

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Harry William Lott,
Plaintiff,

v.

Case No. 2:13-cv-228

Kmart,
Defendant.

OPINION AND ORDER

This is a discrimination action filed pursuant to Title VII of the civil Rights Act of 1964, 42 U.S.C. §2000e et seq. ("Title VII"). Plaintiff Harry William Lott alleges that defendant Kmart discriminated against him on the basis of gender in failing to hire him for a cashier position. This matter is before the court on the July 2, 2013, report and recommendation of the magistrate judge, and plaintiff's objections to the report and recommendation.

Plaintiff filed timely objections to the report and recommendation pursuant to Fed. R. Civ. P. 72(b). If a party objects within the allotted time to a report and recommendation, the court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. §636(b)(1); see also Fed. R. Civ. P. 72(b). Upon review, the court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. §636(b)(1).

In the instant case, the magistrate judge recommended that defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) be granted. Defendant argued that the complaint should be dismissed because plaintiff had not exhausted his administrative

remedies under Title VII. Defendant noted that although plaintiff filed a charge of discrimination with the Ohio Civil Rights Commission on August 16, 2012, and the Equal Employment Opportunity Commission ("EEOC") was notified of that charge on August 17, 2013, plaintiff had not produced a right-to-sue letter. Plaintiff did not file a response to the motion to dismiss, but filed a motion for summary judgment (Doc. 12) in which he argued that he could file suit without first obtaining a right-to-sue letter. The magistrate judge concluded that plaintiff's complaint should be dismissed without prejudice for failure to exhaust administrative remedies. The magistrate judge further recommended that all other pending motions be denied as moot.

The magistrate judge's recommendation was based on an accurate analysis of the governing law. Before filing suit in federal court under Title VII, a plaintiff must first timely file a charge of employment discrimination with the EEOC. Nichols v. Muskingum College, 318 F.3d 674, 677 (6th cir. 2003). After investigation, the EEOC will either file suit on behalf of the claimant or issue a right-to-sue letter. Rivers v. Barberton Bd. of Educ., 143 F.3d 1029, 1032 (6th Cir. 1998). If, after 180 days, the EEOC fails to make a "reasonable cause" finding, the claimant may request a right-to-sue letter from the EEOC. Equal Employment Opportunity Commission v. Frank's Nursery & Crafts, Inc., 177 F.3d 448, 456 (6th Cir. 1999). Upon receipt of a right-to-sue letter, a plaintiff has ninety days in which to bring a federal action alleging a violation of Title VII. 42 U.S.C. §2000e-5(f)(1). An individual may not file suit under Title VII if he does not possess a right-to-sue letter from the EEOC. Id. Premature suits are

subject to a motion to dismiss at any time between the filing of the lawsuit and plaintiff's receipt of the letter. Portis v. State of Ohio, 141 F.3d 632, 635 (6th Cir. 1998).

A party's exhaustion of administrative process for filing a claim of discrimination is a condition precedent to filing suit under Title VII in the district court, not a jurisdictional prerequisite. Mitchell v. Chapman, 343 F.3d 811, 819-20 (6th Cir. 2003). This precondition to filing suit is subject to equitable tolling, waiver and estoppel. Id. at 820.

In his objections, plaintiff does not dispute that he has not received a right-to-sue letter. Rather, he contends that the EEOC failed to issue such a letter 180 days after the filing of the charge of discrimination, and that this court should cure or waive this defect pursuant to 28 U.S.C. §1406(a). However, that provision relates to curing defects in venue, and it is not applicable here.

As stated above, if the EEOC fails to make a determination after 180 days, the complainant may request a right-to-sue letter from the EEOC. Frank's Nursery, 177 F.3d at 456; Cleveland Newspaper Guild, Local 1 v. Plain Dealer Publishing Co., 839 F.2d 1147, 1150 (6th Cir. 1988). Under 29 C.F.R. §1601.28(a), when a complainant requests in writing, at any time after the expiration of 180 days from the filing of the charge, that a notice of right to sue be issued, the EEOC must "promptly issue such notice[.]" 29 C.F.R. §1601.28(a). Plaintiff cited this provision in his objections, but did not state that he had requested a right-to-sue letter from the EEOC. In a similar case, the Sixth Circuit concluded that where plaintiff failed to request a right-to-sue

letter from the EEOC, the action was properly dismissed, and that the circumstances did not warrant the application of waiver, estoppel, or equitable tolling. See Puckett v. Tennessee Eastman Co., 889 F.2d 1481, 1488 (6th Cir. 1989)(failure to request a right-to-sue letter "amounts to a position of arrogance regarding the statutory requirement as mere surplusage").

Because a right-to-sue letter is a condition precedent to filing suit and plaintiff has not received such a letter, this court concludes that the instant case must be dismissed for failure to exhaust administrative remedies. The court hereby adopts the report and recommendation (Doc. 22). Defendant's motion to dismiss (Doc. 6) is granted, and plaintiff's objections (Docs. 24 and 25) are denied. The other pending motions (Docs. 4, 12, 15, 16, 17, and 18) are denied as moot. This action is hereby dismissed without prejudice to re-filing upon obtaining the requisite right-to-sue letter from the EEOC.

Date: July 29, 2013

s/James L. Graham
James L. Graham
United States District Judge