TERRY v. REAL TALENT, INC. (M.D.Fla. 10-27-2009)
TERRY v. REAL TALENT, INC. (M.D.Fla. 10-27-2009)
MICHELLE C. TERRY, Plaintiff, v. REAL TALENT, INC., Defendant.
Case No. 8:09-cv-1756-T-30TBM.
United States District Court, M.D. Florida, Tampa Division.
October 27, 2009

ORDER

JAMES MOODY JR., District Judge

THIS CAUSE comes before the Court upon Defendant Real Talent, Inc.'s Partial Motion to Dismiss (Dkt. 4) and Plaintiff's Response to Defendant's Partial Motion to Dismiss (Dkt. 10). The Court, having reviewed the motion, response, and being otherwise advised in the premises, finds that Defendant's Partial Motion to Dismiss (Dkt. 10) must be denied.

BACKGROUND

On August 27, 2009, Plaintiff filed this action alleging in Count I that Defendant discriminated against her based upon pregnancy in violation of Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 ("Title VII") and the Florida Civil Rights Act of 1992 ("FCRA"). In Count II, Plaintiff claims that Defendant interfered with her leave rights and retaliated against her in violation of the Family and Medical Leave Act ("FMLA").

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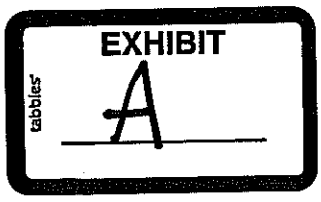
On September 21, 2009, Defendant filed a Partial Motion to Dismiss. Specifically, Defendant argues that the FCRA does not expressly prohibit pregnancy discrimination. On October 22, 2009, Plaintiff filed her Response in Opposition to Defendant's Partial Motion to Dismiss. Plaintiff argues that Defendant's Motion must be denied based on Carsillo v. City of Lake Worth, 995 So. 2d 1118 (Fla. 4th DCA 2008), which held that the FCRA does prohibit pregnancy discrimination. As set forth in more detail herein, the Court agrees that Carsillo clarifies Florida law concerning pregnancy discrimination and makes it clear that a plaintiff may bring a claim of pregnancy discrimination under the FCRA.

DISCUSSION

I. Motion to Dismiss Standard

Determining the propriety of granting a motion to dismiss requires courts to accept all the factual allegations in the complaint as true and evaluate all inferences derived from those facts in the light most favorable to the plaintiff. See Hunnings v. Texaco, Inc., 29 F.3d 1480, 1483 (11th Cir. 1994). Nonetheless, "conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal." Davila v. Delta Air Lines, Inc., 326 F.3d 1183, 1185 (11th Cir. 2003). To survive a motion to dismiss, a plaintiff's complaint must include "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp.



v. Twombly, 127 S.Ct. 1955, 1960 (2007). While in the ordinary case a plaintiff may find the bar exceedingly low to plead only more than "a statement of facts that merely creates a suspicion [of] a legally cognizable right of action," it is clear that "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief'

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requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. at 1959, 1965; see also Davis v. Coca-Cola Bottling Co. Consol., 516 F.3d 955, 974, n. 43 (11th Cir. 2008) (noting the abrogation of the "no set of facts" standard and holding Twombly "as a further articulation of the standard by which to evaluate the sufficiency of all claims"). Absent the necessary factual allegations, "unadorned, the-defendant-unlawfully-harmed-me accusation[s]" will not suffice. Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009).

II. Plaintiff's Claim of Pregnancy Discrimination under the FCRA

Defendant argues that Plaintiff's claim of pregnancy discrimination under the FCRA must be dismissed because Florida law does not recognize a cause of action based on the premise that discrimination against pregnant employees is sex-based discrimination. Defendant relies upon O'Loughlin v. Pinchback, 579 So. 2d 788 (Fla. 1st DCA 1991) and cases interpreting same for this proposition, including Boone v. Total Renal Laboratories, Inc., 565 F. Supp. 2d 1323 (M.D. Fla. 2008)[fn1]. Importantly, on December 3, 2008, Carsillo was decided, which definitely states:

> We conclude that, because the Florida statute is patterned after the Federal Civil Rights Act, which considers pregnancy discrimination to be sex discrimination, the Florida Act bars such discrimination.

