IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BYRON CURRY,

Plaintiff,

vs.

CANADIAN NATIONAL/
ILLINOIS CENTRAL RAILROAD,

Defendant.

Case No. 05C 3652

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS, FILED PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6)

INTRODUCTION

Plaintiff Byron Curry claims that Defendant Illinois Central Railroad Company (improperly sued as "Canadian National/Illinois Central Railroad," and hereinafter referred to as "Illinois Central") improperly terminated him from employment on May 8, 2003, in violation of Title VII's prohibition against racial discrimination and harassment. Title VII explicitly states that an aggrieved individual has 300 days from the date of an allegedly discriminatory act to file a Charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). It cannot be disputed that Curry did not file his EEOC Charge of discrimination until February 25, 2005 – well after the expiration of the 300-day period for filing a Charge regarding his May 8, 2003 termination. Curry's claims are time-barred on the face of the pleadings and, pursuant to Federal Rule of Civil Procedure 12(b)(6), his Complaint must be dismissed with prejudice.

STATEMENT OF UNDISPUTED MATERIAL FACTS[1]

I. CURRY INITIATES HIS LAWSUIT MORE THAN 300 DAYS AFTER THE ALLEGED ACTS OF DISCRIMINATION AND HARASSMENT.

Curry's Complaint alleges that Illinois Central wrongfully terminated him on May 8, 2003, in violation of Title VII's prohibition against race discrimination and harassment. Complaint, ¶¶ 1, 9. Curry further contends that he grieved his termination (through his Union and pursuant to his collectively bargained-for rights), and that in December of 2004, he was ordered to be reinstated to work, as a result of the Union/grievance process that he filed regarding his discharge. *Id.* at ¶ 10. Curry then admits that on February 25, 2005 – some 658 days after having been terminated by Illinois Central – he filed his Charge of race discrimination with the EEOC. *Id.* at ¶ 2.

LEGAL ANALYSIS

I. CURRY'S TITLE VII CLAIMS MUST BE DISMISSED AS TIME-BARRED.

A. The Applicable Standard For Dismissal Pursuant to Federal Rule 12(b)(6).

Motions to dismiss are governed by Federal Rule of Civil Procedure 12(b)(6). When considering motions to dismiss filed under the Rule, the Court will take all facts alleged in the Complaint as true. *Shelton v. Ernst & Young, LLP*, 143 F. Supp. 2d 982, 987 (N.D. Ill. 2001). Moreover, the Court will construe the allegations in the complaint and reasonable inferences arising from the complaint favorably to the plaintiff. *Id.* The allegations of a Complaint will be dismissed for failure to state a claim where (as here) it "appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.*

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[1] This statement of material facts is based on Curry's Complaint. Illinois Central does not concede that Curry's versions of the facts are true in every respect, but rather, asserts that taken alone, his contentions demonstrate that his Complaint is time-barred and must be dismissed.

B. Curry's Claims Are Time-Barred Because He Failed To Comply With The 300-Day Period For Filing a Charge Under Title VII.

Title VII (42 U.S.C. § 2000e-5(e)) provides that within 300 days after the occurrence of an allegedly unfair, discriminatory practice, a party must file a charge of discrimination with the EEOC, and that "failure to do so bars litigation over those claims." *Speer v. Rand McNally & Co.*, 123 F.3d 658, 662 (7th Cir. 1997); *Winters v. Iowa State Univ.*, 768 F. Supp. 231, 237 (N.D. Ill 1991), *aff'd*, 962 F.2d 11 (7th Cir. 1992) (barring Title VII action where EEOC charge was filed outside 300-day period).

In the present case, Curry alleges that, "Most recently, on May 8, 2003, Defendant . . . imposed the discipline of termination," but it was not until February 25, 2005 (658 days later), that he filed his Charge of Discrimination with the EEOC. *Complaint*, ¶¶ 2, 9. As a result, Curry's Complaint is time-barred, and must be dismissed.

