Larson v. Hansen Construction Inc

2020 | Cited 0 times | D. Colorado | July 8, 2020

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO Gordon P. Gallagher, United States Magistrate Judge

Civil Case No. 19-CV-02750-RM-GPG JODI LARSON, Plaintiff, v. HANSEN CONSTRUCTION, INC., Defendant.

REPORT AND RECOMMENDATION GRANTING DEFENDANT'S

MOTION TO DISMISS

This matter comes before the Court on Defendant's motion to dismiss (D. 29) 1

, Plaintiff' s response (D. 31), and Defendant's reply (D. 32). The motion has been referred to this Magistrate Judge. (D. 30). 2

The Court has reviewed the pending motion, response, reply, and all attachments.

1 "(D. 29)" is an example of the stylistic convention used to identify the docket number assigned to a specific paper by the Court's case management and electronic case filing system (CM/ECF). This convention is used throughout this Report and Recommendation. 2 Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. FED. R. CIV. P. 72(b). The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed find ings and recommendations contained in this report may bar the party from a de novo determination by the District Judge of the proposed findings and recommendations. United States v. Raddatz, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted or adopted by the District Court. Thomas v. Arn, 474 U.S. 140, 155 (1985); Moore v. United States, 950 F.2d 656, 659 (10th Cir. 1991). The Court has also considered the entire case file, the applicable law, and is sufficiently advised in the premises. Oral argument is not necessary. This Magistrate Judge respectfully recommends that the Defendant's motion to dismiss

the amended complaint be GRANTED.

Defendant moves to dismiss citing both Federal Rule of Civil Procedure 12(b)(5), for supposed insufficient service of process, and Rule 12(b)(6), for failure to state a claim. Because I believe this matter can be definitively decided based on Rule 12(b)(6), I do not reach the Rule 12(b)(5) analysis.

Plaintiff brings suit under Title VII of the Civil Rights Act of 1964 alleging that her discharge on July 9, 2018 was due to her gender and her intent to become pregnant. (D. 6, pp. 3- 4). Plaintiff, after being told that she was discharged for unprofessional reasons, was escorted out of the office on July 9, 2018. (D. 6, p. 4). Plaintiff definitively establishes July 9, 2018 as the final, if not only, date of violation and makes no argument as to any continuing violation(s) after that date. (D. 6 passim). Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC)/Colorado Civil Rights Division on May 30, 2019. (D. 6, p. 14).

It is three hundred twenty-five (325) days from July 9, 2018 until May 30, 2019. May 5, 2019 would have been three hundred (300) elapsed days from July 9, 2018.

Standard of Review The Court may dismiss a complaint for failure to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6). To withstand a Rule 12(b)(6) motion to dismiss, a complaint must contain enough allegations of fact, which, taken as true, "state a claim to relief that is plausible on its face." Bell Atla ntic Corp. v. Twombly, 550 U.S. 544, 570 (2007); Khalik v. United Air Lines, 671 F.3d 1188, 1190 (10th Cir. 2012). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." Miller v. Glanz, 948 F.2d 1562, 1565 (10th Cir. 1991).

Pro Se Plaintiff

The Court must construe the amended complaint liberally because Plaintiff is not represented by an attorney. See Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1110 (10 th

Cir. 1991). However, the Court should not act as a pro se litigant's advocate. See Hall, 935 F.2d at 1110.

Analysis

For a plaintiff to recover for employment discrimination under Title VII, a plaintiff must first file a charge of discrimination with the EEOC within three hundred (300) days of the alleged discrimination. See 42 U.S.C. § 2000e-5(e)(1); see also Daniels v. United Parcel Serv., Inc., 701 F.3d 620, 628 (10th Cir.2012). Here, the uncontroverted evidence is that the EEOC charge was filed three hundred twenty-five (325) days after discharge. An EEOC charge filed more than three hundred (300) days after the discriminatory conduct is untimely, and timely filing is a prerequisite for a Title VII

suit. See Boyer v. Cordant Technologies, Inc., 316 F.3d 1137, 1139 (10 th

Cir. 2003); see also Murdock v. City of Wichita, Kans. 535 Fed. Appx. 820, 822 (10 th

Cir. 2013) (not selected for official publication). Compliance with the three hundred (300) day filing requirement "is a condition precedent to suit that functions like a statute of limitations and is subject to waiver, estoppel, and equitable tolling." Tademy v. Union Pac. Corp., 614 F.3d 1132, 1150 (10th Cir.2008) (internal quotation mark omitted) Equitable Tolling

"While the statute of l imitations is an affirmative defense, when the dates given in the complaint make clear that the right sued upon has been extinguished, the plaintiff has the burden of establishing a factual basis for tolling the statute." Aldrich v. McCulloch Props., Inc., 627 F.2d 1036, 1041 n. 4 (10th Cir.1980). Therefore, a statute of limitations question may be appropriately resolved on a motion to dismiss. Id. Equitable tolling "is appropriate only where the circumstances of the case rise to the level of active deception ... where a plaintiff is lulled into inaction by [his] past employer, state or federal agencies, or the courts." Hulsey v. Kmart, Inc., 43 F.3d 555, 557 (10th Cir.1994) (internal quotation marks omitted). "Courts may evaluate whether it would be proper to apply such doctrines, although they are to be applied sparingly." Nat'l R.R. Passenger Corp. v. Morgan, 122 S.Ct. 2061 (2002).

In the instant case, Plaintiff makes no argument in support of equitable tolling. See Plaintiff' s response (D. 31). Conversely, Defendant opposes any tolling in its motion to dismiss. (D. 29, p. 6). Plaintiff' s only opposition to the motion to dismiss is that she wants a jury to decide her case. (D. 31). A full review of the facts set forth in Plaintiff' s amended complaint (D. 6), and which I take as true and construe in her favor at this time, show that July 9, 2018 is the last relevant date upon which any action is alleged to have occurred, e.g., no argument or factual averment is made which would carry forward that date as a part of a continuing pattern of discrimination. The buck stopped on that date. Further, the factual recitation from Plaintiff shows that, as of July 9, 2018, she believed Hansen' s stated reason for discharging her " unprofessional reasons" was a pretext or subterfuge. (D. 6, p. 7).

Based on a full and complete review of the amended complaint, the three hundred day EEOC clock started ticking on July 9, 2018. On that date, Plaintiff knew she had been discharged and believed the stated reason for her discharge to be pretextual. At that time, Plaintiff believed she had really discharged in violation of Title VII—gen der discrimination due to her desire to have a child. Thus, it was incumbent upon Plaintiff to file her claim with the EEOC no later than May 5, 2019. Unfortunately for Plaintiff, she did not file until May 30, 2019 and her filing was untimely. No reason exists to toll the time. Nor does the Court find any reason to waive or toll the time period.

Thus, Plaintiff has not met the prerequisite filing requirement for a Title VII suit and her case is subject to dismissal. For the foregoing reasons, this Magistrate Judge respectfully recommends that the motion to dismiss be GRANTED under a Rule 12(b)(6) theory.

Dated at Grand Junction, Colorado this July 8, 2020.

Gordon P. Gallagher United States Magistrate Judge