995 So. 2d at 1119. Carsillo was decided after the cases Defendant relies upon and specifically discusses O'Loughlin and the cases that were decided after O'Loughlin, including Boone. Notably, the court in Carsillo pointed out that O'Loughlin can be

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interpreted to hold that the FCRA does prohibit pregnancy discrimination, but that cases like Boone interpreted O'Loughlin "as not allowing relief under the Florida Act for discrimination based on pregnancy, because the Florida Act was not amended" to include such a claim.[fn2] 995 So. 2d at 1120. The court in Carsillo concluded that it could not agree with those courts' reading of O'Loughlin:

> We conclude that the fact that Congress made clear in 1978 that its intent in the original enactment of Title VII in 1964 was to prohibit discrimination based on pregnancy as sex discrimination, it was unnecessary for Florida to amend its law to prohibit pregnancy discrimination.

Plaintiff argues that Carsillo is a more clearly articulated opinion than O'Loughlin, which is ambiguous regarding whether the FCRA includes pregnancy discrimination. The Court agrees. Carsillo clarifies the ambiguity in O'Loughlin and makes it clear that the FCRA, which is patterned after Title VII, covers an act of discrimination based on pregnancy.

It is therefore ORDERED AND ADJUDGED that Defendant's Partial Motion to Dismiss (Dkt. 4) is hereby **DENIED.**

DONE and **ORDERED** in Tampa, Florida.

[fn1] Boone was decided on June 18, 2008.

[fn2] As discussed in detail in Boone, O'Loughlin has been interpreted by federal district courts as standing for opposite propositions regarding whether a plaintiff can maintain a pregnancy discrimination claim under the FCRA.

CARSILLO v. CITY, 995 So.2d 1118 (Fla.App. 4 Dist. 2008)

CARSILLO v. CITY, 995 So.2d 1118 (Fla.App. 4 Dist. 2008)
Amy CARSILLO, Appellant, v. CITY OF LAKE WORTH, Appellee.
No. 4D07-4236.
District Court of Appeal of Florida, Fourth District.
December 3, 2008.

Appeal from the Fifteenth Judicial Circuit Court, Palm Beach County, Robin L. Rosenberg, J.

Isidro M. Garcia of the Garcia Law Firm, P.A., West Palm Beach, for appellant.

Susan Potter Norton and Jessica T. Travers of Allen, Norton & Blue, P.A., Coral Gables, for appellee.

Travis R. Hollifield, Winter Park, for Amicus Curiae National Employment Lawyers Association Florida Charter.

KLEIN, J.

We withdraw our opinion filed on September 10, 2008 and replace it with this opinion.

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Carsillo, a firefighter/paramedic, sued her employer, the City of Lake Worth, under the Florida Civil Rights Act, alleging a claim for pregnancy discrimination and retaliation. The trial court granted the city's motion for summary judgment, holding that the Florida statute, although prohibiting sex discrimination, does not prohibit discrimination based on pregnancy. We conclude that, because the Florida statute is patterned after the Federal Civil Rights Act, which considers pregnancy discrimination to be sex discrimination, the Florida Act bars such discrimination.

The facts, in brief, are that Carsillo, who had requested light duty in the fire department as a result of her pregnancy, was offered a light duty assignment which was not within the fire department. Carsillo initially objected and took some vacation days rather than accept the assignment, but ultimately returned to light duty assignments in other departments. This lawsuit, which Carsillo filed under the Florida Civil Rights Act, section 760.01—10, Florida Statutes (2004) (FCRA), alleged discrimination in that other employees with physical restrictions had been accommodated with light duty in the fire department.

The Florida Civil Rights Act of 1992 (FCRA) provides in section 760.10:

> It is an unlawful employment practice for an employer: (a) to discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

This provision is identical to the Civil Rights Act of 1964, as amended (Title VII), 42 U.S.C. § 2000e-2, which states:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

It is well-established that if a Florida statute is patterned after a federal law, the Florida statute will be given the same construction as the federal courts give the federal act. *State v. Jackson*, 650 So.2d 24 (Fla. 1995). This is easier said than done, because of a decision of the United States Supreme Court, holding that an employer's disability insurance plan, which did not cover disabilities arising from pregnancy, did not violate Title VII. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976). *Gilbert* was a controversial five-to-four decision to which Congress responded by enacting the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k), (PDA) which specified that discrimination because of pregnancy is sex discrimination and violative of Title VII. Most significantly, when it enacted this amendment, Congress expressed its disapproval of both the holding and the reasoning of *Gilbert. Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 103 S.Ct. 2622, 77 L.Ed.2d 89 (1983) (recognizing that the holding of the majority in *Gilbert* was contrary to the intent of Congress when Title VII was enacted in 1964 and overruling *Gilbert). See also Armstrong v. Flowers Hosp., Inc.*, 33 F.3d 1308, 1312 (11th Cir. 1994) ("Rather than introducing new substantive provisions protecting the rights of pregnant women, the PDA brought discrimination on the basis of pregnancy within the existing statutory framework prohibiting sex-based discrimination.").

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The Florida statute, unlike the federal statute, has never been amended to specifically state that pregnancy discrimination is sex discrimination. It is the lack of such an amendment in Florida which underlies the controversy as to whether Florida prohibits pregnancy discrimination.

O'Loughlin v. Pinchback, 579 So.2d 788 (Fla. 1st DCA 1991), affirmed an award of back pay for a pregnancy discrimination claim under the Florida Act; however, *O'Loughlin* has been interpreted differently by federal district courts in which pregnancy discrimination claims have been asserted under the Florida Act. *Boone v. Total Renal Labs., Inc.*, 565 F.Supp.2d 1323 (M.D.Fla. 2008), cites many of those cases.

It is the preemption discussion in *O'Loughlin* which has resulted in the conflict. After noting that the original acts were identical, and that Congress amended the federal law after *Gilbert*, but Florida has not amended its act, the court stated:

> Under a *Guerra* pre-emption analysis [*California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272, 107 S.Ct. 683, 93 L.Ed.2d 613 (1987)], Florida's

> law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress by not recognizing that discrimination against pregnant employees is sex-based discrimination. The protections afforded by Title VII and the PDA cannot be eroded by the Florida Act which does not contain a similar provision. Thus, we conclude that the Florida Human Rights Act, specifically Section 760.10, Florida Statutes, is pre-empted by Title VII of the Civil Rights Act of 1984, 42 U.S.C. § 2000e-2 to the extent that *Florida's law offers less protection to its citizens than does the corresponding federal law.*

O'Loughlin, 579 So.2d at 792 (emphasis added).

Although *O'Loughlin* involved a claim for pregnancy discrimination under the Florida Act, some federal district courts have interpreted *O'Loughlin* as not allowing relief under the Florida Act for discrimination based on pregnancy, because the Florida Act was not amended. See, *e.g.*, *Boone*. This demonstrates, according to the city, that the Florida legislature did not intend to protect pregnancy discrimination as sex discrimination. We do not agree. We conclude that the fact that Congress made clear in 1978 that its intent in the original enactment of Title VII in 1964 was to prohibit discrimination based on pregnancy as sex discrimination, it was unnecessary for Florida to amend its law to prohibit pregnancy discrimination.

Our reasoning is based on the principle of *Gay v. Canada Dry Bottling Co. of Florida*, 59 So.2d 788 (Fla. 1952), in which our Supreme Court had to decide if a transaction was taxable as a retail sale under a 1949 statute. By the time the case had come to the court, the legislature had in 1951 clarified that the legislative intent was to tax such a transaction. The court adopted the principle from other jurisdictions that "the court had the right and the duty, in arriving at the correct meaning of a prior statute, to consider subsequent legislation." *Id.* at 790. *See also State v. Lanier*, 464 So.2d 1192 (Fla. 1985).

The Florida statute was originally enacted as the Florida Human Relations Act in 1969 and it prohibited discrimination based on "race, color, religion, or national origin." Ch. 69-287, Laws of Fla. (July 1, 1969). An amendment added a prohibition against "sex" discrimination in 1972. Ch. 73-48, Laws of Fla. Other classifications were added in 1977, when the legislature renamed it the Human Rights Act of 1977. It was renamed the Florida Civil Rights

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Act in 1992. As we noted earlier, the Florida statute has been patterned after the federal statute, and under *Jackson*, 650 So.2d 24, this means that the Florida statute will be given the same construction as the federal statute.