C. Curry's Grievance Of His Termination Is Immaterial For Statute Of Limitations Purposes.

Apparently aware of the untimeliness and futility of his Complaint, Curry appears to assert facts regarding his grievance procedure, so as to plead some facts occurring within the limitations period. *See* Complaint, ¶¶ 7, 9-10. That is, Curry alleges that in December 2004, the outcome of the grievance process resulted in his being ordered reinstated to work for Illinois Central. *Id.* at ¶ 10. Curry's grievance of his May 8, 2003 termination is immaterial to the analysis of his failure to comply with the limitations period applicable to his race discrimination complaint, however. This Court – and indeed, the Seventh Circuit – has repeatedly held that the time period for filing an EEOC Charge of discrimination begins to run on the date that the employee discovers the injury – in this case May 8, 2003, when Curry was given his notice of termination. *Sellars v. Perry*, 80 F.3d 243, 245-46 (7th Cir. 1996).

In other words:

> The critical date – that starts the 300 day clock ticking – is when Plaintiff learned about the adverse decision, and not when the financial consequences (such as being taken off the payroll) are felt, or when the termination becomes effective. *See, e.g., Librizzi v. Children's Memorial Medical Center*, 134 F.3d 1302, 1306 (7th Cir. 1998) ("An adverse decision whose effect is deferred gives rise to a claim when the decision is made, not when the effect is felt. This is commonplace in the law of employment discrimination."); *Kuemmerlein v. Bd. of Educ. of Madison Metro. School Dist.*, 894 F.2d 257, 259-60 (7th Cir. 1990) (finding that the cause of action began to accrue on the day that plaintiffs received the layoff decision, and not on the date of the actual termination).

Shelton, *supra*, 143 F. Supp. 2d 982, 987-988 (N.D. Ill., 2001) (emphasis added).

The immateriality of the grievance process to the timeliness of Curry's complaint is further confirmed by numerous holdings of this Court. Specifically, in circumstances involving the grievance of a unionized employee, this Court has held that the statute of limitations period begins to run the date the employee learns of his termination, as opposed to the date the employee's reinstatement request is denied or the date a grievance procedure affirms or upsets the employer's decision. *Spaulding v. Blue Cross-Blue Shield*, 1999 U.S. Dist. LEXIS 16562, *4-5 (N.D. Ill. Oct. 14, 1999); *Delaware State College v. Ricks*, 449 U.S. 250, 261 (the 300-day period began when the tenure decision was made, not when the decision was reviewed or when employment actually ended). In other words, "a pending grievance procedure, an appeal of an alleged discriminatory decision, or 'some other method of collateral review of an employment decision' does not toll the 300-day period." *Spaulding*, *supra*, 1999 U.S. Dist. LEXIS 16562 at *5 *6 ("When there is an allegedly discriminatory employment decision that triggers a grievance or appeal, the limitations period for Title VII begins running from the initial decision. A plaintiff cannot extend the 300 days by requesting that the decision be reviewed."); *Soignier v. American Bd. of Plastic Surgery*, 92 F.3d 547, 551-52 (7th Cir. 1996) (statute of limitations period for ADA claim began when plaintiff was denied accommodation, not when the accommodation

decision was reviewed and affirmed by board); *Lever v. Northwestern Univ.*, 979 F.2d 552 (7th Cir. 1992) (the 300-day period began when the decision to deny tenure was made, not when the decision was reviewed on appeal and made final).

D. There Is No Continuing Violation Theory That Will Save Curry's Untimely Complaint.

In the end, it appears on the face of his Complaint that the best Curry can try to argue is that Illinois Central somehow made a discriminatory decision on May 8, 2003 (to terminate his employment), and that the ongoing failure to correct his termination, until ordered to do so (as he states in his Complaint, at least) in December of 2004 is somehow a continuation of discrimination. That theory also fails, and does not save Curry's untimely Complaint, as it is established law in this Circuit that an employer's alleged failure to correct acts of previous discrimination is *not* in itself a new act of discrimination, for limitations purposes. *Speer v. Rand McNally & Co.*, 123 F.3d at 664 ("'An employer's refusal to undo a discriminatory decision is not a fresh act of discrimination.'") (citation omitted); *Librizzi*, *supra*, 134 F.3d at 1306 ("If an employer allows an appeal of the decision . . . the time to sue is unaffected - for failure to correct a violation of federal law is not itself a violation of that law.") (citations omitted). *Shelton*, *supra*, 143 F. Supp. 2d at 989. Therefore, because there is no applicable "continuing violation" theory to support Curry's complaint regarding his termination,[2] Curry cannot save his untimely Complaint by pointing to the reinstatement order that he claims was issued in December of 2004.

