UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

KAREN BELLIFEMINE, AMY ZEOLI, MICHELLE POPA, NANCY BEANEY, and JENNIFER STORM,	)	
Individually and on Behalf of Others Similarly Situated,	)	
and SUE SULLIVAN, Individually,	)	
Plaintiff,	)	**C.A. NO. 07-2207 (JGK)**
v.	)	**ELECTRONICALLY FILED**
SANOFI-AVENTIS U.S. LLC	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT SANOFI-AVENTIS' PARTIAL MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

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I. INTRODUCTION

This is a purported class action involving numerous factually and legally distinct individual claims asserted by two current and four former employees of Defendant sanofi-aventis U.S. LLC ("Defendant" or "sanofi-aventis"). These six individuals, all with varied employment histories and factual circumstances, assert claims based largely on discrete acts of alleged discrimination that purportedly occurred at different times, in different geographic districts and that allegedly concerned different decision makers who were responsible for different lines of business and personnel.

It is undisputed that in order for a plaintiff to assert a Title VII claim, she must first timely exhaust her administrative remedies by filing a charge of discrimination within 300 days of the alleged discriminatory act. Plaintiff Karen Bellifemine is the only Plaintiff that filed a charge of discrimination. In her charge, Plaintiff Bellifemine asserted one pay allegation; however, that allegation was untimely as it concerned a pay decision that was allegedly made in April of 2005, more than 300 days before Plaintiff Bellifemine filed her charge. Thus, Plaintiff Bellifemine's pay claim is untimely and cannot form the basis of a Title VII claim.

Because Plaintiffs Amy Zeoli, Nancy Beaney, Jennifer Storm and Michelle Popa[1] failed to individually exhaust their administrative remedies, they have attempted to invoke the single-filing rule and piggy-back on Plaintiff Bellifemine's charge of discrimination to assert pay discrimination claims. Because Plaintiff Bellifemine's charge allegation of pay discrimination was untimely, Plaintiffs Zeoli, Beaney, Storm and Popa cannot piggy-back on Plaintiff

[1] Plaintiff Sue Sullivan no longer seeks to be a class representative and is only pursuing an individual claim for alleged hostile work environment. The phrase "Purported Class Plaintiffs" shall refer to Plaintiffs Bellifemine, Zeoli, Storm, Popa, and Beaney collectively. The phrase "Plaintiffs" shall refer to the Purported Class Plaintiffs collectively with Plaintiff Sullivan.

Bellifemine's charge in order to satisfy their exhaustion requirements with respect to their pay claims, and therefore, their pay claims should be dismissed.

Plaintiffs Bellifemine, Zeoli, Beaney, Storm, and Popa also assert claims regarding discrete acts of discrimination that allegedly occurred more than 300 days before Plaintiff Bellifemine filed her charge of discrimination. Because of Title VII's exhaustion requirements, Plaintiffs' Title VII claims cannot extend beyond 300 days before the date that one of the Plaintiffs first filed a charge that asserted class-wide allegations, and thus, these claims must also be dismissed.

Finally, Plaintiffs Zeoli, Popa, Beaney, and Storm assert claims under New York Human Rights Law, N.Y. Exec. §§ 290 et seq. ("NYHRL"). Plaintiffs Zeoli, Popa, Beaney and Storm, however, never worked in and have never been residents of New York. Therefore, they cannot assert NYHRL claims, and the Court should dismiss their NYHRL claims.

II. PROCEDURAL HISTORY

A. Plaintiff Bellifemine's Charge of Discrimination.

On March 8, 2006, Plaintiff Karen Bellifemine filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") (hereafter "Charge") in which she claimed that sanofi-aventis discriminated against her on the basis of sex, retaliated against her and subjected her to a hostile work environment. A true and correct copy of the Charge is attached hereto as Exhibit A. Specifically, Plaintiff Bellifemine claimed that: 1) she was denied a pay increase in April 2005; 2) she was denied promotions in May of 2005 and October of 2005; 3) she was harassed when her manager required her to provide him with copies of documents that memorialized the drug samples that she provided physicians; and, 4) she was retaliated against in December of 2005 when her manager allegedly falsely accused her of having poor relationships with her customers. (Id.).

In addition, Plaintiff Bellifemine included certain vague class claims in her Charge. (Id. at 3). Specifically, she claimed that females were denied promotions, subjected to unspecified disparate terms and conditions of employment, subjected to a hostile work environment, and subjected to other unspecified forms of discrimination. (Id.).

