UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case No. 94-6932-CIV-GOLD/Bandstra

ARLENE M. STONE, et al.

Plaintiffs,

vs.

FIRST UNION CORPORATION, et al.

Defendants.
_____/

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Fed.R.Civ.P. 56, Plaintiffs move the Court for entry of summary judgment against First Union Defendants on their First and Fourth affirmative defenses, and state:

Introduction

Defendants responded to Plaintiff Arlene Stone's September 23, 1994 Complaint on January 27, 1995. D.E. 10 (Answer).

Defendants' **First Affirmative Defense** alleged, "Plaintiff failed to exhaust her administrative remedies." Answer p. 14.

Defendants' **Fourth Affirmative Defense** alleged, "Plaintiff's action is barred, in whole, or in part, by applicable statutes of limitation." Id.

The Court denied Defendants' Motion for Summary Judgment on their Fourth Affirmative Defense (statute of limitations) on May 24, 2001. D.E. 812.

I. Statement of Undisputed Facts

1. Ms. Stone was terminated from her employment with First Union on **October 30, 1992**. Exh. 1 (composite exhibit).

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2. Ms. Stone filed an age discrimination complaint with the EEOC in Miami, and the Florida Commission on Human Relations on **November 30, 1992**. Exh. 1.

3. The EEOC in New Orleans, Louisiana issued a Right-to-Sue letter (RTS) dated **June 10, 1994**, to Ms. Stone. The RTS was sent by certified mail in an envelope bearing the postmark **June 13, 1994** from New Orleans. Exh. 2.

4. Ms. Stone received the RTS by certified mail on Saturday **June 25, 1994** when it was delivered to her at her home by a postal carrier. Exh. 2 (envelope); Exh. 3, (Affidavit of Ms. Stone, ¶ 5, original filed March 13, 2001, D.E. 709).

5. An age discrimination Complaint on behalf of Ms. Stone and all others similarly situated, was filed **September 23, 1994** -- ninety (90) days after Ms. Stone received the RTS.

6. Defendants' reply brief in support of its Motion for Summary Judgment on the issue of the statute of limitations, included a 1998 version of a Postal Service Handbook, which included a version of Postal Service Form 3849 -- revised in December 1994 -- that is generally left by a mail carrier to notify the addressee of an attempt to deliver mail. D.E. 718. (The issue before the Court relates to events occurring in June 1994).

7. All completed versions of Form 3849 in the Handbook submitted by Defendants <u>omit</u> identification of the sender of the certified mail, and nothing in the instructions to the carrier require him or her to indicate the identity of the sender. <u>See</u> Handbook pp. 52-54, 56 (completed Forms 3849); p. 51, § 331 ("you

must leave a notice that bears the location of the delivery unit where the article may be called for"; p. 56 § 335.2 (when leaving notice, "Endorse the article with the reason for non-delivery, such as, No Response, enter route number, the date and initial on article, and return it to the delivery unit."). D.E. 718.

Supplemental Facts

S-1. Although a postal carrier had apparently attempted delivery of the certified letter to her home on June 17, 1994 when Ms. Stone was at work, Ms. Stone was never notified prior to June 25, 1994 when she actually received the RTS, that the post office had a letter from the EEOC for her. Exh. 2 (envelope); Exh. 3 (Affidavit ¶¶ 2, 3, 5, 7).

II. Memorandum of Law

A. Standard of Review

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

A factual issue is "material" if it is a legal element of a claim as identified by the substantive law governing the case such that its presence or absence might affect the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986).

A factual issue is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the non-moving party. Matsushita Elect. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986);

Hairston v. Gainesville Sun Publishing Co., 9 F.3d 913, 919 (11th Cir. 1993) (citation omitted) ("genuine disputes are those in which the evidence is such that a reasonable jury could return a verdict for the non-movant. For factual issues to be considered genuine, they must have a real basis in the record.").

The movant bears the initial burden of informing the court of the basis of the motion and identifying the portions of the record and affidavits which it believes demonstrate the absence of a genuine issue of material fact; if the movant meets this burden, the non-movant must then go beyond the pleadings and designate facts that show there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324-325, 106 S.Ct. 2548, 2553-2554 (1986).

If the non-movant would bear the burden of proof at trial, the movant must show there is an absence of evidence to support the non-moving party's case, or support its motion for summary judgment with affirmative evidence demonstrating the non-moving party will be unable to prove its case at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324, 325, 106 S.Ct. 2548, 2553-2554 (1986).

Once the moving party has met its burden by presenting evidence which, if uncontradicted, would entitle it to a directed verdict at trial, Rule 56(e) shifts to the non-movant the burden of presenting specific facts showing that such contradiction is possible. Walker v. Darby, 911 F.2d 1573 (11th Cir. 1990), citing British Airways Board v. Boeing Co., 585 F.2d 946, 950-952 (9th Cir. 1978), cert. denied, 440 U.S. 981, 99 S.Ct. 1790 (1979).

The non-movant's failure to prove an essential element of a claim renders all factual disputes as to that claim, immaterial, and requires the motion for summary judgment be granted:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex, 477 U.S. 317, 322-323, 106 S.Ct. 2548, 2552-2553 (1986).

In meeting its burden, the non-movant must offer more than a "scintilla of evidence" because "the mere existence of a scintilla of evidence in support of the position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]". Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 2512 (1986); Carter v. City of Miami, 870 F.2d 578, 581 (11th Cir. 1989) (non-moving party must provide more than a mere scintilla to survive a motion for summary judgment as a matter of law, there must be a substantial conflict in evidence to support a jury question); Miles v. Tennessee River Pulp and Paper Co., 862 F.2d 1525, 1527-1528 (11th Cir. 1989) (a mere scintilla of evidence does not create a jury question; there must be a substantial conflict in evidence to support a jury question).

Instead, the evidence offered by the non-movant with the

burden of proof must be "significantly probative", and more than "merely colorable":

> [T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party . . .. If the evidence is merely colorable . . . or is not significantly probative . . . summary judgment may be granted.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250, 252, 106 S.Ct. 2505, 2511 (1986); Celotex, 477 U.S. 317, 322-323, 106 S.Ct. 2548, 2552-2553 (1986) (non-movant with burden of proof must present "significantly probative" evidence on the issue to avoid summary judgment); LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 835 (11th Cir. 1998) (non-moving party "must raise significant probative evidence that would be sufficient for a jury to find for that party.").

Moreover, the nonmoving party must raise more than a "metaphysical doubt": "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elect. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct 1348 (1986).

B. Substantive Law

Under the ADEA, if an aggrieved employee lives in a "deferral" state (one that has its own discrimination laws and an agency for enforcement), he or she has three hundred (300) days from the date of the discriminatory act in which to file a charge of discrimination with the EEOC. 29 U.S.C. § 626(d).

An ADEA action may not be brought more than ninety days after

the complainant has adequate notice that the EEOC has dismissed the charge. Santini v. Cleveland Clinic, 232 F.3d 823, 825 (11th Cir. 2000).

The ADEA itself provides:

> A civil action may be brought under this section by a person [covered by the Act] . . . within 90 days **after the date of the receipt** of . . . notice [of dismissal of the charge].

29 U.S.C. § 626(e) (emphasis added).

Statutory notice is generally complete only upon actual receipt of a right-to-sue letter (RTS) from the EEOC. See Franks v. Bowman Transportation Co., 495 F.2d 398, 404, 405 (5th Cir. 1974), rev'd on other grounds, 424 U.S. 747, 96 S.Ct. 1251 (1976), where the Court held that the "constructive receipt" doctrine does not serve the remedial purposes of the act; that "Congress did not intend to condition a claimant's right to sue . . . on fortuitous circumstances or events beyond his control"; and that where "it is shown that the claimant through no fault of his own has failed to receive the suit letter . . . the delivery of the letter to the mailing address cannot be considered to constitute statutory notification." See also Miller v. Int'l Paper Co., 408 F.2d 283, 287 (5th Cir. 1969) (notification takes place only when "notice of the failure to obtain voluntary compliance has been sent and received.").

Notably, even in actions under Title VII and the Americans with Disabilities Act (ADA) where the statutes provide "within 90 days **after the giving** of . . . notice of dismissal" a civil action may be brought (42 U.S.C. § 2000e-5(f)(1)), the law in this Circuit

is that "giving of such notice" should be construed as "actual receipt of the suit letter", Zillyette v. Capital One Financial Corp., 179 F.3d 1337, 1339 (11th Cir. 1999), Stallworth v. Wells Fargo Armored Service Corp., 936 F.2d 522, 524 (11th Cir. 1991) (90 day period did not begin because there was unrebutted testimony that plaintiff neither received nor knew about the right-to-sue letter).

In this Circuit, the limitations period is triggered upon actual receipt of the RTS by either the plaintiff (or a designated representative) or a responsible person at plaintiff's residence, but if a postal notice is left at plaintiff's residence, the limitations period begins three days after the plaintiff's receipt of official notification **if and only if** the notification advises that a certified letter from the EEOC awaits him or her at a nearby postal station. Zillyette v. Capital One Financial Corp., 179 F.3d 1337, 1341-1342 (11th Cir. 1999):

> [I]f the delivery notice left for [plaintiff] by the postal service had **failed to contain the information that the EEOC was the sender**, it would have simply advised him that a letter was waiting for him at the post office, a letter that could have been from anyone.
>
> **Under these circumstances, the suit letter from the EEOC could not fairly or reasonably be deemed to have been received from the date of the notice**, because [plaintiff's] failure to retrieve the letter would have had no bearing at all on the diligence with which he was pursuing his claim.
>
> On the other hand, had the **notice identified the EEOC as sender**, [plaintiff] would have had the de minimis responsibility to obtain the letter in a timely manner [three days] or

> provide a reasonable explanation as to why this was not done.

