FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-3561

BRANDY SUMMERLIN,

Appellant,

v.

L3 COMMUNICATIONS
INTEGRATED SYSTEMS, LP a/k/a
L3 CRESTVIEW,

Appellee.

On appeal from the Circuit Court for Okaloosa County.
Michael A. Flowers, Judge.

October 6, 2022

JAY, J.

Appellant asserts that the trial court erred in dismissing her third amended complaint for failing to exhaust her administrative remedies or, alternatively, for failing to state causes of action for associational discrimination and retaliation. We agree that the trial court erred in dismissing the complaint for failure to exhaust administrative remedies because the court relied on the contents of a document that was not attached to the complaint. We also agree that the trial court erred in concluding that Appellant failed to state causes of action for associational discrimination under the Americans with Disabilities Act of 1990 (ADA) and retaliation under the Title VII of the Civil Rights Act of 1964 (Title VII).

However, the trial court properly dismissed Appellant's claims for associational discrimination under Title VII and associational discrimination under the Age Discrimination in Employment Act (ADEA). Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

I.

Appellant filed a third amended complaint alleging that she was the victim of associational discrimination under Title VII, the ADEA, and the ADA (count I), and for retaliation under Title VII (count II). The complaint contained the following allegation:

> 5. Plaintiff has satisfied all conditions precedent to bringing this action in that Plaintiff filed a charge of discrimination with the Florida Commission on Human Relations and with the EEOC. This action is timely filed thereafter.

The charge of discrimination was not attached to the complaint.

Appellee filed a motion to dismiss the complaint. In the motion, Appellee asked for a dismissal because Appellant failed to attach the charge of discrimination. Alternatively, Appellee asked the court to consider the contents of the charge in determining whether Appellant had exhausted her administrative remedies. In support of these arguments, Appellee appended a copy of the charge of discrimination. In the charge, Appellant designated "marital status" and "association" as the bases of the discrimination.

Appellant filed a response to the motion to dismiss. Among other arguments, Appellant asserted that the charge of discrimination did not need to be attached to her complaint because it was not a document upon which her action was based. She further argued that the purported failure to exhaust administrative remedies was an affirmative defense that could not be raised in a motion to dismiss because the defense was not apparent from the four corners of her complaint.

At the hearing on the motion to dismiss, Appellant's counsel moved to strike the charge of discrimination arguing that Appellant's purported failure to exhaust her administrative remedies did not appear on the face of the complaint. In response, Appellee's counsel argued that the charge was properly raised because Appellant's failure to exhaust administrative remedies deprived the court of subject-matter jurisdiction. Appellant's counsel replied by noting that exhaustion of administrative remedies was a factual issue that could not be resolved by examining the face of the discrimination charge because the charge was only the starting point for the EEOC's investigation, which could expand to include any other issue that reasonably grew out of the investigation.

Ultimately, the trial court granted Appellee's motion and dismissed Appellant's claims with prejudice. In doing so, the court found that Appellant's "claims could not reasonably be expected to grow out of her charge of discrimination[.]" Alternatively, the court ruled that even if Appellant did exhaust her administrative remedies, the complaint failed to state causes of action for associational discrimination and retaliation. This appeal followed.

II.

The United States Supreme Court has held that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). As a result, federal courts have consistently held that exhaustion of administrative remedies is a condition precedent to discrimination actions under Title VII, the ADEA, and the ADA. *Myers v. Cent. Fla. Invs., Inc.*, 592 F.3d 1201, 1224 (11th Cir. 2010) (Title VII); *Parisi v. Boeing Co.*, 400 F.3d 583, 585 (8th Cir. 2005) (ADEA); *Parry v. Mohawk Motors of Mich., Inc.*, 236 F.3d 299, 309 (6th Cir. 2000) (ADA). Under the Federal Rules, "[i]n pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed." *Myers*, 592 F.3d at 1224 (quoting Fed. R. Civ. P. 9(c)). The First District has applied these same legal principles to employment discrimination and retaliation claims under the Florida Civil

Rights Act. *See Brewer v. Clerk of Cir. Ct., Gadsden Cnty.*, 720 So. 2d 602, 603 (Fla. 1st DCA 1998) (referencing Fla. R. Civ. P. 1.120(c)).

Here, Appellant argues that the trial court erred in dismissing her complaint for failure to exhaust administrative remedies because her general allegation that she "satisfied all conditions precedent" was sufficient. She further asserts that the trial court improperly considered the charge of discrimination, a document which was not attached to her complaint.

As it did below, Appellee argues that the trial court properly considered the EEOC charge because it was required to be attached based on Rule 1.130(a) of the Florida Rules of Civil Procedure. That rule provides:

> **(a) Instruments Attached.** All bonds, notes, bills of exchange, contracts, accounts, or documents on which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, must be incorporated in or attached to the pleading. No documents shall be unnecessarily annexed as exhibits. The pleadings must contain no unnecessary recitals of deeds, documents, contracts, or other instruments.

