1984 WL 1045
United States District Court; D. Minnesota, Third Division.

Margaret J. Holden et al., Plaintiffs
v.
Burlington Northern, Inc. et al., Defendants.

Civil Action No. 3-81-994
|
June 15, 1984

Opinion

MAGNUSON, D.J.

***1** A hearing was held before the undersigned upon a series of motions for summary judgment brought by defendant Burlington Northern.

[*Statement of Case*]

This is an action brought pursuant to Title VII against Burlington Northern, Inc., alleging systemic discrimination based upon sex in violation of 42 U.S.C. § 2000e *et seq.* There are presently twelve individual plaintiffs in this action and the Equal Employment Opportunity Commission ("EEOC") has intervened. The individual plaintiffs seek to represent a broadly defined class of applicants and current and former employees of Burlington Northern. The motions presently before this court are brought in contemplation of the upcoming class certification hearing.

Before examining the merits of Burlington's motions, the court deems it advisable to give a brief description of them. First, Burlington Northern has made a motion to dismiss plaintiff Joleen McIlravy on the ground that she requested and received a right to sue letter too soon. Second, Burlington has made a motion for summary judgment to prevent Karla Keefe and Diane Kubes from pursuing their claims on grounds of laches. Third, Burlington has moved this court for an order striking paragraphs 23(c) and 23(d) of plaintiffs' Complaint based upon plaintiffs' answers to interrogatories. Finally, Burlington has made a motion to dismiss defendants Burlington Northern, Inc., Milestone Petroleum, Inc., and BN Timberlands, Inc.

At the outset it is important to keep in mind the narrow procedural posture which gives rise to the present motions. These are motions for summary judgment and this court is guided by the familiar principle that summary judgment should not be granted unless the moving party has established its right to judgment "with such clarity as to leave no room for controversy and unless the other party is not entitled to recover under any discernible circumstances." *Vette Co. v. Aetna Casualty and Surety Co.*, 612 F.2d 1076, 1077 (8th Cir. 1980). The court must give the non-moving party the benefit of all reasonable inferences to be drawn from the facts. *Id.* at 1077.

Motion to Dismiss Joleen McIlravy

Joleen McIlravy has been employed as an operator with Burlington Northern since 1975. On January 10, 1984 she filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging that she was denied a promotion because of her sex and subjected to sexual harassment. On February 15, 1984, 36 days after she filed her charge of discrimination, McIlravy received a Notice of Right to Sue from the EEOC.

42 U.S.C. § 2000e-5(f)(1) permits the EEOC to issue a right to sue letter to complainant if the EEOC and the party against whom the complaint is brought fail to enter into a conciliation agreement within 180 days of the charge of discrimination. The basis of the defendants' motion is that the failure of Joleen McIlravy to wait the required 180 days prior to seeking a right to sue letter is a jurisdictional defect in her claim requiring a dismissal. Burlington Northern relies primarily upon *Hiduchenko v. Minneapolis Medical & Diagnostic Center, Ltd.*, [19 EPD P 9192] 467 F. Supp. 103 (D.Minn. 1979) (*"Hiduchenko I"*) where the court held that the failure of the plaintiff to defer to the EEOC for the required statutory period was a defect requiring dismissal.

***2** Burlington Northern's reliance upon *Hiduchenko I* for the proposition that this action must be dismissed is misplaced. In *Hiduchenko v. Minneapolis Medical & Diagnostic Center, Ltd.*, [20 EPD P 30,269] 475 F. Supp. 1175 (D. Minn. 1979) (*"Hiduchenko II"*), the plaintiff brought suit after waiting the 180 days. When the defendants again moved to dismiss, the court held that the previous dismissal was without prejudice and was only intended to require the plaintiff to exhaust her administrative remedies prior to filing suit. *Id.* at 1178

n.1. The court also noted that instead of dismissing the first action it could have held the first action in abeyance for the statutory period and eliminate the need to file a second action. *Id.* at 1179 n.2.

Both *Hiduchenko I* and *Hiduchenko II* presume that the statutory framework of Title VII prevents any litigation-related activity pending the outcome of conciliation attempts during the initial 180 days following the filing of a charge of discrimination. The cases differ only as to the procedural vehicle used to accomplish that result. Regardless of the method used, the result would be to require Ms. McIlravy to wait approximately five weeks before proceeding with her claim.