It is undisputed that Plaintiff Bellifemine is the only Plaintiff that filed a charge of discrimination with the EEOC. (Docket No. 16 ¶8). [2]

B. Plaintiffs' Commencement of Litigation.

On March 14, 2007, Plaintiffs Bellifemine, Popa, Zeoli and Sullivan filed a purported class action complaint and alleged that sanofi-aventis discriminated against them on the basis of sex by allegedly denying them pay and promotions, creating an allegedly hostile work environment and retaliating against them. (Docket No. 1). Plaintiffs Bellifemine, Popa, Zeoli and Sullivan filed an Amended Complaint on August 29, 2007. (Docket No. 2). Thereafter, on January 31, 2008, Purported Class Plaintiffs filed a Second Amended Complaint, individually and as purported class representatives. However, in the Second Amended Complaint, Plaintiff Sullivan is only pursuing a claim in her individual capacity and no longer seeks to represent a class. (Docket No. 16).

Plaintiffs' Second Amended Complaint haphazardly lumps together factually distinct claims of discrete acts of discrimination of two current and four former employees, who worked in six different districts, under six different district sales mangers, in different lines of business, and in different areas of the country. In the Second Amended Complaint, despite the fact that no Plaintiff timely exhausted her administrative remedies with respect to a pay claim, Plaintiffs Zeoli, Popa, Beaney, and Bellifemine have all asserted pay discrimination claims. (Docket No.

[2] The EEOC dismissed Ms. Bellifemine's Charge, finding no probable cause to believe a violation of applicable statutes had occurred, and issued her a Notice of Right to Sue on or about December 22, 2006. A true and correct copy of the Notice of Right to Sue is attached hereto as Ex. B; see also Docket No. 16 ¶8.

16 ¶¶52-55, 64-66, 75-76, 87-91, 98-100).[3] In addition, Plaintiffs assert many other claims based on discrete acts of alleged discrimination that took place prior to May 12, 2005. Specifically, Plaintiffs allege that they suffered the following discrete acts of discrimination, which all occurred prior to May 12, 2005:[4]

1. Plaintiff Bellifemine claims that in January of 2005 she did not receive a managerial position that Todd Miklajczk allegedly received. (Docket No. 16 ¶47);

2. Plaintiff Bellifemine claims that in May 2005 she did not receive a promotion to Hospital Sales Representative in Hackensack, New Jersey. (Id. ¶48).

3. Plaintiff Bellifemine claims that in April of 2005, male employees received a higher raise than she. (Id. ¶¶53, 54).

4. Plaintiff Bellifemine further claims that in January of 2005 her manager tried to force her to force her to admit to false accusations about her expense reports. (Id. ¶56);

5. Plaintiff Zeoli claims that from 2004 through May 12, 2005 she was denied promotions to three district manager positions. (Id. ¶61);

6. Plaintiff Zeoli further claims that she received a lower rate of pay than male employees from 2002 until May 12, 2005. (Id. ¶64);

7. Plaintiff Zeoli further claims that in March of 2005 she was denied a merit increase. (Id. ¶66);

8. Plaintiff Zeoli further claims that in January of 2005 her manager threatened to terminate her employment. (Id. ¶69);

9. Plaintiff Popa claims that from November 2003 until May 12, 2005 she was paid less than male employees. (Id. ¶¶71, 76);

10. Plaintiff Beaney claims that from 1991 to May 12, 2005 she was paid less than male employees and denied promotions. (Id. ¶¶7, 79);

11. Plaintiff Beaney further claims that in 2005 she was denied a raise. (Id. ¶88);[5]

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[3] For the purposes of this motion only, Defendant accepts as true, as it must under Rule 12(b)(6), the allegations in the Second Amended Complaint.

[4] In some instances, Plaintiffs assert claims both before and after May 12, 2005. For the purposes of this motion, Defendant is seeking to dismiss those untimely allegations concerning alleged discrete acts of discrimination occurring prior to May 12, 2005.

[5] On the face of the Second Amended Complaint, it is clear that this alleged denial of pay took place prior to May 15, 2005, as merit increases in 2005 were communicated to employees in April. (Docket No 16 ¶¶53, 54).

12. Plaintiff Storm claims that from September 2003 until May 12, 2005 she was paid less than male employees. (Id. ¶¶92, 98).

Finally, Purported Class Plaintiffs have also asserted a claim for discrimination on the basis of sex under New York Executive Law § 296. (Docket No. 16 ¶¶139-45). However, it is undisputed that Plaintiffs Popa, Zeoli, Beaney, and Storm have not and cannot allege that they are residents of New York or that they ever worked in New York. (Id. ¶¶11-14).

