2000 WL 1024700
United States District Court, S.D. New York.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
DELOITTE & TOUCHE, LLP, Defendant.

No. 97CIV6484 LMM. | July 25, 2000.

**Opinion**

**MEMORANDUM AND ORDER**

MCKENNA, D.J.

**1.**

***1** In this action brought by plaintiff Equal Employment Opportunity Commission ("EEOC") against the accounting firm of Deloitte & Touche, LLP ("Deloitte"), under Title I of the Americans with Disabilities Act of 1990 ("ADA"), EEOC alleges that "[s]ince at least November, 1994, [Deloitte] has engaged in unlawful employment practices" that "include denying a monetary death benefit to the Estate of Peter J. Krolak, because of Mr. Krolak's disability, rectal cancer and cancer of the lymph nodes." (Compl.¶ 8.)

Deloitte moves for an order, pursuant to Fed.R.Civ.P. 12(b)(6) (or, in the alternative, *id.* 56), dismissing the complaint, and EEOC cross-moves for judgment in its favor, pursuant to *id.* 56.

> When ruling on a motion pursuant to Rule 12(b)(6) to dismiss for failure to state a claim upon which relief may be granted, the court must accept the material facts alleged in the complaint as true. It must not dismiss the action "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

*Cohen v. Koenig,* 25 F.3d 1168, 1171–72 (2d Cir.1994) (quoting *Conley v. Gibson,* 355 U.S. 41, 45–46 (1957) (citations omitted)).

On a motion for summary judgment, the court's function is to determine (resolving all ambiguities and drawing all inferences in favor of the non-moving party) whether the moving party has shown that there is no genuine issue as to any material fact. *Gallo v. Prudential Residential Servs. Ltd. Partnership,* 22 F.3d 1219, 1223–24 (2d Cir.1994).

As will appear, the present case, essentially one of first impression, presents some unusual and difficult issues.

**2.**

There is no substantial dispute as to the following facts.[1]

In December of 1984, Mr. Krolak joined the accounting firm of Touche Ross & Co. ("Touche"), a predecessor to Deloitte. Mr. Krolak was diagnosed with rectal cancer and underwent surgery for this condition in June of 1988. During surgery it was discovered that the cancer had spread to Mr. Krolak's perirectal lymph nodes.

In August of 1988, Touche promoted Mr. Krolak to the position of principal, "contingent upon an acceptable report of physical examination." (Grossman Decl. Nov. 5, 1997, Ex. 3.) On October 25, 1988, Touche and Mr. Krolak executed both a Principal's Agreement dated as of September 1, 1988 (Guerin Decl. Ex. A), and a Supplemental Agreement also dated as of September 1, 1988. (*Id.* Ex. B.) Paragraph 5 of the Principal's Agreement provides for the payment, upon the principal's death, of certain benefits to the principal's designated beneficiary or beneficiaries or the principal's estate; the death benefits are payable over a period of 10 years from the principal's death commencing the month after the principal's death. Paragraph 2 of the Supplemental Agreement provides:

> Notwithstanding the provisions of paragraph 5 of the Principal's Agreement with respect to benefits payable upon the death or disability of the Principal, in the event of the Principal's death or disability during the term of the Principal's Agreement substantially resulting from the rectal cancer or cancer of the perirectal lymph nodes, for which the Principal has recently had surgery and is continuing post operative treatments, the Principal shall not be entitled to receive and [Touche] shall not be obligated to provide the disability or death benefits otherwise payable under the provisions of paragraph 5 of the Principal's Agreement.

***2** (Guerin Decl. Ex. B ¶ 2.)

Every employee promoted to principal by Touche executed a Principal's Agreement, and each such agreement provided the same death benefits described in paragraph 5 of Mr. Krolak's Principal's Agreement, so long as a physical examination did not reveal that the employee being promoted had a life-threatening medical condition. If the physical examination revealed a life-threatening medical condition, the newly-promoted employee's agreement was supplemented to exclude death benefits if death resulted substantially from that specific condition.

Of 69 employees who worked for Touche at any time during the period July 26, 1992 to September 25, 1995 who became eligible for death benefits of the sort provided in the Principal's Agreement, Mr. Krolak was the only one deemed to have a preexisting medical condition so life-threatening as to require a Supplemental Agreement affecting his death benefits. (Grossman Decl., Nov. 5, 1997, Ex. 7 at 6.)

Subsequent to the entry by Touche and Mr. Krolak into the Principal's Agreement and the Supplemental Agreement, Touche combined with Deloitte Haskins & Sells to form Deloitte, which assumed Touche's obligations under those agreements.

Mr. Krolak died on or about September 25, 1994 of rectal cancer. On November 7, 1994 Deloitte advised Joseph A. Bailey, Jr., the executor of Mr. Krolak's estate, that, by reason of the provisions of the Supplemental Agreement, "no [death] benefits [under paragraph 5 of the Principal's Agreement] are payable to [Mr. Krolak's] estate." (Guerin Decl. Ex. E.) That advice was repeated by Deloitte in a letter to Mr. Bailey (responding to a letter from Mr. Bailey) on December 21, 1994. (*Id.* Ex. F.)

On February 28, 1995, EEOC filed a Notice of Charge of Discrimination against Deloitte, on a Charge of Discrimination by Mr. Bailey dated December 29, 1994. Deloitte has not paid the death benefits provided for in paragraph 5 of the Principal's Agreement to the estate of Mr. Krolak.

**3.**

The ADA became effective on July 26, 1992, and is not retroactive. *Smith v. United Parcel Serv. of Am.,* 65 F.3d 266, 266 (2d Cir.1995). The ADA provides that: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual 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), which include "the provision of fringe benefits." *Castellano v. City of New York,* 142 F.3d 58, 66 (2d Cir.) (citing 42 U.S.C. § 12112(b)(2)), *cert. denied,* 525 U.S. 820 (1998). "The term 'qualified individual with a disability' means an individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

***3** EEOC does not allege that requiring Mr. Krolak to enter into the Supplemental Agreement was a violation of the ADA; rather, it alleges that the failure, "[s]ince at least November, 1994" (Compl.¶ 8), to pay the death benefits provided for in the Principal's Agreement, by reason of the provisions of the Supplemental Agreement, constitutes prohibited discrimination by reason of disability.[2] Deloitte responds by arguing that the ADA cannot apply to its conduct in November of 1994 because Mr. Krolak, having died in September of 1994, was thereafter not a qualified individual with a disability as that term is defined in 42 U.S.C. § 12111(8) (quoted *supra* ).

While the parties' motions were pending, the Second Circuit decided *Castellano, supra.* There, the court answered in the affirmative the question "whether a retiree on disability who is presently unable to perform the 'essential functions' of his former employment can still be a 'qualified individual with a disability' within Title I of the Americans with Disabilities Act for the purpose of challenging alleged discrimination in the provision of fringe benefits." 142 F.3d at 62.

> In light of the textual ambiguity surrounding the time at which a plaintiff must have been a "qualified individual," the purpose of the "essential functions" requirement, the illogic inherent in a statutory prohibition of discrimination in the provision of fringe benefits that would exclude a large body of retirees from coverage, and the ADA's broad remedial purpose, we hold that a former employee with a disability who "with or without reasonable accommodation" could "perform the essential functions of the employment position" for a period sufficient to establish entitlement to an employer-related fringe benefit (i.e., who is otherwise entitled to receive a fringe benefit) is a "qualified individual with a disability" within Title I of the ADA for the purpose of challenging alleged discrimination in the provision of that fringe benefit.

*Id.* at 69.

This Court believes that the reasoning of *Castellano,* logically extended, defeats Deloitte's argument based on the ADA's definition of a "qualified individual with a disability." 42 U.S.C. § 12111(8). If representatives of

deceased employees could not (as a result of the interpretation of the ADA proffered by Deloitte) challenge an employer's denial of death benefits based by the employer on a ground prohibited by the ADA, then the employer could, without any opportunity for redress by the employee's beneficiaries or estate, deny the benefits otherwise due, on the prohibited ground, the "day after [the employee's death]," *Castellano,* 142 F.3d at 69, thus frustrating the purposes of the ADA as elaborated in *Castellano.* Retirement, of course, is not the same as death. Yet among the post-employment fringe benefits that the *Castellano* court was concerned would be lost to employees was life insurance, *id.* at 68, which suggests that *Castellano* should be applied in the present case.

**4.**

***4** Deloitte next argues that the discriminatory employment action charged "occurred *not* in November or December 1994, following Mr. Krolak's death, but in 1988, when Mr. Krolak signed the Supplemental Agreement which clearly excluded death benefits if he were to die of rectal cancer, a pre-exiting medical condition." (Def. Mem. at 16.) If that is so, then, Deloitte argues, either the ADA does not apply because it was not the law in 1988 (*id.* at 16–17), or the EEOC's claim is time-barred because it was not filed within 300 days of the discriminatory employment action. *See Solomon v. New York City Bd. of Educ.,* 95 Civ. 1878, 1996 WL 118541, at *4 (E.D.N.Y. Mar. 6, 1996). (Def. Mem. at 20.) EEOC responds that its claim is timely under the continuing violation doctrine. (Pl. Mem. at 14 (citing *Lorance v. AT & T Tech., Inc.,* 490 U.S. 900, 912 & n. 5 (1989), and *Bazemore v. Friday,* 478 U.S. 385, 395–96 (1986)).) Under that doctrine, according to EEOC, Deloitte:

> violated the ADA when it forced Krolak to sign the Supplemental Agreement, and again each month it did not pay the death benefit. Therefore the Estate's charge of discrimination could have been brought at any time after the effective date of the ADA and before 300 days after November, 2004, the date the last death benefit payment is due.

(Pl. Mem. at 14–15.) (Citations and footnote omitted.)

That the conduct claimed to be discriminatory at least began in September of 1988, with the signing of the Supplemental Agreement, can hardly be denied, and EEOC appears to recognize this fact: as just noted, it argues that Deloitte's predecessor, Touche, "violated the ADA when it forced Krolak to sign the Supplemental Agreement" (Pl. Mem. at 14–15); EEOC also states that "the mechanisms used by [Touche] to create the Supplemental Agreement are themselves violations of the ADA" (*id.* at 18), and that:

> In the instant case, [Deloitte] admits that [Touche] required Krolak to undergo a medical exam as a prerequisite to his promotion to principal. The purpose of this exam was to determine whether [Touche] would promote Krolak and/or force him to sign a Supplemental Agreement, both of which it did. As the medical exam did not relate in any way to Krolak's job duties as an accountant, no legitimate job or business-related reason could exist for this requirement. As such, [Touche] acted in direct contradiction to the ADA by requiring Krolak to undergo a physical exam whose sole purpose was to enable it to consider his disability in [ ] its employment decisions. [Touche] then used the improper exam to generate the Supplemental Agreement, which also violates the ADA.

(Def. Mem. at 19–20.) (Footnote omitted.)[3] Had Mr. Krolak signed only the Principal's Agreement, but not the Supplemental Agreement, it is clear, his estate would have been paid the death benefits provided for in the former. The Supplemental Agreement is a "but for" cause of the denial of death benefits.

***5** If the undisputed facts are analyzed without reference to the continuing violation doctrine, then, it is clear, EEOC's claim must fail. EEOC contends that, in 1988, by forcing Mr. Krolak to sign the Supplemental Agreement, Touche committed what would have been a violation of the ADA, had it been in force. (*See* Pl. Mem. at 14.)[4] Forcing Mr. Krolak to sign the Supplemental Agreement, in other words, was a discriminatory act. The failure to pay the death benefits was a consequence of that act. Under *Delaware State College v. Ricks,* 449 U.S. 250 (1980), and *Chardon v. Fernandez,* 454 U.S. 6 (1981) (*per curiam* ), the time for filing with the EEOC begins to run with the discriminatory act, not at the time of its consequences. "In *Ricks* we held that the proper focus is on the time of the *discriminatory act,* not the point at which the *consequences* of the act became painful." *Chardon,* 454 U.S. at 8 (citing *Ricks,* 449 U.S. at 258).

That "neither [Mr. Krolak] nor [Touche or Deloitte] could have known whether [either] would deny the Estate the death benefit until after [Mr.] Krolak passed away from rectal cancer or cancer of the lymph nodes" (Pl. Mem. at 17), in other words, that denial of death benefits depended upon a "noninevitable event," and so is "speculative," does not avoid the *Ricks* rule. *See Lorance,* 490 U.S. at 907 n. 3.[5]

Mr. Krolak, could not, of course, have challenged his having been forced to sign the Supplemental Agreement as unlawful under the ADA prior to July 26, 1992, when the ADA became effective. If *Bazemore* applies, however, then forcing Mr. Krolak to sign the Supplemental Agreement, which "would have constituted a violation of [the ADA], but for the fact that the statute had not yet become effective, became a violation upon [the ADA's] effective date," *Bazemore,* 478 U.S. at 395, and he could have brought an action under the ADA at that time, as EEOC appears to concede. (Pl. Mem. at 15 ("the Estate's charge of discrimination could have been brought at any time after the effective date of the ADA and before 300 days after November, 2004, the date the last benefit payment is due").)[6] However, no charge of discrimination was commenced within 300 days of the effective date of the ADA.

Whether or not the "continuing violation" doctrine can apply here is not immediately clear from the case law. It is clear, however, that it is necessary that "a continuing violation [be] clearly asserted both in the EEOC filing and in the complaint." *Miller v. International Tel. & Tel. Corp.,* 755 F.2d 20, 25 (2d Cir.1985); *see also Cook v. Pan Am. World Airways, Inc.,* 771 F.2d 635, 646 (2d Cir.1985); *O'Malley v. GTE Serv. Corp.,* 758 F .2d 818, 821 (2d Cir.1985). While a continuing violation is suggested in Mr. Bailey's EEOC charge (*see* n. 2, *supra,* & Guerin Decl. Ex. G, ¶ 12 at [4] ), the complaint in the present case is devoid of allegations of a continuing violation.[7]

***6** Accordingly, Deloitte's motion for dismissal pursuant to Fed.R.Civ.P. 12(b)(6) must be granted. Ordinarily, the Court would allow EEOC to amend the complaint to attempt to assert a continuing violation claim. For the reasons set forth in the following section of this Memorandum and Order, however, summary judgment dismissing the complaint must be granted on a ground that would not be affected by such an amendment, so that leave to amend is denied as futile.

**5.**

Deloitte also argues that it is protected by the so-called "safe harbor" provision of 42 U.S.C. § 12201(c), which provides:

> Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict—
>
> (1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.
>
> Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter I and III of this chapter.

*Id.*

In *Leonard F. v. Israel Discount Bank,* 199 F.3d 99 (2d Cir.1999), the Second Circuit held that "the subterfuge clause in [42 U .S.C. § 12201(c) ] should be construed, as in [*Public Employees Retirement Sys. v. Betts,* 492 U.S. 158 (1989) ], to require an intent to evade, making it inapplicable to a plan formulated prior to the passage of the [ADA] regardless whether the plan relies on sound actuarial principles." 199 F.3d at 104.[8]

*Leonard F.* was concerned with a claim against an insurer that had issued disability insurance which was made available to plaintiff by his employer. Thus, the Court of Appeals' opinion addresses 42 U.S.C. § 12201(c)(1), which applies to an insurer. 199 F.3d at 103. The present case is brought against plaintiff's employer, so that the possibly relevant subdivisions of the statute are 42 U.S.C. § 12201(c)(2) and (3), both of which apply to "a person or organization covered by this chapter," *id.,* a category plainly including Deloitte. Neither party has suggested that the death benefit arrangement at issue is "subject to State laws that regulate insurance," *id.* § 12201(c)(3), so that that subdivision is the relevant one here.[9]

The death benefit arrangement at issue is a "bona fide benefit plan," *id.,* "because it exists, pays benefits, and has been communicated to covered employees." *Krauel v. Iowa Methodist Med. Ctr.,* 915 F.Supp. 102, 109

(S.D.Iowa 1995), *aff'd,* 95 F.3d 674 (8th Cir.1996) (citing *Betts,* 492 U.S. at 166 ("All parties apparently concede ... that [defendant's] plan is 'bona fide,' in that it " 'exists and pays benefits." " ' (Quoting *United Air Lines, Inc. v. McMann,* 434 U.S. 192, 194 (1977)))).[10]

***7** "The only issue, then, is whether the [death benefit arrangement] is being used as a subterfuge to evade the purposes of the ADA." *Krauel,* 95 F.3d at 678. Under the Second Circuit's construction of 42 U.S.C. § 12201(c), however, Deloitte's adoption of that arrangement prior to the passage of the ADA cannot have been the result of an intent to evade, and hence not a subterfuge. *Leonard F.,* 199 F.3d at 104.[11]

Accordingly, the Court grants Deloitte's motion for summary judgment dismissing the complaint.[12]

**6.**

EEOC includes in the relief it seeks not only the payment to Mr. Krolak's estate of the death benefit but an order requiring Deloitte "to make whole the [estate] by providing compensation for non-pecuniary losses, including but not limited to physical and emotional pain and suffering, mental anguish, inconvenience and loss of enjoyment of life" and "punitive damages for [Deloitte's] malicious and/or reckless conduct." (Compl., *ad damnum* ¶¶ E & F.) Deloitte asserts that neither compensation for non-pecuniary loss nor punitive damages are available.[13]

"Compensatory damages, including emotional damages, as well as punitive damages are available under the ADA." *Sharp v. Abate,* 887 F.Supp. 695, 699 (S.D.N.Y.1995). The claim for compensatory damages survives Mr. Krolak's death; the claim for punitive damages, however, does not. *Estwick v. U.S. Air Shuttle,* 950 F.Supp. 493, 498 (E.D.N.Y.1996).

**7.**

Deloitte's application for sanctions is denied. While, in this Court's view for the reasons set forth above, EEOC's complaint must be dismissed, its case was reasonably arguable, and a public agency should, surely, be allowed to attempt to extend the law to cover new situations.

