she checked "No" in response to Jury Demand.

Still, for reasons that are not entirely clear, at the preliminary pretrial conference and in the subsequently-issued pretrial conference order and an amended order, this case was set to be tried by a jury. (9/15/15 PPTC Order (dkt. #16) ¶ 8 ("Trial shall be to a jury of eight and shall be bifurcated."); *see also* Am. PPTC Order (dkt. #18) ("Jury Selection and Trial: November 7, 2016 at 9:00 a.m.")) As a result, the court and the parties, including, critically defendants, all treated this case as proceeding to a jury trial. In their brief in support of summary judgment, among other references to a jury trial, defendants stated: "Because Erickson has not presented sufficient evidence to reach a jury on whether she was able to

perform the essential functions of her job with an accommodation, as discussed above, this Court need not consider any claim alleging a failure to engage in any interactive process.” (Def.’s Br. (dkt. #36) 31.) Moreover, this “emergency” motion was filed more than two weeks after the court issued its summary judgment opinion from which defendants, rightly or wrongly, must have taken some comfort.¹ Finally, the motion comes after the parties’ filed a joint stipulation for an extension of time to file *voir dire* and jury instructions -- neither of which would be necessary if this case were proceeding to a bench trial. All of this is to say that defendants’ motion for “clarification” strikes this court as a blatant attempt to change course.

While there appears no doubt that plaintiff waived her right to demand a jury trial by failing to serve a written demand within 14 days of the last pleading as required under Rule 38(b), an avenue for the court to relax this requirement “in order to achieve the goal of substantial justice” exists under Rule 39(b). 9 Charles Alan Wright and Arthur R. Miller, *Federal Practice & Procedure* § 2234 (3d ed. 2008). Rule 39(b) states that “the court may, on motion, order a jury trial on any issue for which a jury might have been demanded.” Fed. R. Civ. P. 39(b). As such, the court might treat plaintiff’s opposition to defendants’ motion for clarification as a motion for a trial by jury under Rule 39(b), and the course of action described above would certainly seem to provide a sound reason for granting that motion, but for one flaw: plaintiff has not, and indeed cannot at this late date, demonstrate that she has a right to a jury trial under the Seventh Amendment to the United States Constitution.

¹ If so, defendants read too much into the court’s expressions of skepticism with plaintiff’s proof or too little into its expressions of skepticism with defendants’ response. Regardless, I will come to this trial with *no* preconceived notion as to its outcome.

In response to defendants' motion for clarification, plaintiff points out that compensatory damages are an available remedy for a violation of § 504 of the Rehabilitation Act, and a claim for legal relief entitles a plaintiff to a jury trial under the Seventh Amendment. (Pl.'s Opp'n (dkt. #77) 5-6 (citing *CTL ex rel. Trebatoski v. Ashland Sch. Dist.*, 743 F.3d 524, 528 (7th Cir. 2014); *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564 (1990)).) Plaintiff's argument, however, falters in demonstrating that she actually made such a demand for legal relief. While her first amended complaint contains a reference to "[s]uch other *legal* or equitable relief," the remainder of the claim for relief solely concerns equitable remedies. (1st Am. Compl. (dkt. #13) pp.16-17 (emphasis added).) Perhaps acknowledging this, plaintiff instead relies on a statement in the parties' Joint Rule 26(f) Discovery Plan and Pretrial Conference Statement that "[p]laintiff seeks injunctive and declaratory relief, compensation for back pay and *such other additional relief available under the remedy portions of § 504 of the Rehabilitation Act[.]*" (Joint Rept. (dkt. #15) p.2.)

Viewed liberally these statements *could* be seen as a demand for compensatory damages or other legal (non-equitable) relief. As defendants explain in their reply in support of their motion for clarification, however, plaintiff made no disclosure of any claim for for compensatory damages as required under Rule 26(a)(1). Instead, she expressly seeks an accounting for front and back pay, which are equitable remedies. *See, e.g., Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 501 (7th Cir. 2000) ("Front pay and back pay under Title VII and the [ADA] are 'equitable' matters."); *see also* 29 U.S.C.A. § 794a (providing that the remedies for a violation of the Rehabilitation Act are the same available under Title VII).

Based on all of this, the court concludes that plaintiff has failed to demonstrate a right to a jury trial under the Seventh Amendment. As such, this case will proceed to a trial to the bench. Below, the court sets forth a revised pretrial schedule based on this decision.

ORDER

IT IS ORDERED that:

- 1) Defendants' motion for clarification (dkt. #75) is GRANTED, and this case will proceed to a trial to the bench, commencing November 7, 2016.
- 2) The court's order governing the final pretrial conference in bench trials is attached to this order.
- 3) In light of the required bench trial filings, the court sets the following deadlines:
 - a) Deadline for filings identified in ¶ B: October 13, 2016;
 - b) Deadline for filings identified in ¶ C: October 20, 2016;
 - c) Court's copy of exhibits (either in electronic form or in hard copy): October 27, 2016;
 - d) Final pretrial conference: November 2, 2016, at 4:00 p.m.;
 - e) Court Trial: November 7, 2016, at 8:30 a.m.

Entered this 7th day of October, 2016.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge