2000 WL 382008
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United States District Court, D. Kansas.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
EARL SCHEIB OF KANSAS, INC. and EARL SCHEIB AUTOMOTIVE PAINT FINISHES, INC., Defendants.

No. 99–2445–JWL. | March 15, 2000.

Opinion

MEMORANDUM AND ORDER

LUNGSTRUM, District J.

***1** The Equal Employment Opportunity Commission (EEOC) filed suit against defendants Earl Scheib of Kansas, Inc. and Earl Scheib Automotive Paint Finishes, Inc. on behalf of Darryl Davis, a former employee of defendants. According to the EEOC, Mr. Davis was aggrieved by defendants' alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. This matter is presently before the court on defendants' motion to dismiss plaintiff's complaint (doc. # 5) and plaintiff's motion for leave to file an amended complaint (doc. # 9). For the reasons set forth below, defendants' motion to dismiss is granted in part and denied in part. Plaintiff's motion for leave to file an amended complaint is granted.

I. Defendants' Motion to Dismiss

Pursuant to Federal Rule of Civil Procedure 12(b)(1), defendants move to dismiss plaintiff's complaint because neither Earl Scheib of Kansas, Inc. nor Earl Scheib Automotive Paint Finishes, Inc. was named as a respondent in the relevant EEOC charge of discrimination. In addition, defendants move to dismiss plaintiff's claims against Earl Scheib Automotive Paint Finishes, Inc., pursuant to Federal Rule of Civil Procedure 12(b)(6), because that defendant is not named in the body of plaintiff's complaint. As set forth in more detail below, the court denies defendants' motion to the extent it is based on plaintiff's failure to name the defendants in the EEOC charge. The court grants defendants' motion to dismiss plaintiff's claims against defendant Earl Scheib Automotive Paint Finishes, Inc. because plaintiff concedes in its papers that this defendant is not a proper party to the action. Moreover, because plaintiff has not objected to the dismissal of this defendant with prejudice, the court grants defendants' request that plaintiff's claims against Earl Scheib Automotive Paint Finishes, Inc. be dismissed with prejudice.[1]

Before turning to the merits, the court addresses the procedural posture of defendants' motion to the extent the motion seeks dismissal based on plaintiff's failure to name defendant Earl Scheib of Kansas, Inc. as a respondent in the EEOC charge. Defendants move to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, asserting that the court lacks subject matter jurisdiction over this case. It is well settled that "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.,* the courts' statutory or constitutional *power* to adjudicate the case." *See Steel Co. v. Citizens for a Better Environment,* 118 S.Ct. 1003, 1010 (1998) (emphasis in original) (citation omitted). In fact, as the Supreme Court recently reiterated, "dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court or otherwise completely devoid of merit as not to involve a federal controversy." ' *Id.* (quoting *Oneida Indian Nation of N.Y. v. County of Oneida,* 414 U.S. 661, 666 (1974)); *accord Harline v. Drug Enforcement Admin.,* 148 F.3d 1199, 1203 (10th Cir.1998) (quoting *Steel Co.*), *cert. denied sub nom. Harline v. Department of Justice,* 119 S.Ct. 798 (1999).

***2** Plaintiff here presents a non-frivolous claim under federal law. No more is necessary for subject-matter jurisdiction. *See Cardtoons, L.C. v. Major League Baseball Players Ass'n,* 95 F.3d 959, 965 (10th Cir.1996) ("Dismissal of a complaint for lack of subject matter jurisdiction would only be justified if 'that claim were "so attenuated and unsubstantial as to be absolutely devoid of merit" or "frivolous." " ' (quoting *Baker v. Carr,* 369 U.S. 186, 199 (1962))). Thus, the court denies

defendants' motion to the extent it seeks dismissal for lack of subject matter jurisdiction.

Construing defendants' motion as a motion to dismiss for failure to state a claim upon which relief may be granted, *see* Fed.R.Civ.P. 12(b)(6), the court now turns to the merits of the motion. Earl Scheib of Kansas, Inc. ("Scheib Kansas") moves to dismiss plaintiff's complaint on the grounds that it was not named in the EEOC charge. Scheib Kansas maintains that dismissal of the complaint is warranted because the only respondent named in the charge is Earl Scheib Paint & Body, an entity that, according to Scheib Kansas, does not exist.[2] As set forth below, the court concludes that dismissal would be inappropriate under the circumstances presented here.

As a general rule, a plaintiff must file a charge against a party with the EEOC before he or she can sue that party under Title VII. *See* 42 U.S.C. § 2000e–5(f)(1) ("[A] civil action may be brought against the respondent named in the [EEOC] charge ... by the person claiming to be aggrieved...."). The purpose of the filing requirement is to provide notice of the alleged violation to the charged party, and to provide the administrative agency with the opportunity to conciliate the claims. *Seymore v. Shawver & Sons, Inc.,* 111 F.3d 794, 799 (10th Cir.1997) (citing *Schnellbaecher v. Baskin Clothing Co.,* 887 F.2d 124, 126 (7th Cir.1989)).

Although a plaintiff should name all defendants in his or her EEOC charge, the omission of a party's name does not mandate dismissal of a Title VII action. *See Romero v. Union Pac. R.R.,* 615 F.2d 1303, 1311 (10th Cir.1980). A Title VII action may proceed against a defendant not named in the EEOC charge "where the defendant was informally referred to in the body of the charge, or where there is a clear identity of interest between the unnamed defendant and the party named in the administrative charge to satisfy the intention of Title VII that the defendant have notice of the charge and the EEOC have an opportunity to attempt conciliation." *See id.* (citations omitted).[3] In determining whether the failure to name a party requires dismissal of the action, the court considers, in addition to other relevant facts, the following:

> (1) whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the EEOC complaint;
>
> (2) whether, under the circumstances, the interest of a named [sic] are so similar as the unnamed parties that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings;
>
> ***3** (3) whether its absence from the EEOC proceedings resulted in actual prejudice to the interest of the unnamed parties;
>
> (4) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party.

See id. at 1312 (quoting *Glus v. G.C. Murphy Co.,* 562 F.2d 880, 888 (3d Cir.1977)); *see also Knowlton v. Teltrust Phones, Inc.,* 189 F.3d 1177, 1185 (10th Cir.1999).

Scheib Kansas has failed to address the *Romero* factors in its motion to dismiss.[4] For that reason alone, it has failed to meet its burden of proving that no set of facts exist in support of plaintiff's theory of recovery that would entitle it to relief. *See Aguirre v. McCaw RCC Communications, Inc.,* 923 F.Supp. 1431, 1434 (D.Kan.1996) (citation omitted). In addition, after reviewing plaintiff's claims in light of the four *Romero* factors and other relevant facts, the court concludes that plaintiff may maintain its action against Scheib Kansas. Although Mr. Davis named only "Earl Scheib Paint and Body" in his charge, Scheib Kansas (or, more specifically, Earl Scheib, Inc. on behalf of Scheib Kansas) received the charge and responded to it. Moreover, Scheib Kansas engaged in conciliation efforts with the EEOC. These facts reveal that the purposes underlying the filing requirement—to provide notice of the alleged violation to the charged party, and to provide the administrative agency with the opportunity to conciliate the claim—have been satisfied with respect to plaintiff's claims against Scheib Kansas. Defendants' motion to dismiss plaintiff's complaint on this basis is denied. *See Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130,* 657 F.2d 890, 905 (7th Cir.1981) ("[W]here an unnamed party has been provided with adequate notice of the charge, under circumstances where the party has been given the opportunity to participate in conciliation proceedings aimed at voluntary compliance, the charge is sufficient to confer jurisdiction over that party.") (citations omitted).

II. Plaintiff's Motion for Leave to File an Amended Complaint

As set forth above, plaintiff concedes that defendant Earl Scheib Automotive Paint Finishes, Inc is not a proper party to this

lawsuit. In that regard, plaintiff has filed a motion for leave to file an amended complaint in which it seeks to substitute Earl Scheib, Inc. as a defendant in the place of Earl Scheib Automotive Paint Finishes, Inc. In response, defendants do not oppose the dismissal of defendant Earl Scheib Automotive Paint Finishes, Inc. so long as that party is dismissed with prejudice. Defendants oppose, however, plaintiff's efforts to substitute Earl Scheib, Inc. on the grounds that plaintiff unduly delayed seeking the amendment and that the proposed amendment would be futile because Earl Scheib, Inc. was never named as a respondent in the EEOC charge and, in any event, because Earl Scheib, Inc. was not Mr. Davis's employer. As set forth in more detail below, the court rejects defendants' arguments and grants plaintiff's motion for leave to file an amended complaint.