Id. at 1341 (emphasis added); Stallworth v. Wells Fargo Armored Service Corp., 936 F.2d 522, 524 (11th Cir. 1991) (90 day period did not begin because there was unrebutted testimony that plaintiff neither received nor knew about the right-to-sue letter); Bell v. Eagle Motor Lines, Inc., 693 F.2d 1086, 1087 (11th Cir. 1982) (receipt by plaintiff's wife at his residence triggered the 90-day period). See also Jackson v. Continental Cargo-Denver, 183 F.3d 1186, 1190 (10th Cir. 1999) (delivery of Postal Service Form 3849 alone did not start the limitations period where the form did not disclose the name or address of the sender); Hornsby v. United States Postal Service, 787 F.2d 87 (3d Cir. 1986), (a case Zillyette at n. 3 cited as persuasive, examined the postal service form and found it "meaningless" for the purpose of conveying notice of the EEOC's final action because it does not disclose the name or address of the sender).

Indeed, the pivotal fact in the Court's decision to affirm dismissal of plaintiff's claim in Zillyette, was an unrebutted affidavit by a postal service employee that was submitted by the defendant in support of its motion for summary judgment. It was this "unrebutted evidence that the delivery notice Zillyette received contained the sender's [EEOC] name . . . ", that led to the conclusion that the complaint was untimely filed -- plaintiff had notice of the EEOC's letter before actual delivery, yet did not pick up the letter within three days of being placed on notice that the post office had a certified letter from the EEOC for him.

The exception to the general rule that only actual receipt of the RTS begins the limitations period, is where the evidence shows that the plaintiff did not assume "minimal responsibility" to ensure receipt of mail, or where the plaintiff was at fault for the failure to receive the RTS. See Stallworth v. Wells Fargo Armored Service Corp., 936 F.2d 522, 524-525 (11th Cir. 1991).

For example, plaintiff failed to assume minimal responsibility and failed to exercise diligence where the plaintiff failed to notify the EEOC of his change of address, Lewis v. Conners Steel Co., 673 F.2d 1240, 1242-1243 (11th Cir. 1982), or where the RTS was returned unclaimed because the plaintiff gave the EEOC an address other than where she herself resided, gave an address where her family resided knowing they often lied to her and lost her mail, admitted she did not ask about her mail or messages, and left her state of residence for an extended time without informing the EEOC, Nelmida v. Shelly Eurocars, 112 F.3d 380 (9th Cir. 1997).

As another example, in Graham-Humphreys v. Memphis Brooks Museum of Art, 209 F.3d 552 (6th Cir. 2000), the court found the plaintiff "indisputably knew that her RTS would be proximately arriving" because she had specifically requested the RTS from the EEOC the week before, conceded that she knew or suspected the delivery notice of certified mail was the RTS she had requested, had a flexible work schedule that did not prevent her from retrieving the letter, admitted she had no excuse for not retrieving the letter from the post office, yet ignored multiple notices left at her home by the post office resulting in the

eventual return of the letter to the EEOC as unclaimed.

In other cases, the plaintiff was not excused for delay caused by another responsible adult at the plaintiff's home who signed for the certified letter from the EEOC, Law v. Hercules, Inc., 713 F.2d 691, 692-693 (11th Cir. 1988), Bell v. Eagle Motor Lines, Inc., 693 F.2d 1086, 1087 (11th Cir. 1982) (receipt by plaintiff's wife at his residence triggered the 90-day period), or was held to the date her attorney received and signed for the RTS, Chapman v. Travalco, U.S.A., Inc., 973 F.Supp. 1045, 1046 (S.D. Fla. 1997).

III. Application Of Substantive Law To The Facts Warrant Summary Judgment For Plaintiffs On First Affirmative Defense

Defendants' First Affirmative Defense alleged, "Plaintiff failed to exhaust her administrative remedies." Answer p. 14. Since Florida is a "deferral state" under the ADEA, Ms. Stone had **three hundred (300) days** from the discriminatory act in which to file a charge with the EEOC. See 29 U.S.C. § 626(d). The undisputed facts prove Ms. Stone filed her charge with the EEOC within **thirty (30) days** of her termination; the EEOC investigated the charge and issued a right-to-sue letter. No more was required. Accordingly, Plaintiffs are entitled to summary judgment as a matter of law, on Defendants' First Affirmative Defense.