29 C.F.R. § 1601.28(a)(2) authorizes the EEOC to issue a right to sue letter prior to the expiration of the 180 day period if the appropriate EEOC official makes a determination that it is unlikely that the EEOC will be able to complete its investigation of the charge of discrimination within 180 days. In the present case Joleen McIlravy received a Notice of Right to Sue letter from the Denver office of the EEOC which contained the following notation on the first page:

> Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filing of the charge.

See Exhibit B to Affidavit of Eric Olson. That statement satisfied the requirements of 29 C.F.R. § 1601.28(a)(2).

This court is of the opinion that the procedures outlined in 29 C.F.R. § 1601.28(a)(2) authorized Joleen McIlravy to file an action prior to the expiration of 180 days from the filing of her charge. The rationale for requiring that a complainant wait 180 days prior to filing suit is to encourage conciliation rather than litigation. *Hiduchenko*, 467 F.Supp. 103, 107 (D. Minn. 1979). However, in the present case, the EEOC already made an express determination that it would be unable to complete its investigation within the 180 days. Requiring Ms. McIlravy to wait would be of little or no value in the present case. Thus, the court will deny Burlington Northern's motion to dismiss Joleen McIlravy as a party plaintiff.

Motion to Dismiss Karla Keefe and Diane Kubes

Karla Keefe applied, and was rejected, for a job at Burlington Northern in May, 1974. In November, 1974 she filed a charge of discrimination with the EEOC. The EEOC, for some unexplained reason, failed to act upon the charge until Ms. Keefe demanded a right to sue letter which was issued on February 19, 1984, nearly 10 years after the filing of the charge of discrimination. The basis of Burlington Northern's motion for summary judgment is that the equitable doctrine of laches prevents Ms. Keefe from pursuing her claim.

***3** 42 U.S.C. § 2000e *et.seq.* requires a complainant to file a written charge of discrimination with the EEOC prior to filing suit. The EEOC is to give notice of the filing of the charge within ten days. 42 U.S.C. § 2000e-5(b). In the present case, Burlington Northern did not receive notice of Ms. Keefe's charge until March 24, 1975. The statute contemplates that the EEOC will attempt to negotiate a voluntary settlement with the party against whom the complaint was lodged. If the EEOC cannot come to an agreement with alleged wrongdoer within 180 days from the filing of the charge it may issue a right to sue letter which gives the complainant the right to file an action under Title VII within 90 days after receipt of the right to sue letter. Following the 180 day conciliation period, a complainant may elect to abandon the EEOC process and demand a right to sue notice from the EEOC. In the present case there is no dispute that Ms. Keefe filed a timely charge of discrimination and filed suit within 90 days of receiving her right to sue notice. However, nearly ten years elapsed between the time of the filing of the charge and the issuance of the right to sue letter.

Ms. Keefe testified at her deposition that between June of 1974, the date of the filing of the charge, and 1984 she called the EEOC to check on the status of her charge only once. During that same period of time the EEOC contacted her twice to inform her that it had not forgotten her charge. It should be noted that Ms. Keefe did not initiate her own claim, rather she demanded a right to sue letter only after being contacted by plaintiff's counsel to arrange for her deposition. Burlington Northern argues that under these circumstances Ms. Keefe should be barred from pursuing her claim.

To establish the defense of laches to a Title VII action a defendant must establish both unreasonable delay on the part of the plaintiff and prejudice to the defendant arising out of that delay. *Boone v. Mechanical Specialties Co.*,[21 EPD P 30,458] 609 F.2d 956, 959-60 (9th Cir. 1979); *EEOC v. Westinghouse Electric Corp.*, [18 EPD P 8929] 592 F.2d 484 (8th Cir. 1979); *EEOC v. Liberty Loan*

Corp., [18 EPD P 8658] 584 F.2d 853 (8th Cir. 1978). As noted above, the defendant argues that Keefe's minimum contacts with the EEOC from 1974 through 1984 constitutes unreasonable delay. The plaintiffs argue that Keefe's delay was not unreasonable because of the ongoing existence of the EEOC investigation.

The defendant has cited this court to a number of cases in which courts have held that delays of considerably less than ten years were sufficient to warrant dismissal of a plaintiff's cause of action. *See Boone v. Mechanical Specialties Co.*, [21 EPD P 30,458] 609 F.2d 956 (9th Cir. 1979). In *Boone* the plaintiff filed a complaint with the EEOC following his discharge in 1969. Seven years later Boone requested and received a right to sue letter. The district court dismissed Boone's action on the grounds of laches and the Ninth Circuit Court of Appeals affirmed stating the "[T]itle VII clearly cannot countenance the type of delay which occurred in the present case." *Id.* at 959. The crucial distinction between Boone and Karla Keefe is that Boone was on notice that he was entitled to a right to sue letter. In the present case there is no evidence that Ms. Keefe was aware of the fact that she could bypass the EEOC.

***4** In *Kamberos v. GTE Automatic Electric, Inc.*, [20 EPD P 30,133] 603 F.2d 598, 603 (7th Cir. 1979) the complainant permitted her claim to remain with the EEOC for four years after filing a charge of discrimination. The 7th Circuit held that in computing back pay damages the district court should have subtracted the time from the end of the 180 day period until the plaintiff received her right to sue letter. The rationale for the limitation of back pay is that a complainant should not be permitted to take advantage of the EEOC's backlog in processing claims. The distinguishing factor between *Kamberos* and the present case is that the plaintiff in *Kamberos* was herself a lawyer and had retained counsel. She was fully aware of her right to demand a right to sue letter. *Id. See also Lynn v. Western Gillette, Inc.*, [15 EPD P 7959] 564 F.2d 1282 (9th Cir. 1977) (appropriate to take plaintiff's lack of diligence into account in determining amount of back pay.)

The court wishes to point out that it is dismayed at the conduct of the EEOC lured Ms. Keefe in believing that it was looking after her claim. In the end, the EEOC issued a right to sue letter; something it could have done nine years earlier. Had the EEOC never contacted Ms. Keefe to assure her that her claim was being taken care of, Burlington's laches defense would be more persuasive. If it had issued a right to sue letter, Ms. Keefe would have been forced to file suit immediately. Instead, the EEOC called Ms. Keefe twice during a ten year period to assure her that it had not forgotten about her claim. In essence, the EEOC did just enough to keep Ms. Keefe's claim alive but not enough to push it through to final resolution.[1] Viewing all the facts in the light most favorable to Ms. Keefe, the court is forced to conclude that her claim is not barred as a matter of law.

***5** The case law is clear that federal district courts possess sufficient equitable power to prevent inordinate delay on the part of either the EEOC or a private plaintiff from seriously prejusicing a Title VII defendant. *Occidental Life Ins. Co. v. EEOC,* [14 EPD P 7619] 432 U.S. 355 (1977); *EEOC v. Westinghouse Electric Corp.*, [18 EPD P 8929] 592 F.2d 484 (8th Cir. 1979); *EEOC v. Liberty Loan Corp.*, [18 EPD P 8658] 584 F.2d 853 (8th Cir. 1978). Whether a court's discretion takes the form of a limitation on back pay liability as in *Kamberos, supra,* or a bar to the plaintiff's entire claim as in *Boone, supra,* the result in both cases prevents a plaintiff from taking advantage of its own inexcusable delay. In the present case it appears as though the EEOC may have been guilty of unreasonable delay. However, the defendant has not persuaded this court that the delay attributable to the EEOC can be used to bar Ms. Keefe's claim absent a showing that Ms. Keefe was aware of her ability to bypass the EEOC administrative process.

The court is cognizant of the fact that the entire series of motions being decided today are merely a prelude to the upcoming class certification hearing. Ms. Keefe is the only one of the twelve named plaintiffs in this case who was rejected as an applicant for employment at Burlington Northern. Without her presence as a plaintiff it will be more difficult for the plaintiffs to maintain a class action which includes rejected applicants. *See General Telephone Co. of the Southwest v. Falcon,* [29 EPD P 32,781] 457 U.S. 147 (1982). However, it must be kept in mind that the motion before this court is one for summary judgment to prevent Ms. Keefe from pursuing her individual claim on the grounds of laches. The limited opinion being expressed by the court today goes no further than to hold that when all factual inferences are drawn in favor of Ms. Keefe the court cannot say as a matter of law that Ms. Keefe's delay was inexcusable thereby barring her *individual* claim.[2]

At the class certification hearing this court will be forced to decide issues concerning the propriety of Ms. Keefe's attempt to represent rejected applicants and the temporal scope of such a class. The extent to which Ms. Keefe exercised due diligence in pursuing her claim is a relevant factor in determining her ability to act as a class representative and the extent to which the defendant will be liable for back pay. The court wishes to point out that those issues are not now before this court and will be

addressed at the evidentiary hearing which will be held prior to any determination concerning class certification.

Diane Kubes began working at Burlington Northern in 1966 and on January 9, 1973 she filed a charge of discrimination with the EEOC. Over 11 years later, on February 9, 1984, the EEOC issued Diane Kubes a right to sue letter. Though Kubes did very little during the period between the filing of the charge and the issuance of the right to sue letter, the EEOC assured her on more than one occasion that her claim was being processed. The conduct of Diane Kubes and Karla Keefe was very similar and they both had a similar relationship with the EEOC. Accordingly, the court reincorporates by reference its discussion with respect to Burlington Northern's Motion to dismiss Karla Keefe and for similar reasons, the court will deny Burlington Northern's motion to dismiss Diane Kubes.

***6** *Motion to Strike Paragraphs 23(c) and 23(d)*

In paragraphs 23(c) and 23(d) of their Amended Complaint, the plaintiffs allege that:
(c) In 1976, Burlington Northern adopted an agreement which merged seniority for a limited purpose and which discriminated against women in job placement both by its terms and the manner in which it was implemented.

(d) Burlington Northern failed fully to afford women their rights and protections under a 1967 agreement arising out of the merger of Burlington Northern with other railroads.

See Sixth Amended Complaint, pp. 13-14; Paragraphs 23(c) and 23(d). Since the filing of the Sixth Amended Complaint the plaintiffs have modified their position with respect to paragraphs 23(c) and 23(d). Plaintiffs do not oppose the motion to dismiss paragraph 23(d) of the Sixth Amended Complaint. Accordingly, that motion will be granted.

Paragraph 23(c) is more difficult but only because the parties cannot agree on the subject matter of that paragraph. Plaintiffs claim that when they filed the Sixth Amended Complaint they mistakenly understood that Burlington Northern had entered into a 1976 agreement that adversely affected women. Plaintiffs state that they have no objection to the court dismissing paragraph 23(c) as long as they are not barred from introducing evidence concerning four seniority modification agreements between Burlington and three unions in 1975-1976, which they claim constitute an admission that women were previously discriminated against.

Since it appears that paragraph 23(c) was mistakenly included in plaintiffs' Complaint, the court will grant defendants' motion to strike. In doing so, however, this court is not expressing any opinion on the admissibility of evidence concerning the seniority modification agreements. Evidence will be admitted or excluded in accordance with the Federal Rules of Evidence at the time of trial and not at this stage in the discovery process.

Motion to Dismiss Burlington Northern, Inc., Milestone Petroleum, Inc., and BN Timberlands, Inc.

Burlington Northern's final motion is to dismiss defendants Burlington Northern, Inc., Milestone Petroleum, Inc., and BN Timberlands, Inc. The court has been advised by counsel that the parties are attempting to negotiate a stipulation with respect to this motion. Accordingly, the court will defer ruling on this matter. Counsel should keep the court advised of the progress of their negotiations.

For the reasons stated above, It is Ordered that:
1. Defendants' motion to dismiss Joleen McIlravy is denied.

2. Defendants' motion to dismiss Karla Keefe is denied.

3. Defendants' motion to dismiss Diane Kubes is denied.

All Citations

Not Reported in F.Supp., 1984 WL 1045, 36 Fair Empl.Prac.Cas. (BNA) 798, 34 Empl. Prac. Dec. P 34,581

Footnotes

[1] The court is aware of the heavy workload faced by the staff of the EEOC. However, as the court stated in *EEOC v. Bell Helicopter Co.,* 426 F.Supp. 785, 793 (N.D. Tex. 1976):

"The commission itself was established by Congress. If Congress does not see fit to adequately staff or fund the

Commission to carry out its declaration of policy, that is also a congressional decision. The federal courts can only go so far in forcing inconvenience and prejudice on defendant employers because of EEOC inaction."

Id. The facts of this case lead this court to believe that it may have been something other than an overworked staff that caused the EEOC to wait nearly ten years to issue a right to sue letter. When class counsel for the plaintiffs contacted the EEOC in early 1984, Ms. Keefe obtained a right to sue letter almost immediately. Moreover, in the case of Joleen McIlravy, the EEOC issued a right to sue letter with 36 days of the filing to the charge. The court cannot understand why, in a case involving the same defendant, it should take over 3,000 days to issue one right to sue letter and only 36 days to issue another.

[2] Having decided that Ms. Keefe's delay was not inexcusable as a matter of law, the court need not reach the issue of whether Burlington Northern was prejudiced by the delay.