

2004 WL 534046

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United States District Court,  
D. Nebraska.

EQUAL EMPLOYMENT, OPPORTUNITY  
COMMISSION, Plaintiff,

v.

WOODMEN OF THE WORLD LIFE INSURANCE  
SOCIETY AND/OR OMAHA WOODMEN LIFE  
INSURANCE SOCIETY, Defendant.

No. 8:03CV165. | March 17, 2004.

**Attorneys and Law Firms**

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Michael B. Kratville, Kratville Law Firm, Omaha, NE, for Intervenor Plaintiff.

Kirk S. Blecha, Scott S. Moore, Lindsay K. Lundholm, Baird, Holm Law Firm, Omaha, NE, for Defendant.

**Opinion**

**MEMORANDUM AND ORDER**

BATAILLON, J.

**INTRODUCTION**

\*1 This matter is before the court on defendant’s motion to dismiss and for judgment on the pleadings or in the alternative for summary judgment pursuant to Fed.R.Civ.P. 12(b)(6) and 12(c) and Fed.R.Civ.P. 56. Filing No. 15. Plaintiff filed an amended complaint in this case, Filing No. 10, alleging that the defendant discriminated against her on the basis of gender, sexual harassment and hostile work environment and retaliation in violation of Title VII, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981(a). Defendant contends that the plaintiff has failed to timely file a charge of discrimination with the Equal Employment Opportunity Commission and the Nebraska Employment Commission and thus the case should be dismissed. I have carefully reviewed the record, briefs in support and in opposition, and the relevant law,

and I conclude that the motion to dismiss should be denied.

**FACTS**

Louella Rollins is a female who began her employment with defendant starting in June of 1989. Rollins contends that defendant’s employees harassed her from 1994 through February 1999, at which time she alleges defendant demoted her. Rollins, the state manager in Pennsylvania, supervised Ted Guminey, who is her alleged harasser. Rollins contends that Guminey tried to have her removed from her management position, grabbed and slapped her buttocks, made kissing gestures towards her, winked at her, told others she was involved in a lesbian relationship, and so forth. Rollins reported this behavior to her field manager, the human resources manager, and her supervisor. According to Rollins, no action was taken and she was told to manage her office. Rollins asked for permission to fire Guminey in September 1998. Thereafter, on February 11, 1999, defendant demoted Rollins.

**PROCEDURAL HISTORY**

Rollins’ demotion occurred on February 11, 1999. On September 20, 1999, Rollins submitted her allegations of discrimination to the Pennsylvania office of the Equal Employment Opportunity Commission (EEOC), and on October 8, 1999, the Philadelphia office received an intake questionnaire. This was 239 days after the February 11, 1999, demotion. On October 14, 1999, the Philadelphia office determined that the employer, Woodmen of the World Life, was located in the State of Nebraska and transferred the file to the Denver office, which was received on November 2, 1999. On November 8, 1999, the file was assigned to an investigator to draft the formal charge of discrimination, known as Form 5. On November 17, 1999, the EEOC sent a notice of the charge of discrimination to the defendant. On January 6, 2000, Rollins signed the EEOC Charge Form. On January 7, 2000, the EEOC sent the charge to the Nebraska Equal Opportunity Commission (NEOC). On January 14, 2000, the Denver office received the charge of discrimination and on January 28, 2000, forwarded the same to the NEOC, stating that pursuant to the worksharing agreement discussed below, the Denver office would initially process the charge. *See* Attachment H, Form 212, Charge Transmittal. On February 7, 2000, the NEOC notified the EEOC that it considered the charge to be dismissed as untimely, concluding that the charge was

outside of the 300–day time required to file a charge of discrimination.

\*2 On September 22, 1998, the EEOC and the NEOC entered into a worksharing agreement. Such agreement allows for one to accept filings for and act as agent for the other.

#### STANDARD OF REVIEW—MOTION TO DISMISS

In reviewing a complaint on a Rule 12(b)(6) motion, the court must consider all of the facts alleged in the complaint as true, and construe the pleadings in a light most favorable to the plaintiff. *See, e.g., Brotherhood of Maint. of Way Employees v. BNSF R.R.*, 270 F.3d 637, 638 (8th Cir.2001). A dismissal is not lightly granted. “A complaint shall not be dismissed for its failure to state a claim upon which relief can be granted unless it appears beyond a reasonable doubt that plaintiff can prove no set of facts in support of a claim entitling him to relief.” *Young v. City of St. Charles*, 244 F.3d 623, 627 (8th Cir.2001). When accepting the facts of the complaint as true, a court will not, however, “blindly accept the legal conclusions drawn by the pleader from the facts.” *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir.1990) (citing *Morgan v. Church’s Fried Chicken*, 829 F.2d 10, 12 (6th Cir.1987)). A dismissal under Rule 12(b)(6) is therefore granted “only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief,” *Schmedding v. Tnemec Co.*, 187 F.3d 862, 864 (8th Cir.1999), such as a missing allegation about an element necessary to obtain relief or an affirmative defense or other bar, *Doe v. Hartz*, 134 F.3d 1339, 1341 (8th Cir.1998). The court does not determine whether the plaintiff will ultimately prevail, but rather whether the plaintiff is entitled to present evidence in support of his claim. *Doe v. Norwest Bank*, 909 F.Supp. 668, 670 (D.Minn.1995).