***4** The Federal Rules of Civil Procedure provide that a party may amend his or her pleading after a responsive pleading has been filed "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." *See* Fed.R.Civ.P. 15(a); *Calderon v. Kansas Dep't of Social & Rehabilitation Servs.,*181 F.3d 1180, 1185–86 (10th Cir.1999). In determining whether to grant leave to amend, the court may consider such factors as undue delay, bad faith of the moving party, the prejudice an amendment may cause the opposing party, and the futility of amendment. *Hom v. Squire,* 81 F.3d 969, 973 (10th Cir.1996) (citing *Foman v. Davis,* 371 U.S. 178, 182 (1962)); *accord Bauchman ex rel. Bauchman v. West High School,* 132 F.3d 542, 559 (10th Cir.1997), *cert. denied,* 524 U.S. 953 (1998). Ultimately, whether to grant leave to amend a complaint is within the discretion of the district court. *See Bauchman,* 132 F.3d at 559 (citing *Hom,* 81 F.3d at 973).

According to defendants, plaintiff's motion should be denied because plaintiff has unduly delayed seeking its proposed amendment. In support of their argument, defendants emphasize that plaintiff has been in contact with Earl Scheib, Inc. since September 1997 and that Earl Scheib, Inc. has been "actively involved in the EEOC investigation and conciliation" since that time. In other words, defendant contends that plaintiff knew of the facts upon which its proposed amendment is based for more than two years before it filed this lawsuit. The court finds no undue delay here. First, the parties are in the very early stages of the litigation process. Indeed, discovery has not yet commenced. Second, the mere fact that plaintiff has been in contact with Earl Scheib, Inc. since 1997 (Earl Scheib, Inc. was apparently negotiating with the EEOC on behalf of its subsidiary, Earl Scheib of Kansas, Inc.) does not address the relevant issue—i.e., whether plaintiff knew or should have known that Earl Scheib, Inc. was Mr. Davis's employer such that Earl Scheib, Inc. would be a proper defendant in this action. For these reasons, the court rejects defendants' argument that plaintiff's proposed amendment is unduly delayed.

Defendants also contend that plaintiff's proposed amendment should be denied based on futility. In support of this argument, defendants first maintain that Earl Scheib, Inc. was not named as a respondent in the EEOC charge. Defendants set forth the same arguments as set forth above in connection with their motion to dismiss. These arguments are equally unavailing here. Specifically, the facts demonstrate that Earl Scheib, Inc. had notice of Mr. Davis's charge and had the opportunity to participate in conciliation efforts with the EEOC. The response to Mr. Davis's charge, for example, was written by an agent of Earl Scheib, Inc., albeit on behalf of Scheib Kansas. Moreover, in response to the EEOC's Request for Information, this agent submitted several documents pertaining to Earl Scheib, Inc., including the "Business Practice Policies" of Earl Scheib, Inc. and a list of Earl Scheib, Inc. employees. Thus, the court rejects defendants' argument that plaintiff's complaint against Earl Scheib, Inc. would be subject to dismissal for failure to name this entity in Mr. Davis's charge. *See Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130,* 657 F.2d 890, 905 (7th Cir.1981).

***5** Finally, defendants maintain that plaintiff's proposed amendment is futile because Earl Scheib, Inc. was not Mr. Davis's employer and, thus, it cannot be held liable to Mr. Davis under Title VII. In support of their argument, defendants offer the affidavit of Russell Woerz, a Division Manager of Earl Scheib of Kansas, Inc. In it, Mr. Woerz avers that Earl Scheib of Kansas, Inc. controlled the manner and means of Mr. Davis's work. According to defendants, this affidavit "shows conclusively" that Earl Scheib, Inc. was not Mr. Davis's employer. As set forth below, defendants' argument exhibits a fundamental misunderstanding of the relevant standard governing plaintiff's motion.