As we noted earlier, when Congress passed the PDA in 1978, it explained that it had intended to prohibit discrimination based on pregnancy when it enacted Title VII in 1964. Because it was the intent of Congress in 1964 to prohibit this discrimination, and under *Jackson* we construe Florida statutes patterned after federal statutes in the same manner that the federal statutes are construed, it follows that the sex discrimination prohibited in Florida since 1972 included discrimination based on pregnancy. This conclusion is also consistent with the expressed intent of our legislature that our statute is to be liberally construed for victims of employment

discrimination. § 760.01(3), Fla. Stat.; *Maggio v. Fla Dep't of Labor & Employment Sec*, 899 So.2d 1074 (Fla. 2005); *Woodham v. Blue Cross & Blue Shield of Fla., Inc.*, 829 So.2d 891 (Fla. 2002).

Courts in other jurisdictions, in which the state civil rights statute prohibited sex discrimination, but not specifically pregnancy discrimination, have also interpreted sex discrimination to include pregnancy discrimination. *Lapeyronnie v. Dimitri Eye Ctr., Inc.*, 693 So.2d 236 (La.App. 4 Cir. 1997); *Brennan v. Nat'l Tel. Dir. Corp.*, 850 F.Supp. 331 (E.D.Pa. 1994); *Gorman v. Wells Mfg. Corp.*, 209 F.Supp.2d 970 (S.D.Iowa 2002).

The summary judgment is reversed.

TAYLOR and DAMOORGIAN, JJ., concur.

ROMANELLI v. WESTERN & SOUTHERN LIFE INSURANCE CO. (M.D.Fla. 4-26-2007)

ROMANELLI v. WESTERN & SOUTHERN LIFE INSURANCE CO. (M.D.Fla. 4-26-2007)
HEATHER ROMANELLI, Plaintiff, v. THE WESTERN AND SOUTHERN LIFE INSURANCE CO.
d/b/a SOUTHERN FINANCIAL GROUP, Defendant.
Case No. 3:06-cv-819-J-32HTS.
United States District Court, M.D. Florida, Jacksonville Division.
April 26, 2007

ORDER[fn1]

[fn1] Under the E-Government Act of 2002, this is a written opinion and therefore is available electronically. However, it has been entered only to decide the motion or matter addressed herein and is not intended for official publication or to serve as precedent.

TIMOTHY CORRIGAN, Magistrate Judge

This case is before the Court on Defendant Western and Southern Life Insurance Co. d/b/a Southern Financial Group's ("defendant") Motion to Dismiss, or in the Alternative, for Summary Judgment (Doc. 6). Plaintiff, Heather Romanelli ("plaintiff"), filed a response in opposition (Doc. 10) and a Notice of Supplemental Authority (Doc. 13).

I. APPLICABLE STANDARDS

When considering a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the Court must accept all factual allegations in the complaint as true, consider the allegations in the light most favorable to the plaintiff, and accept all reasonable inferences that

can be drawn from such allegations. Hill v. White, 321 F.3d 1334, 1335 (11th Cir. 2003); Jackson v. Okaloosa County, Fla., 21 F.3d 1531, 1534 (11th Cir. 1994). A complaint may not be dismissed under Rule 12(b)(6) "`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.'" Lopez v. First Union Nat'l Bank, 129 F.3d 1186, 1189 (11th Cir. 1997) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

If a party moves to dismiss pursuant to Rule 12(b)(6) and presents matters outside the pleadings, the court has discretion whether or not to consider documents attached to the motion to dismiss. Once the court determines to consider matters extraneous to the pleadings, Rule 12(b) mandates that the motion is converted to a motion for summary judgment under Rule 56, and the court must provide the nonmoving party ten days "to supplement the record" prior to issuing a ruling. Fed.R.Civ.P. 12(b); Trustmark Ins. Co. v. ESLU, Inc., 299 F.3d 1265, 1267 (11th Cir. 2002). The Court exercises its discretion in this case to construe Defendant's motion (Doc. 6) as a motion to dismiss under Rule 12, and not a motion for summary judgment under Rule 56.