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[2] Curry's Complaint attempts to allege that, "Beginning in April 28, 1979 and continuing through December 11, 2004, Defendant engaged in various actions of harassment . . .." Complaint, ¶ 7. It is undisputed, however, that Curry was terminated on May 8, 2003, and not ordered reinstated, at least according to his Complaint, until December 11, 2004. *Id.* at ¶¶ 9-10. The Supreme Court has recognized that a claimed termination in violation of Title VII is a claim regarding a "discrete discriminatory act," not an incident that could, when linked with other conduct, constitute part of a hostile environment claim. *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). There is, therefore (and contrary to Curry's attempts), no "continuing violation" theory to keep his claim alive.

CONCLUSION

For all the reasons set forth above, Defendant's Motion to Dismiss Curry's Complaint should be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6), and his Complaint should be dismissed with prejudice.

Dated: July 18, 2005

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COUNSEL FOR DEFENDANT

FOCUS - 12 of 28 DOCUMENTS

SPAULDING vs. BLUE CROSS-BLUE SHIELD OF IL

99 C 5810

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

1999 U.S. Dist. LEXIS 16562

October 14, 1999, Decided
October 15, 1999, Date Docketed

DISPOSITION: [*1] Motion to dismiss [8-1] Count I of the complaint granted. Count I dismissed with prejudice.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant employer moved to dismiss, under Fed. R. Civ. P. 12(b)(6), plaintiff's Count I filed pursuant to Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e* et seq., in suit alleging unlawful race discrimination in the termination of plaintiff.

OVERVIEW: Plaintiff sued defendant employer, alleging that her termination constituted unlawful race discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), *42 U.S.C.S. § 2000e* et seq., as well as *42 U.S.C.S. § 1981*. Defendant moved to dismiss the Title VII count and the court granted the motion. The court held that, pursuant to the applicable statute of limitations for Title VII actions, a charge of discrimination had to be filed with the Equal Employment Opportunities Commission within 300 days of when the plaintiff received notice of the allegedly discriminatory act. However, the court found that plaintiff had failed to file such a charge within **300 days** of receiving notice of her **termination.** Furthermore, the court found that a subsequent union grievance procedure participated in by plaintiff did not operate to toll the running of the statute of limitations.

OUTCOME: Defendant's motion to dismiss Count I granted; plaintiff's claim under Count I was time-barred pursuant to the applicable statute of limitations; union grievance procedure participated in by plaintiff subsequent to plaintiff's termination did not operate to toll the running of the applicable statute of limitations.

CORE TERMS: reinstatement, motion to dismiss, statute of limitations, discriminatory act, terminated, grievance procedure, limitations period, termination, grievance, employment decision, began to run, discriminatory, accommodation, requesting, discharged, falsifying, tenure, sheets, toll

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Failure to State a Cause of Action

[HN1] For purposes of a motion to dismiss, the court accepts all well-pleaded allegations in the complaint as true and draws all reasonable inferences in favor of the plaintiff.

Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Failure to State a Cause of Action

[HN2] In ruling on a motion to dismiss, the court considers whether relief is possible under any set of facts that could be established consistent with the allegations. A motion to dismiss tests the sufficiency of the complaint, not its merits. A claim may be dismissed only if it is beyond doubt that under no set of facts would a plaintiff's allegations entitle her to relief.

Labor & Employment Law > Discrimination > Racial Discrimination > Defenses & Exceptions

[HN3] To be actionable under Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e* et seq., a charge of employment discrimination must be filed with the Equal Employment Opportunity Commission within 300 days of the discriminatory act. Failure to file a charge within this time bars a plaintiff from litigating her claims.