A court may deny a motion to amend as futile if the proposed amendment would not withstand a motion to dismiss or otherwise fails to state a claim. *Ketchum v. Cruz,* 961 F.2d 916, 920 (10th Cir.1992). Thus, the court analyzes plaintiff's proposed amendment as if it were before the court on a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Dismissal of a claim under Rule 12(b)(6) is appropriate only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery that would entitle him or her to relief, *Conley v. Gibson,* 355 U.S. 41, 45–46 (1957); *Maher v. Durango Metals, Inc.,* 144 F.3d 1302, 1304 (10th Cir.1998), or when an issue of law is dispositive. *Neitzke v. Williams,* 490 U.S. 319, 326 (1989). The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations, *Maher,* 144 F.3d at 1304, and all reasonable inferences from those facts are viewed in favor of the plaintiff. *Witt v. Roadway Express,* 136 F.3d 1424, 1428 (10th Cir.), *cert. denied,* 119 S.Ct. 188 (1998). The issue in resolving a motion such as this is not whether the plaintiff will ultimately prevail, but whether he or she is entitled to offer

evidence to support the claims. *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974).

Thus, the mere fact that defendants have controverted by sworn testimony plaintiff's allegations concerning Mr. Davis's employer does not necessarily defeat the proposed amendment. Parties usually do controvert the allegations in pleadings by sworn testimony at trial or otherwise. *Corvel Healthcare Corp. v. Shorman & Assocs.,* Civ. A. No. 94–2131–GTV, 1995 WL 13440, at *1 (D.Kan. Jan. 13, 1995). The motion seeks only the privilege of making the allegations. *See id.* In that regard, viewing all reasonable inferences in its favor, the court cannot say that it appears beyond a doubt that plaintiff can prove no set of facts in support of its allegation that Earl Scheib, Inc. was Mr. Davis's employer. Thus, plaintiff is entitled to offer evidence to support its allegation.[5]

Having rejected all of defendants' arguments in opposition to plaintiff's motion, the court grants plaintiff leave to file an amended complaint. The amended complaint that plaintiff has attached to its motion is deemed filed and served as of March 15, 2000—the date of this order.

***6** IT IS THEREFORE ORDERED BY THE COURT THAT defendants' motion to dismiss (doc. # 5) is granted in part and denied in part. Specifically, the motion is granted with respect to defendant Earl Scheib Automotive Paint Finishes, Inc. Plaintiff's claims against Earl Scheib Automotive Paint Finishes, Inc. are dismissed with prejudice. Defendant's motion to dismiss is otherwise denied. Plaintiff's motion for leave to file an amended complaint (doc. # 9) is granted. Plaintiff's amended complaint (attached to its motion) is deemed filed and served as of March 15, 2000.

IT IS SO ORDERED.

Footnotes

1 Because plaintiff does not object to the dismissal with prejudice of its claims against Earl Scheib Automotive Paint Finishes, Inc., the court need not address the merits of defendants' arguments with respect to this defendant.

2 Although "Earl Scheib Paint & Body" may not exist as a separate corporate entity, Scheib Kansas used this phrase on its letterhead, business cards and coupons. Moreover, "Earl Scheib Paint & Body" appears on the front of the building in which Mr. Davis worked.

3 Although plaintiff has not argued that Scheib Kansas was informally referred to in the body of Mr. Davis's charge, such an argument could be made in the context of this case. *See Scales v. Sonic Indus., Inc.,* 887 F.Supp. 1435, 1437–38 (E.D.Okla.1995) (court determined that defendant Sonic Industries, Inc. was informally referenced in EEOC charge by plaintiff's reference to trade name of "Sonic Drive–In"). Here, Mr. Davis named Earl Scheib Paint & Body in the charge. The parties' papers reveal that this name is a trade name used by Scheib Kansas and Earl Scheib, Inc. Mr. Davis's reference to this trade name sufficiently links Scheib Kansas and Earl Scheib, Inc. to Earl Scheib Paint & Body. In light of these circumstances, particularly where Scheib Kansas and/or Earl Scheib, Inc. have responded to the charge and engaged in conciliation efforts with the EEOC, the court is unwilling to dismiss the EEOC's complaint based on defendants' hypertechnical interpretation of Mr. Davis's charge. As another court has aptly noted, "[t]o hold otherwise would be ... at odds with the court's obligation to liberally construe [EEOC] complaints to accomplish the underlying purposes of Title VII." *See id.* at 1438.

4 According to Scheib Kansas, the *Romero* factors are simply inapplicable because it cannot have an "identity of interest" with an entity that does not exist.

5 The court notes, in any event, that plaintiff has offered evidence tending to show that Earl Scheib, Inc. was the employer of Mr. Davis.