III. ARGUMENT

A. Legal Standard For Dismissal Under Rule 12(b)(6).

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007). Under this standard, a plaintiff must allege facts sufficient to establish that a claim is timely because if a plaintiff does not allege sufficient facts of timeliness, then she has not alleged facts sufficient to render her claim plausible. See Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007) (explaining that plaintiff is required to "amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.") (emphasis added); see also LC Capital Partners, L.P. v. Frontier Ins. Group, Inc., 318 F.3d 148, 156-57 (2d Cir. 2003) (affirming dismissal of claim on statute of limitations grounds when it was clear from face of complaint and related documents that claim was time-barred); Pac. Health Advantage v. CAP Gemini Ernst & Young, No. 07-CV-3725, 2007 WL 2619052, at *2, 5 (S.D.N.Y. Sept. 5, 2007) (dismissing plaintiff's complaint and recognizing that when face of complaint indicates claim is time-barred, dismissal is appropriate).

When considering whether a plaintiff's claim should be dismissed pursuant to Rule 12(b)(6), the Court must consider all facts alleged in the complaint, as well as "documents attached to the complaint as exhibits or incorporated in the complaint by reference," Stuto v.

Fleishman, 164 F.3d 820, 826 n.1 (2d Cir. 1999) (citing Newman & Schwartz v. Asplundh Tree Expert Co., 102 F.3d 660, 662 (2d Cir. 1996) and quoting Kramer v. Time Warner, Inc., 937 F.2d 767, 773 (2d Cir. 1991)). For the reasons set forth below, under this standard, several of Plaintiffs' claims cannot withstand a motion to dismiss.

B. Plaintiffs Failed To Exhaust Their Administrative Remedies With Respect Claims Their Pay Claims.

The filing of a timely administrative charge is a prerequisite to filing a Title VII lawsuit. See 42 U.S.C. § 2000e-5; Borrero v. Am. Express Bank Ltd., No. 05 CIV. 10801, 2008 WL 313602, at *3 (S.D.N.Y. Feb. 5, 2008); Plant v. Deutsche Bank Sec., Inc., No. 07 CIV. 3498, 2007 WL 2187109, at *2 (S.D.N.Y. July 23, 2007). A plaintiff must file a charge with the EEOC within 300 days of the alleged discriminatory practice and exhaust her administrative remedies before filing a Title VII claim. 42 U.S.C. § 2000e-5; Borrero, 2008 WL 313602, at *3; Plant, 2007 WL 2187109, at *2. For the reasons set forth below, because Plaintiffs failed to exhaust their administrative remedies with respect to their Title VII pay claims, those claims must be dismissed.

1. Plaintiff Bellifemine failed to timely exhaust her pay claim.

Plaintiff Bellifemine filed her Charge on March 8, 2006, and thus, any allegation in her Charge that pre-dates May 12, 2005 is untimely. (Ex. A.). Therefore, Plaintiff's charge allegation that she was denied a pay increase in April 2005 was untimely. (Id.). Thus, Plaintiff Bellifemine's claim that is predicated upon this allegation must be dismissed. (Docket No. 16 ¶¶53-54).[6]

[6] Plaintiff Bellifemine also asserts other allegations of pay discrimination. (Docket No. 16 ¶¶52, 55). For the reasons set forth below, because these discrete acts of alleged discrimination were unexhausted, they too must be dismissed.

2. All class and individual pay discrimination claims must be dismissed because Plaintiffs failed to exhaust their administrative remedies with respect to these claims and cannot piggy-back on Plaintiff Bellifemine's untimely Charge with respect to these allegations.

A plaintiff who has not filed a charge of discrimination with the EEOC may take advantage of the single-filing rule and piggy-back on a *timely* filed EEOC charge by another individual *only* if the non-filing plaintiff's claims are "sufficiently similar" to those of the filing plaintiff. Snell v. Suffolk County, 782 F.2d 1094, 1100-02 (2d Cir. 1986). For purposes of the single-filing rule, an individual's claims are only "sufficiently similar" to those of the filing plaintiff when they are "reasonably related" to the allegations in a *timely* charge. Butts v. N.Y. Dep't of Hous. Preserv. and Dev., 990 F.2d 1397, 1401 (2d Cir. 1993) (internal citations omitted). Even if the claims of the non-filing plaintiffs in this case are reasonably related to Plaintiff Bellifemine's claims, they can only piggy-back on Plaintiff Bellifemine's Charge if it asserts timely claims. In this case, Plaintiff Bellifemine's pay claim is untimely. (See supra at 7-8).

