1997 WL 260595
United States District Court, N.D. Illinois.

Anita BIELICKI, and all others similarly situated, Plaintiff,
v.
CITY OF CHICAGO, Defendant.

No. 97 C 1471. | May 8, 1997.

Female police officer brought action against city, alleging discrimination in violation of Americans with Disabilities Act (ADA), Title VII and Pregnancy Discrimination Act and breach of contract in violation of public policy. City moved to dismiss. The District Court, Conlon, J., held that: (1) officer's allegation that she suffered from disability of infertility was sufficient to state claim for ADA disability discrimination; (2) officer's allegation that city paid for infertility treatments for male employees covered by health plan but denied coverage for her infertility treatments under same plan was sufficient to state claim for Title VII gender discrimination; and (3) officer could bring claim that city breached health benefits contract by refusing to pay infertility benefits in violation of Illinois public policy, as embodied in Illinois Insurance Code, without exhausting collective bargaining agreement (CBA) remedies.

Motion denied.

Opinion

MEMORANDUM OPINION AND ORDER

CONLON

***1** Anita Bielicki ("Bielicki") sues the City of Chicago ("the City") for discrimination in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et. seq.,* (Count I), Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et. seq.,* (Count II) and the Pregnancy Discrimination Act which amended Title VII (Count III). Bielicki also claims the City has breached her health insurance contract by refusing to pay infertility benefits in violation of Illinois public policy (Count IV). The City moves to dismiss Bielicki's complaint pursuant to Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction and 12(b)(6) for failure to state a claim upon which relief can be granted.

BACKGROUND

For purposes of a motion to dismiss, the court accepts all well-pleaded allegations in the complaint as true. *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia,* 73 F.3d 1423, 1428 (7th Cir.1996). Bielicki is police officer employed by the City of Chicago. Compl. at ¶ 8. Bielicki suffers from ovarian dysfunction and infertility. *Id.* at ¶ 10. Bielicki claims her condition substantially limits one or more of her major life activities, including procreation, reproduction, conception, pregnancy and the birth and raising of her own children. *Id.* From approximately August 1994 to August 1995, Bielicki received treatments for infertility, including tests and *in vitro* fertilization. *Id.* at ¶ 11. From approximately October 1994 to August 1995, Bielicki received medical treatments and tests relating to her pregnancy. *Id.* at ¶ 12.

The City maintains a self-insured benefit plan ("the Plan") which provides medical and other health benefits to City employees. *Id.* at ¶¶ 5, 9. Bielicki was denied health care coverage for her infertility treatment and treatment related to her pregnancy. *Id.* at ¶ 13. On April 24, 1995, Bielicki inquired into the denial of coverage. *Id.* at ¶ 14. On June 21, 1995, the City informed Bielicki that the medical services she received were infertility treatments and she would not be considered for payment. *Id.* at ¶¶ 14–15. On July 13, 1995, Bielicki appealed the decision to deny her coverage to the finance committee; the

committee denied her appeal and affirmed the City's decision on July 17, 1995. *Id.* at ¶¶ 16–17.

On January 4, 1996, Bielicki filed a charge of discrimination on behalf of herself and all others similarly situated with the Equal Employment Opportunity Commission ("EEOC"). *Id.* at ¶ 18. On December 19, 1996, the EEOC issued a notice of the right to sue and Bielicki timely filed this suit. *Id.*

DISCUSSION

I. STANDARD FOR A MOTION TO DISMISS

In ruling on a motion to dismiss, the court considers "whether relief is possible under any set of facts that could be established consistent with the allegations." *Bartholet v. Reishauer A.G.,* 953 F.2d 1073, 1078 (7th Cir.1992) (citing *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). A claim may be dismissed only if it is beyond doubt that under no set of facts would a plaintiff's allegations entitle her to relief. *Travel All Over The World, Inc.,* 73 F.3d 1423, 1429 (7th Cir.1996); *Venture Associates Corp. v. Zenith Data Systems Corp.,* 987 F.2d 429, 432 (7th Cir.1993) (citing *Beam v. IPCO Corp.,* 838 F.2d 242, 244 (7th Cir.1988)). A motion to dismiss tests the sufficiency of the complaint, not its merits. *Gibson v. City of Chicago,* 910 F.2d 1510, 1520 (7th Cir.1990).

II. STATUTE OF LIMITATIONS

***2** [1] In Illinois, a plaintiff must filed charges of discrimination with the EEOC within 300 days of the alleged discriminatory act. *See Washburn v. Sauer–Sundstrand, Inc.,* 909 F.Supp. 554, 558 (N.D.Ill.1995). The City argues Bielicki did not satisfy this requirement. Therefore, the City argues, Bielicki's ADA and Title VII claims are time-barred and this court lacks jurisdiction.