Labor & Employment Law > Discrimination > Racial Discrimination > Defenses & Exceptions

[HN4] The statute of limitations for Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e* et seq., claims starts when a plaintiff receives notice of a discriminatory act.

Labor & Employment Law > Discrimination > Racial Discrimination > Defenses & Exceptions

[HN5] A pending grievance procedure, an appeal of an alleged discriminatory decision, or some other method of collateral review of an employment decision do not toll the 300-day statute of limitations period of Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e* et seq.

Labor & Employment Law > Discrimination > Racial Discrimination > Defenses & Exceptions

[HN6] When there is an allegedly discriminatory employment decision that triggers a grievance or appeal, the limitations period for Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e* et seq., begins running from the initial decision. A plaintiff cannot extend the 300 days by requesting that the decision be reviewed.

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For BLUE CROSS BLUE SHIELD OF ILLINOIS, defendant: Carolyn Clift, John A. Busch, Health Care Service Corporation, Chicago, IL.

JUDGES: Suzanne B. Conlon.

OPINIONBY: Suzanne B. Conlon

OPINION:

ORDER

Cynthia J. Spaulding ("Spaulding") sues Blue Cross Blue Shield of Illinois ("Blue Cross") for race discrimination in violation of Title VII, *42 U.S.C. § 2000e* et seq. (Count I), and *42 U.S.C. § 1981* (Count II). Blue Cross moves to dismiss Count I pursuant to *Fed. R. Civ. P 12(b)(6)*.

[HN1] For purposes of a motion to dismiss, the court accepts all well-pleaded allegations in the complaint as true and draws all reasonable inferences in favor of the plaintiff. *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia, 73 F.3d 1423, 1429 (7th Cir. 1996)*. Spaulding, an African-American woman, worked for Blue Cross from August 28, 1975 until she was terminated on July 1, 1998. Compl. P 2. Spaulding was discharged for allegedly falsifying **[*2]** time sheets. Id. P 5. Spaulding denies falsifying time sheets and claims Blue Cross discharged her as a result of racial discrimination. Id. PP 6, 20. Spaulding filed a grievance with the union requesting reinstatement; Blue Cross denied reinstatement on August 20, 1998. n1 Pl. Resp. at 1. Spaulding filed a charge with the Equal Employment Opportunity Commission ("EEOC") on June 17, 1999, and received a right to sue letter on June 22, 1999. Compl. PP 4, 8. She filed this action on September 3, 1999.

n1 With her response, Spaulding includes a copy of an August 20, 1998 letter from Blue Cross to a union representative denying her request for reinstatement. Generally, matters outside the pleadings cannot be considered on a motion to dismiss. However, a plaintiff may present additional facts in order to defeat a motion to dismiss if these facts are consistent with the allegations in the complaint. *Hentosh v. Herman M. Finch Univ., 167 F.3d 1170, 1173 n.3 (7th Cir. 1999)*. Accordingly, the court considers allegations Spaulding presents in her response.

----------End Footnotes----------

[HN2] **[*3]**

In ruling on a motion to dismiss, the court considers "whether relief is possible under any set of facts that could be established consistent with the allegations." *Bartholet v. Reishauer A.G., 953 F.2d 1073, 1078 (7th Cir. 1992)*(citing *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*). A motion to dismiss tests the sufficiency of the complaint, not its merits. *Gibson v. City of Chicago, 910 F.2d 1510, 1520 (7th Cir. 1990)*. A claim may be dismissed only if it is beyond doubt that under no set of facts would a plaintiff's allegations entitle her to relief. [HN3] *Travel All Over the World, Inc., 73 F.3d at 1429*.

To be actionable under Title VII, a charge of employment discrimination must be filed with the EEOC within 300 days of the discriminatory act. *Koelsch v. Beltone Electronics Corp., 46 F.3d 705, 707 (7th Cir. 1995)*. Failure to file a charge within this time bars a plaintiff from litigating her claims. *42 U.S.C. § 2000e-5; Speer v. Rand McNally & Co., 123 F.3d 658, 662 (7th Cir. 1997)*. Blue Cross asserts Count I should be