Courts within the Second Circuit have consistently held plaintiffs who have failed to exhaust their administrative remedies cannot take advantage of the single-filing rule by piggy-backing on time-barred allegations in an EEOC charge. Butts, 990 F.2d at 1403 (finding time-barred allegations in EEOC charge "cannot serve as predicates for allegations in the complaint."); Smith v. Long Island Univ., No. 03 CV 2991, 2007 WL 1541299, at *6 (E.D.N.Y. May 25, 2007) (holding plaintiff cannot use time-barred allegations in EEOC charge as predicates for reasonably related allegations in complaint); Byrne v. Telesector Res. Group, Inc., No. 04-CV-76S, 2005 WL 464941, at *8 (W.D.N.Y. Feb. 25, 2005) (holding that plaintiff cannot "bootstrap" complaint to untimely charge allegations); Joseph v. Manhattan and Bronx Surface Transit Operating Auth., No. 96 CIV. 9015, 2004 WL 1907750, at *7 (S.D.N.Y. Aug. 25, 2004)

(same); Spencer v. UPS, No. 03 CIV. 0574, 2004 WL 362599, at *6 (S.D.N.Y. Feb. 27, 2004) (same); Kulkarni v. City Univ. of N.Y., No. 01 CIV. 3019, 2001 WL 1415200, at *4 (S.D.N.Y. Nov. 13, 2001) (same); Johnson v. Nat'l Maritime Union Pension and Welfare Plans, No. 95 CIV. 4112, 1998 WL 32759, at *6 (S.D.N.Y. Jan. 29, 1998) (same).

In this case, it is undisputed that Plaintiffs Zeoli, Popa, Storm and Beaney never filed a charge of discrimination. (See supra at 4). Thus, in order for Plaintiffs Zeoli, Popa, Storm and Beaney to assert discriminatory pay claims, their pay claims would have to be reasonably related to timely allegations in Plaintiff Bellifemine's Charge. Plaintiff Bellifemine's Charge contains one allegation regarding discriminatory pay - she claims that she was denied a pay increase in April 2005. As set forth above, this charge allegation was untimely. (See supra at 7-8). Thus, Plaintiffs Zeoli, Popa, Storm and Beaney cannot take advantage of the single-filing rule by piggy-backing on this untimely charge allegation (regardless of whether their allegations are reasonably related), and therefore, their pay claims must be dismissed.

C. Claims Predicated Upon Discrete Acts That Occurred Prior To May 12, 2005 Are Time-barred And Must Be Dismissed.

Because of Title VII's exhaustion requirements, Plaintiffs' Title VII claims that concern discrete acts of discrimination cannot extend beyond 300 days before the date that one of the Plaintiffs first filed a charge that asserted class-wide allegations. Snell, 782 F.2d at 1100-01. It is undisputed that the earliest charge filed by any Plaintiff that even arguably asserted such allegations was filed by Plaintiff Bellifemine on March 8, 2006. (Ex. A). Thus, Plaintiffs' Title VII claims cannot extend earlier than 300 days before that date, which is May 12, 2005.

Recently, in Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162 (2007), the Supreme Court reconfirmed its holding in Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101

(2002)[7] when it rejected the notion that the effects of past discrimination on present employment circumstances could be actionable if the discrete acts of past discrimination occurred outside of the applicable statute of limitations for Title VII claims. Specifically, the Court held that with respect to a Title VII pay claim, the controlling date for deciding whether a charge of discrimination is timely is the date that the employer allegedly made the pay decision. Id. at 2169; Borrero, 2008 WL 313602, at *3. "[C]urrent effects alone cannot breathe life into prior, uncharged discrimination . . . such effects in themselves have 'no present legal consequences.'" Ledbetter, 127 S. Ct. at 2169. Thus, under Ledbetter claims based on "discrete acts" must be independently exhausted by filing an EEOC Charge (or an amendment to a pending Charge) within 300 days after the employer allegedly made the decision that underlies the alleged discrete act of discrimination. Ledbetter, 127 S. Ct. at 2169; see also Morgan, 536 U.S. at 109-15; see also Elmenayer, 318 F.3d at 134.

Courts within the Second Circuit have held that discrete acts of discrimination include but are not limited to, "termination or resignation, job transfer, discontinuance of a job assignment, denial of a promotion or increased pay grade, or failure to compensate adequately." Plant, 2007 WL 2187109, at *2 (internal citations omitted); DeJesus v. Starr Tech. Risks Agency, Inc., No. 03 CIV. 1298, 2004 WL 2181403, at *6 (S.D.N.Y. Sept. 27, 2004).[8] All of the following claims concern discrete acts of discrimination that occurred prior to May 12, 2005:

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[7] The Ledbetter decision expanded upon the Supreme Court's prior holding in Morgan – claims that are predicated on a discrete act "[start] a new clock for filing charges alleging that act." 536 U.S. at 113; Elmenayer v. ABF Freight Sys., 318 F.3d 130, 134-35 (2d Cir. 2003) (applying Morgan to grant defendant summary judgment because proposed religious accommodation was discrete act).