According to Bielicki, the treatment at issue was administered from approximately August 1994 to August 1995. Bielicki claims the City discriminated against her by refusing to provide health care coverage for that treatment, but she does not state when she applied for coverage or when the City denied it. *See* Compl. at ¶ 13. Rather, Bielicki claims she inquired about the denial of coverage on April 24, 1995 and the City informed her on June 21, 1995 that she would not be considered for payment. Bielicki filed charges of discrimination with the EEOC on January 4, 1996.

[2] [3] [4] The statute of limitations began to run as to Bielicki's discrimination claims on the date of the alleged unlawful practice, that is, the day the City denied coverage. *Brennan v. Daley,* 929 F.2d 346, 349 (7th Cir.1991). Nevertheless, the limitations period is subject to equitable tolling. *Id.* In other words, the limitations period may be tolled until a reasonable person in Bielicki's situation would know or should know she was the subject of discrimination. *Id.* Considering June 21, 1995—the day the City responded to Bielicki's inquiry—as the day Bielicki became aware of the alleged discrimination, her EEOC discrimination charge was timely.

[5] [6] The City argues the statute of limitations has run as to Bielicki's current claim because in 1993 she filed a separate charge of discrimination with the EEOC based upon the City's refusal to provide health care coverage for a series of infertility treatments. Thus, the City argues, the denial of coverage upon which this suit is based is merely an additional denial in response to an additional request under the same health plan for the same treatment. This argument is improperly addressed in a motion to dismiss because it requires examination of materials outside the complaint. *See Doe v. First National Bank,* 865 F.2d 864, 873 (7th Cir.1989) ("motion to dismiss must be decided on the face of the complaint, including materials appended as exhibits"). In ruling on a motion to dismiss for lack of subject matter jurisdiction, the district court may look beyond the jurisdictional allegations of the complaint and "view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Capitol Leasing Co. v. F.D.I.C.,* 999 F.2d 188, 191 (7th Cir.1993) (per curiam); *Barnhart v. United States,* 884 F.2d 295, 296 (7th Cir.1989), *cert. denied,* 495 U.S. 957, 110 S.Ct. 2561, 109 L.Ed.2d 743 (1990). "[F]iling a timely charge with the EEOC [however] is not a jurisdictional prerequisite to suit in federal court.... " *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 393, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). Accordingly, the court may not yet address this argument.

III. WAIVER

***3** [7] [8] The City also argues Bielicki waived her right to challenge its decision to deny coverage in the settlement agreement she entered into with respect to her first discrimination charge in 1993. The settlement of an EEOC discrimination charge may include a clear and unambiguous waiver that will bar a subsequent Title VII claim based on the same events. *See Sherman v. Standard Rate Data Service, Inc.,* 709 F.Supp. 1433 (N.D.Ill.1989). In this case, however, the parties dispute the scope of the waiver. Bielicki claims the settlement of her 1993 EEOC discrimination charge does not prohibit this suit because this action is based on a subsequent EEOC charge related to a separate series of infertility treatments resulting in the birth of a different child. Resolution of this affirmative defense, like the City's first argument, requires consideration of matters outside the complaint. It is improperly addressed in a motion to dismiss and will not be considered at this time.

IV. DISABILITY

[9] Under the ADA, it is unlawful for an employer to "discriminate against a qualified individual with a disability because of the disability ... in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment." 42 U.S.C. § 12112(a). The City argues Bielicki's complaint must be dismissed because her claimed disability, infertility, does not constitute a disability within the meaning of the ADA. The ADA defines a "disability" as "a physical ... impairment that substantially limits one or more of the major life activities of an individual...." 42 U.S.C. § 12102(2). A "physical impairment" includes "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, *reproductive,* digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.... " 29 C.F.R. § 1630.2(h)(1) (emphasis added). Infertility, as a physiological disorder of the reproductive system, is a physical impairment under the ADA. Because infertility substantially limits the major life activity of reproduction, Bielicki states a cause of action under the ADA. *See Erickson v. Board of Governors,* 911 F.Supp. 316, 323 (N.D.Ill.1995) ("allegation that infertility is a physical impairment which substantially limits the major life activity of reproduction states a claim under the ADA"); *Pacourek v. Inland Steel Co.,* 858 F.Supp. 1393, 1404–1405 (N.D.Ill.1994) (same).