II. BACKGROUND

Plaintiff worked as an Insurance Agent for Defendant from January 26, 2004 to April 22, 2005. (Doc. 1, ¶ 6, Complaint). Defendant alleges that plaintiff suffered from a pregnancy related ailment and physiological disorder that substantially limited

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one or more major life activities (reproduction). (Doc. 1, ¶ 7). Because of plaintiff's complicated and high risk pregnancy, her doctor ordered bed rest and she began leave under the Family and Medical Leave Act ("FMLA") in January 2005. (Id.). Before Plaintiff's FMLA leave expired, she asked to return to work in a temporary receptionist position until she was medically able to perform her job as a door-to-door salesperson. (Id.). Defendant denied plaintiff's request. (Id.). On April 22, 2005, defendant terminated plaintiff. (Id.). Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") and Florida Commission on Human Relations ("FCHR"). (Id. at ¶ 9). Subsequently, after giving birth and becoming medically capable of performing the duties of her former position, plaintiff applied for rehire, but was not rehired.[fn2] (Id.).

On September 15, 2006, plaintiff filed a five-count Complaint alleging: (1) discrimination based on sex and pregnancy and unlawful retaliation in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended by the Pregnancy Discrimination Act of 1979 ("PDA") and the Civil Rights Act of 1991 ("Count I"); (2) discrimination based on sex and pregnancy and retaliation in violation of the Florida Civil Rights Act of 1992 ("FCRA") ("Count II"); (3) unlawful retaliation in violation of the FMLA ("Count III"); (4) discrimination and retaliation in violation of the Americans with

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Disabilities Act ("ADA") ("Count IV"); and (5) handicap discrimination and retaliation in violation of the FCRA ("Count V").

Defendant moves to dismiss the Complaint asserting: (1) plaintiff cannot (under any set of facts) state a claim for pregnancy discrimination under the FCRA; (2) plaintiff fails to state a prima facie case of sex discrimination under Title VII and the FCRA; (3) plaintiff is not an FMLA eligible employee; (4) plaintiff failed to provide required FMLA medical certification; (5) pregnancy is not a recognized impairment under the ADA; (6) plaintiff failed to inform defendant of her alleged disability; and (7) plaintiff failed to exhaust administrative remedies for claims of discrimination based on failure to rehire. (Doc. 6).

III. DISCUSSION

A. Pregnancy Discrimination under the FCRA

Defendant contends that there is no recognized cause of action for pregnancy discrimination under the FCRA. (Doc. 6). Judges in both the Middle and Southern Districts of Florida have addressed this issue and arrived at opposite conclusions. Some Judges have held there is no claim for pregnancy discrimination under the FCRA. See Westrich v. Diocese of St. Petersburg, Inc.,

2006 WL 1281089 (M.D. Fla. 2006) (unpublished opinion); Fernandez v. Copperleaf Golf Club Community Ass'n, Inc., 2005 WL 2277591 (M.D. Fla. 2005) (unpublished opinion); Swiney v. Lazy Days R.V. Center, Inc., 2000 WL 1392101 (M.D. Fla. 2000) (unpublished opinion); Ward v.

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Asset Acceptance, Case No. 8:05-cv-2073-T-26TGW, Doc. 7 (M.D. Fla. Dec. 21, 2005); Dragotto v. Savings Oil Company, Case No. 8:04-cv-734-T-30TGW, Doc. 6 (M.D. Fla. June 25, 2004); Frazier v. T-Mobile USA, Inc., Case No. 3:03-cv-764-J-20MMH, Doc. 11 (M.D. Fla. Nov. 4, 2003); Zemetskus v. Eckerd Corp., Case No. 8:02-cv-1939-T-27TBM, Doc. 13 (M.D. Fla. April 1, 2003).

Other Judges have held such a claim is available. See Rose v. Commercial Truck Terminal, Inc., et al., Case No. 8:06-cv-901-T-17TGW, Doc. 19 (M.D. Fla. March 30, 2007); Wesley-Parker v. The Keiser School, Inc., Case No. 3:05-cv-1068-J-25MMH, Doc. 22 (M.D. Fla. August 21, 2006); Brewer v. LCM Medical Inc., Case No. 05-61741-civ-COOKE/BROWN (S.D. Fla. May 25, 2006).