[8] Courts within the Second Circuit have also consistently held that because these are discrete acts of discrimination, the continuing violation doctrine does not apply. DeJesus, 2004 WL 2181403, at *6-7 (finding promotion claim time-barred because plaintiff failed to file charge within 300 days of occurrence and recognizing that although plaintiff may feel effects of alleged discriminatory action through remainder of employment, promotion claim is predicated upon discrete act and cannot form the basis of continuing violation); see also Plant, 2007 WL 2187109, at *3-4 (holding elimination of job duties over time are discrete acts and cannot form basis of continuing violation).

1. Plaintiff Bellifemine claims that in January of 2005 she did not receive a managerial position that Todd Miklajczk allegedly received. (Docket No. 16 ¶47);

2. Plaintiff Bellifemine claims that in May 2005 she did not receive a promotion to Hospital Sales Representative in Hackensack, New Jersey. (Id. ¶48).

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6. Plaintiff Zeoli further claims that she received a lower rate of pay than male employees from 2002 until May 12, 2005. (Id. ¶64);

7. Plaintiff Zeoli further claims that in March of 2005 she was denied a merit increase. (Id. ¶66);

8. Plaintiff Zeoli further claims that in January of 2005 her manager threatened to terminate her employment. (Id. ¶69);

9. Plaintiff Popa claims that from November 2003 until May 12, 2005 she was paid less than male employees. (Id. ¶¶71, 76);

10. Plaintiff Beaney claims that from 1991 to May 12, 2005 she was paid less than male employees and denied promotions. (Id. ¶¶7, 79);

11. Plaintiff Beaney further claims that in 2005 she was denied a raise. (Id. ¶88);

12. Plaintiff Storm claims that from September 2003 until May 12, 2005 she was paid less than male employees. (Id. ¶¶92, 98).

As each of the above alleged discrete acts occurred more than 300 days before any charge of discrimination was filed, they are time-barred and should be dismissed.

D. Purported Class Plaintiffs Zeoli, Popa, Beaney, and Storm's NYHRL Claims Must Be Dismissed Because This Court Lacks Subject Matter Jurisdiction Over Those Claims.

NYHRL does not apply extra-territorially to individuals or companies outside of New York unless an act that would constitute an unlawful discriminatory practice if committed within New York is committed outside New York against a resident of New York or against a

corporation organized under the laws of New York to do business in New York. N.Y. Exec. Law § 298-a(1). In fact, New York courts have held that they do not have subject matter jurisdiction over extra-territorial NYHRL claims "absent an allegation that a discriminatory act was committed in New York or that a New York State resident was discriminated against." See e.g. Iwankow v. Mobil Corp., 150 A.D.2d 272, 273-74 (N.Y. App. Div. 1st Dep't 1989) (dismissing complaint for lack of subject matter jurisdiction because court did not "think that Executive Law § 298-a extends the State's jurisdiction to discrimination against a nonresident which occurs outside the State"); Beckett v. Prudential Ins. Co. of Am., 893 F. Supp. 234, 238 (S.D.N.Y. 1995) (dismissing NYHRL claims brought by non-resident plaintiff who alleged discriminatory acts occurred in Ohio) (citing Iwankow, 150 A.D.2d at 272); Miller v. Citicorp, No. 95 CIV. 9728, 1997 WL 96569, at *8-9 (S.D.N.Y. Mar. 4, 1997) (dismissing NYHRL claims brought by non-resident plaintiff who alleged discriminatory acts occurred in Florida).

Plaintiffs Zeoli, Popa, Beaney, and Storm are not residents of New York and do not allege that they suffered any discrimination in New York. (See supra at 6). Thus, Plaintiffs Zeoli, Popa, Beaney and Storm cannot assert establish that a discriminatory act was committed against them in New York or that Defendant discriminated against a New York state resident, and their NYHRL claims should be dismissed.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs' unexhausted Title VII claims must be dismissed and Plaintiff Zeoli, Popa, Beaney and Storm's NYHRL claims must be dismissed.

February 29, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael S. Burkhardt, hereby certify that on February 29, 2008, I served a true and correct copy of the foregoing Notice of Motion to Dismiss, Memorandum of Law in Support of Defendant sanofi-aventis' Partial Motion to Dismiss the Second Amended Complaint and exhibits thereto and proposed order by the Electronic Case Filing system and Federal Express, upon the following:

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