**8.**

For the reasons set forth herein, Deloitte's motions for dismissal pursuant to Fed.R.Civ.P. 12(b)(6) and for summary judgement pursuant to *id.* 56 are granted, and EEOC's cross-motion for summary judgment pursuant to *id.* 56 is denied. The Clerk will enter judgment dismissing the complaint.

SO ORDERED.

1 *See* Pl. Local Rule 56.1 Statement of Undisputed Material Facts and exhibits cited, and Def. Response thereto.

2 EEOC's Notice of Charge of Discrimination identifies both the earliest and the latest dates of alleged violation as December 21, 1994. (Guerin Decl. Ex. G at [1].) Mr. Bailey's Charge of Discrimination does not identify the earliest date of discrimination, but identifies the latest dated of discrimination as November 7, 1994, and further identifies the discrimination as "continuing action." (*Id.* at [2].)

3 EEOC's statements in this regard must, since the ADA was not law in 1988, be taken to mean that Deloitte's conduct "would have constituted a violation of [the ADA], but for the fact that the statute had not yet become effective." *Bazemore,* 479 U.S. at 395 (Brennan, J., concurring).

4 EEOC also contends that requiring Mr. Krolak to undergo a medical examination and to receive an acceptable report of that examination, as a condition of his promotion to principal, would have been violations of the ADA. (*Id.* at 19–20.)

5 *Lorance,* notwithstanding the 1991 amendment of 42 U.S.C. § 2000e–5(3) to modify the limitations rules in seniority system cases, is not "irrelevant to the instant case" or "no longer good law." (Pl. Reply Mem. at 10.) *See Huels v. Exxon Coal USA, Inc.,* 121 F.3d 1047, 1050 n. 1 (7th Cir.1997) ("[a]lthough *Lorance*'s specific holding has been abrogated by statute ... its reasoning remains persuasive outside of the Title VII/intentionally discriminatory seniority system context"); *see also Brunet v. City of Columbus,* 1 F.3d 390, 401–02 (6th Cir.1993).

6 In a letter to Deloitte dated December 14, 1994, Mr. Bailey, Mr. Krolak's executor, says that Mr. Krolak "believed that [Deloitte] might be discriminating against him under, at a minimum, ADA." (Landsman Decl. 22, 1997, Ex. B.) Thus, Mr. Krolak was aware of a possible claim under the ADA which he could have

commenced during his lifetime.

[7] EEOC's briefs contain arguments regarding the continuing violation doctrine based upon asserted facts, but those facts are not alleged in the complaint.

[8] *Leonard F.* was decided while the parties' motions were pending. The parties argued the significance to the present case of Judge Brieant's decision in *Leonard F.,* the reasoning of which the Second Circuit agreed with, *id.* at 100, reversing only because Judge Brieant granted a Fed.R.Civ.P. 12(b)(6) motion relying in part on matter outside the pleadings, without an opportunity for discovery. *Id.*

[9] EEOC's argument that the Supplemental Agreement is inconsistent with state law (Pl. Mem. at 21 (citing N.Y. Executive Law § 296(1)(a) & N.Y. Insurance Law § 2606)) addresses the terms of 42 U.S.C. § 12201(c)(2), not those of *id.* § 12201(c)(3).

[10] The Principal's Agreement comes within ERISA in that it provides benefits in the event of death. 29 U.S.C. § 1002. That it is directly funded by Deloitte rather than through insurance does not render 42 U.S.C. § 12201(c)(3) inapplicable. *See Krauel v. Iowa Methodist Med. Ctr.,* 95 F.34 674, 678 (8th Cir.1996).

EEOC quotes a statement from *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 124 (1985) that "any seniority system that includes the challenged practice is not 'bona fide' under the statute." (*See* Pl. Mem. at 21–22.) In *Thurston,* however, the challenged portion of the seniority system was adopted after the effective date of the statute, 29 U.S.C. § 623(f)(2), the Court was considering. That statute, moreover, contained the exception "that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual." 29 U.S.C. § 623(f)(2)(A). *See Thurston,* 469 U.S. at 124.

[11] EEOC's suggestion that *Betts* is no longer good law, and its arguments based on its own regulations and on legislative history were, in substance, rejected in *Leonard F.. See* 199 F.2d at 103–06.

[12] EEOC has not suggested that it seeks further discovery in connection with the "safe harbor" issue. That the Supplemental Agreement was entered into prior to the effective date of the ADA is not disputed. *Cf. Leonard F.,* 199 F.3d at 107.

[13] The Court considers this issue, despite its mootness, for the sake of completeness.

**Parallel Citations**

11 A.D. Cases 1523