IV. Application Of Substantive Law To The Facts Warrant Summary Judgment For Plaintiffs On Fourth Affirmative Defense

Defendants' Fourth Affirmative Defense alleged, "Plaintiff's action is barred, in whole, or in part, by applicable statutes of limitation." Answer p. 14.

The undisputed facts prove Ms. Stone filed her age

discrimination Complaint within ninety days of her actual receipt at her home of the RTS sent by the EEOC. Accordingly, Plaintiffs are entitled to judgment as a matter of law on the Fourth Affirmative Defense.

There is no genuine issue of material fact. The only evidence before the Court is Ms. Stone's sworn affidavit that prior to her actual receipt of the RTS on June 25, 1994 (indicated on the envelope containing the RTS), she had never received any notification identifying the EEOC as the sender of a certified letter for her. Defendants have absolutely no evidence to contradict this. See Miles v. Tennessee River Pulp and Paper Co., 862 F.2d 1525, 1527-1528 (11th Cir. 1989) (a mere scintilla of evidence does not create a jury question; there must be a substantial conflict in evidence to support a jury question).

Defendants have no evidence that prior to actual delivery to her, Ms. Stone had ever been placed on notice that the post office had a certified letter from the EEOC for her.

Under the standard for summary judgment, since Defendants would have the burden of proving the affirmative defenses at trial, in order to avoid summary judgment they would have to do more than raise some "metaphysical doubt" as to whether Ms. Stone was notified prior to actual receipt of the RTS, that the post office had the EEOC's RTS for her. See Matsushita Elect. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct 1348 (1986).

The evidence offered by the non-movant with the burden of proof must be "significantly probative", and more than "merely

colorable". Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250, 252, 106 S.Ct. 2505, 2511 (1986); Celotex, 477 U.S. 317, 322-323, 106 S.Ct. 2548, 2552-2553 (1986) (non-movant with burden of proof must present "significantly probative" evidence on the issue to avoid summary judgment); LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 835 (11th Cir. 1998) (non-moving party "must raise significant probative evidence that would be sufficient for a jury to find for that party.").

In the matter at bar, even if the Court permitted Defendants to introduce the 1998 version of the Postal Service Handbook and the version of Form 3849 that was revised to an unknown extent in December 1994, as evidence with respect to events occurring in June 1994, no reasonable jury could find for Defendants.

To find for Defendants, a jury would have to speculate (without evidence) that the pre-December 1994 version of Form 3849 included a space for identification of the sender, speculate (without evidence) that the letter carrier in fact inserted the name of the sender in the small space provided even though the Handbook did not require that this be done, and assume (without evidence) that Ms. Stone lied in her Affidavit when she stated she was not placed on notice that the post office had a certified letter from the EEOC for her until after the letter was actually delivered to her. This no reasonable jury would do.

Moreover, in stark contrast to Graham-Humphreys, Ms. Stone had no reason to believe or even suspect that a letter would be arriving from the EEOC in June 1994. The charge she signed and

filed with the Miami office of the EEOC and the Florida Commission on Human Relations in November 1992, was not determined and the RTS not sent by the New Orleans office of the EEOC until June 13, 1994 -- almost two years later.

Further, there is no evidence whatsoever that Ms. Stone was in any way at fault for the delay in her receipt of the letter dated June 10, 1994. The delay was in fact caused by events beyond her control: the EEOC letter dated June 10, 1994 was not mailed from New Orleans until June 13; it did not make its way to Ms. Stone's Florida address until June 17 when she was at work[1]; in the normal course, the letter was redelivered to her home on Saturday, June 25, 1994 and received at that time.

V. Conclusion

Under the prevailing law in this Circuit, the facts presented here make the filing of the lawsuit timely as a matter of law, and prove that beyond question, Ms. Stone exhausted all her administrative remedies prior to filing suit. Plaintiffs are entitled to summary judgment as to First Union's First and Fourth Affirmative Defenses.

Respectfully submitted,

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[1] At the time, Ms. Stone worked all day Monday through Fridays, and alternate Saturdays. Affidavit, ¶ 7.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was sent by U.S. Mail to ROBERT T. KOFMAN, ESQ., Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Museum Tower, Suite 2200, 150 West Flagler St., Miami, FL 33130; and to J. THOMAS KILPATRICK, ESQ., Alston & Bird, Attorneys for Defendants, One Atlantic Center, 1201 West Peachtree St., Atlanta, GA 30309-3424, on this 31st day of January, 2003.

Brenda J. Carter

BRENDA J. CARTER