IV. GENDER DISCRIMINATION

[10] Bielicki may prove gender discrimination in one of two ways. First, she can prove discriminatory intent directly through the use of direct or circumstantial evidence. *Geier v. Medtronic, Inc.,* 99 F.3d 238, 241 (7th Cir.1996). Alternatively, Bielicki may use the *McDonnell Douglas* approach which shifts the burden of production to the defendant once the plaintiff establishes a prima facie case of discrimination. *Geier,* 99 F.3d at 241; *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1972). To establish a prima facie case of gender discrimination, Bielicki must show she was (1) a member of a protected class, (2) performed her job satisfactorily, (3) suffered an adverse employment action and (4) was treated less favorably than similarly-situated male employees. *Hughes v. Brown,* 20 F.3d 745, 746 (7th Cir.1994). Once a prima facie case is established, the City must articulate a legitimate, nondiscriminatory reason for its action. *Id.* Bielicki, however, may still rebut the stated reason as merely pretextual. *Id.* at 747.

***4** The City argues Bielicki fails to state a claim because she fails to explicitly allege discriminatory intent and "but for" causation. Bielicki alleges the City paid for infertility treatments for males covered under the same health plan, but denied coverage for her infertility treatments. This allegation of disparate treatment gives rise to an inference of discriminatory intent. *See Village of Bellwood v. Dwivedi,* 895 F.2d 1521, 1533 (7th Cir.1990). If this allegation is true, it may also establish "but for" causation. *See Konowitz v. Schnadig Corp.,* 965 F.2d 230, 232 (7th Cir.1992). Accordingly, Bielicki has stated a claim for gender discrimination.

V. CONTRACT CLAIM

[11] In Count IV, Bielicki claims the City has breached her health benefits contract by refusing to pay infertility benefits in violation of Illinois public policy as embodied in the Illinois Insurance Code, 215 ILCS 5/356m. The City asserts the Illinois Insurance Code addresses the coverage to be provided by private insurers. Because the City is a home rule unit of government and self-insured, the City argues it is not governed by the terms of the Illinois Insurance Code in this regard. Thus, the City argues Bielicki may not claim its refusal to cover infertility treatments is against public policy. Bielicki concedes the City is not specifically covered by the Illinois Insurance Code; she merely asserts the statute embodies the public policy of the State of Illinois. Accordingly, Bielicki may invoke public policy to bolster her interpretation of the health

insurance contract at issue.

The City also argues Bielicki's contract claim is improper because it arises under a labor agreement and she has not exhausted her collective bargaining remedies or obtained a finding of unfair labor practices from the Public Employee's Labor Board. Bielicki asserts her contract claim arises not under any labor agreement, but under the independent health insurance contract between her and the City.

[12] [13] Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, "governs claims founded directly on rights created by collective-bargaining agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement.' " *Caterpillar Inc. v. Williams,* 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed.2d 318, (1987) (quoting *Electrical Workers v. Hechler,* 481 U.S. 851, 859, n. 3, 107 S.Ct. 2161, 95 L.Ed.2d 791 (1987)). "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert [labor] contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress." *Republic Steel Corp. v. Maddox,* 379 U.S. 650, 652, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965). Bielicki's contract claim is not governed by section 301. She does not claim the City breached a collective bargaining agreement; she claims the City breached an independent health insurance contract. Nor does she sue on behalf of her fellow union members; she sues on behalf of all others similarly situated, that is, those covered by the Plan, but denied coverage for infertility treatments, regardless of their union membership. Bielicki asserts the issue presented by her contract claim is whether the City properly interpreted the term "medically necessary" in the health insurance contract to exclude infertility treatments. The resolution of this issue does not require any analysis of any collective bargaining agreement. As the Supreme Court has found, "a plaintiff covered by a collective-bargaining agreement is permitted to assert legal rights independent of that agreement, including state-law contract rights, so long as the contract relied upon is not a collective-bargaining agreement." *Caterpillar,* 482 U.S. at 396 (citing *Allis–Chalmers Corporation v. Lueck,* 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985)). Accordingly, Bielicki's contract claim is proper.

VI. PUNITIVE DAMAGES

***5** In each of her discrimination claims, Bielicki seeks punitive damages. Municipalities are expressly exempted from liability for punitive damages under Title VII and Title I of the ADA. Bielicki apparently concedes this point by failing to address the issue in her response to the City's motion to dismiss. Accordingly, Bielicki's request for punitive damages is stricken from Counts I, II and III.

CONCLUSION

The City of Chicago's motion to dismiss is denied. The City is directed to answer the complaint by May 15, 1997. Plaintiff's request for punitive damages is stricken from Counts I, II and III.

Parallel Citations

10 NDLR P 28