The basis for these decisions is the interpretation of O'Loughlin v. Pinchback, 579 So.2d 788 (Fla. 1st DCA 1991). Given that this issue is clearly unsettled within the Eleventh Circuit and that discovery on the federal pregnancy claim and the state FCRA pregnancy claim will be the same in this case, the Court will deny the motion to dismiss and decide this dispositive issue at a later phase of this case.

B. Sex Discrimination under Title VII and the FCRA

Defendant also asserts that Plaintiff failed to state a prima facie case of sex discrimination under Title VII and the FCRA (Counts I and II). (Doc. 6). Defendant contends that plaintiff must state a prima facie case of sex discrimination by showing that: (1) she is a member of a protected group; (2) she was qualified for the position

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or benefit sought; (3) she suffered an adverse employment action; and (4) she suffered from a differential application of work or disciplinary rules. Spivey v. Beverly Enterprises, Inc., 196 F.3d 1309, 1312 (11th Cir. 1999).

The requirement of establishing a prima facie case is an evidentiary standard, not a pleading standard. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510 (2002). To survive a motion to dismiss and satisfy the notice pleading requirements of Fed.R.Civ.P. 8(a), a complaint must simply provide a "short and plain statement of the claim" and give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. Id. at 511-12. Plaintiff has satisfied the exceedingly light pleading requirements under Swierkiewicz and Rule 8(a); thus, Defendant's motion to dismiss for failure to state a claim for sex discrimination under Title VII and the FCRA is due to be denied.

C. Retaliation under the FMLA

Defendant contends that Count III should be dismissed because Plaintiff is not an eligible employee under the FMLA. (Doc. 6). To qualify as an eligible employee, the individual must be employed for twelve months and must have worked at least 1,250 hours during the previous twelve months of employment. 29 U.S.C. § 2611(2)(A). Plaintiff began working for defendant on January 26, 2004. (Doc. 1, ¶ 6). While plaintiff alleges that she started FMLA leave "on or about January 2005," the complaint is silent as to precisely when the leave began. It may well be that Plaintiff

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is not an "eligible employee" pursuant to the criteria in 29 U.S.C. § 2611(2)(A). However, because the four corners of the complaint do not allow this Court to definitively make that determination, it will not do so at the Rule 12(b)(6) stage.

D. Remaining Grounds for Dismissal of FMLA, ADA and Handicap Discrimination Claims (Counts III, IV and V)

Defendant moves to dismiss Counts III (FMLA), IV (ADA) and V (Handicap) arguing that plaintiff: (1) did not provide the required FMLA medical certification; (2) fails to identify a recognized disability or handicap; and (3) failed to properly inform defendant of her alleged disability or handicap. (Doc. 6). Because the Court has exercised its discretion to consider defendant's motion under Rule 12(b)(6) standards, after reviewing the four corners of the Complaint, the Court is satisfied that plaintiff has met her minimal notice pleading burden on these claims.

E. Failure to Exhaust Administrative Remedies

Defendant's final argument is that because plaintiff did not file a charge of discrimination based on defendant's purported retaliation for a not rehiring her after filing her original charge, plaintiff failed to exhaust administrative remedies for such claims. (Doc. 6). A "judicial complaint is limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." Mulhall v. Advance Sec., Inc., 19 F.3d 586, 589 n. 8 (11th Cir. 1994). The Court is not prepared to rule at the Rule 12(b)(6) phase that, under no set of facts, could a retaliation claim for failure to rehire be reasonably expected to grow out

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of the underlying discrimination claims here.

Accordingly, it is hereby **ORDERED:**

Defendant Western and Southern Life Insurance Co. d/b/a Southern Financial Group's Motion to Dismiss, or in the Alternative, for Final Summary Judgment (Doc. 6) is **DENIED.** The Court's decision to decline the invitation to view defendant's motion as a Rule 56 motion, rather than a Rule 12(b)(6) motion, will not preclude either party from moving for Summary Judgment at a later stage. Defendant's answer should be filed no later than **May 16, 2007.**

DONE AND ORDERED at Jacksonville,

[fn2] Plaintiff alleges that she scheduled and appeared for two interviews with the district manager, but, upon arrival on both occasions, was told that the district manager was not available. (Doc. 1, ¶ 9).