Judgment on the pleadings, pursuant to Fed.R.Civ.P. 12(c), is permissible where there are no material issues of fact remaining to be resolved and the movant is entitled to judgment as a matter of law. *Faibisch v. University of Minnesota*, 304 F.3d 797 (8th Cir.2002). The court can consider matters outside of the pleadings; however, the motion then must be treated as one for summary judgment. *Casazza v. Kiser*, 313 F.3d 414, 417–18 (8th Cir.2002). However, my review of the public documents, such as the EEOC charge, does not convert this motion to one for summary judgment. *Faibisch*, at 802–03.

#### DISCUSSION

##### a. Filing Requirements

Defendant argues that the charge in this case had to be filed with the state agency within 180 days of February 11, 1999. Plaintiff argues that Rollins filed her charge of discrimination on September 20, 1999, which is within the 300–day limit required of the EEOC. Pursuant to § 2000e of Title VII,

a charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred ... except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency ... such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred....

\*3 42 U.S.C. § 2000e–5(e)(1). Timely filing is a prerequisite to filing a complaint in federal court. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 501 (2001). As stated in *National Railroad Passenger Corp.*:

In a State that has an entity with the authority to grant or seek relief with respect to the alleged unlawful practice, an employee who initially files a grievance with that agency must file the charge with the EEOC within 300 days of the employment practice; in all other States, the charge must be filed within 180 days. A claim is time barred if it is not within these time limits.

*Id.* at 109.

A charge of discrimination must be filed with the EEOC within 180 days of the occurrence of the last alleged act of unlawful employment practice, unless the 300–day time limit applies. 42 U.S.C. § 2000e–(5)(e). This is not a jurisdictional requirement, but it is an administrative requirement subject to the doctrines of estoppel, waiver, and equitable tolling. *Zipes v. Trans World Airlines*, 455 U.S. 385, 393, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982); *Jennings v. American Postal Workers Union*, 672 F.2d 712, 714–15 (8th Cir.1982). The last act of discrimination occurred on February 11, 1999; Rollins filed her affidavit with the EEOC in Pennsylvania on September 20, 1999,

approximately 218 days, or at least by October 8, 1999, 239 days, after the incident. No separate state charge was filed. Thus, argues the defendant, the EEOC's complaint must be dismissed. *Burds v. Union Pacific Corp.*, 223 F.3d 814, 818 (8th Cir.2000). However, the EEOC and the EEOC have a workshare agreement. Filing No. 19, Ex. D. The EEOC contends, correctly, that the workshare agreement it has with the state allows it to accept filings on behalf of the state. Said agreement designates each agency as the agent for the other for purposes of receiving and drafting charges. *Id.* at IIA. Consequently, when the EEOC accepted the filing it did so on behalf of itself and on behalf of the State of Nebraska. Because said filing occurred within the 300 day time limit, I conclude that the claim was timely filed.

**b. 10-day Notice Requirement**

Defendant also argues that plaintiff failed to provide it with notice of the charge within the ten days after the charge was made. 42 U.S.C. § 2000e-5(b). The allegations were received on September 20, 1999, but the

notice was not sent until November 7, 1999. The EEOC argues that the time that elapsed because of transfer to Denver caused a delay in notifying the defendant, but that shortly thereafter defendant received notice. I have carefully reviewed the chronology in this case. I do not find that the EEOC's failure to comply with the 10-day time provision was willful or in bad faith. *See Equal Employment, Opportunity Comm'n v. Burlington Northern, Inc.*, 644 F.2d 717, 720 (8th Cir.1981). Further, I conclude that the 10-day notice of the charge is not jurisdictional. *Id.* at 718-19. The explanation of the EEOC coupled with the delay itself is not sufficient for me to dismiss this case. The delay, as I have previously found, was caused in large part by the transfer from the Pennsylvania to the Denver office. Additionally, defendant has made no showing that the delay has prejudiced it.

\*4 THEREFORE, IT IS ORDERED that the defendant's motion to dismiss, Filing No. 15, is denied.