Based on the language of the rule, a pleader must incorporate or attach those documents "on which action may be brought," meaning, if the papers are the basis of the pleader's claim, they must be appended. *See Railey v. Skaggs*, 220 So. 2d 689, 690 (Fla. 3d DCA 1969) ("[T]hat rule of pleading, by its very words, is meant to include documents upon which an action is being brought."); Philip J. Padovano, *Florida Civil Practice*, § 7:19, n.1 (2022 ed.) ("[A] party who makes a claim . . . based on a written instrument must incorporate the instrument . . . or attach a copy of it to the pleading[.]"). Stated differently, incorporation is necessary "if the cause of action rests or depends on the attachment[]." *Dep't of Revenue ex rel. Meire v. Bander*, 734 So. 2d 1145, 1146 (Fla. 5th DCA 1999). Accordingly, the rule does not require a document to be attached "merely because that instrument is material to the allegations made in the pleading, or merely because the instrument is relevant to an issue that will be raised in the case."

Padovano, *supra*, § 7:19. "The question is not whether the written instrument would be admissible in evidence, but whether the action . . . **is derived from the instrument itself**." *Id.* (emphasis added).

Here, the discrimination charge was not the basis of the Appellant's claims. That is, the action was not "derived" from the charge of discrimination. *Id.* Instead, Appellant's claims were predicated upon multiple statutory sections, sections that were detailed in her complaint. Given the comprehensive nature of her allegations, there was no mystery about the relief she was requesting. In fact, Appellee filed a multi-page motion to dismiss attacking the propriety of every single claim. *See Nat'l Collegiate Student Loan Tr. 2006-4 v. Meyer*, 265 So. 3d 715, 719 (Fla. 2d DCA 2019) ("The purpose of rule 1.130(a) 'is to apprise the defendant of the nature and extent of the cause of action so that the defendant may plead with greater certainty.'") (citations omitted). Accordingly, Appellant was not required to attach the discrimination charge to her complaint. *See Nationstar Mortg., LLC v. McDaniel*, 288 So. 3d 1235, 1237 (Fla. 5th DCA 2020) ("Appellant is not suing on the servicing agreement or power of attorney; thus, those documents need not be attached to the complaint"); *Williams v. Palm Coast Blue Water Int'l Corp.*, 954 So. 2d 1264, 1265 (Fla. 5th DCA 2007) ("[A]ppellants were not required to attach a 'written notice of closing' to the complaint because it was not a document 'upon which action may be brought.' Fla. R. Civ. P. 1.130(a)."); *Hewett-Kier Constr., Inc. v. Lemuel Ramos & Assocs., Inc.*, 775 So. 2d 373, 375 (Fla. 4th DCA 2000) ("Here, Hewett–Kier did not sue on the design contract and . . . was not required to attach it to the complaint.").

Despite that, the charge of discrimination was the focus of the motion to dismiss hearing and the primary basis of the dismissal order. This was improper. "The purpose of a motion to dismiss is to test the legal sufficiency of a complaint, not to determine factual issues." *Sealy v. Perdido Key Oyster Bar & Marina*, LLC, 88 So. 3d 366, 367–68 (Fla. 1st DCA 2012). Thus, in evaluating a motion to dismiss, "the trial court may look no further than the four corners of the complaint[.]" *Id.* at 368. Meaning, "the court's review is limited to an examination solely of the complaint and its attachments." *Santiago v. Mauna Loa Invs., LLC*, 189 So. 3d 752,

755 (Fla. 2016). Here, the trial court circumvented the four corners rule by straying from the complaint, resolving factual issues that were not before it, and relying on a document—the EEOC charge—which was only attached to the motion to dismiss. All of this was error. *See Hewett-Kier*, 775 So. 2d at 375–76 ("[I]n ruling on the motion to dismiss, [the trial court] explicitly relied upon the design contract which was only attached to the motion to dismiss. Because the trial court improperly went beyond the four corners of the complaint, we must reverse."); *see also Santiago,* 189 So. 3d at 757 ("The district court's examination of one complaint and its attachments to determine the sufficiency of a separate complaint to state a cause of action clearly contravenes the longstanding four-corners rule explained above."); *Norwich v. Glob. Fin. Assocs., LLC*, 882 So. 2d 535, 537 (Fla. 4th DCA 2004) ("While the defenses of res judicata and collateral estoppel may be resolved through a motion for summary judgment, the trial court erred when it ventured outside the four corners of the complaint, took judicial notice of the final judgment of dissolution of marriage, and dismissed the complaint with prejudice.").

Moreover, Appellant's allegation that she satisfied all conditions precedent to bringing her claim had to be accepted as true and "all reasonable inferences" had to be drawn in her favor. *Abruzzo v. Haller*, 603 So. 2d 1338, 1340 (Fla. 1st DCA 1992). Thus, her general averment was sufficient to withstand Appellee's motion to dismiss. *Williams v. City of Jacksonville*, 191 So. 3d 925, 927 (Fla. 1st DCA 2016) ("Our review of the complaint shows that the general allegations of compliance with sections 95.11(3)(a) and 768.28(6)(a), Florida Statutes, were sufficient to allege compliance with the conditions precedent to the lawsuit."); *Bank of Am., Nat'l Ass'n v. Asbury*, 165 So. 3d 808, 809–10 (Fla. 2d DCA 2015) ("Florida Rule of Civil Procedure 1.120(c) establishes a special pleading rule in regard to conditions precedent: 'In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred.' . . . Under this rule a plaintiff is allowed to allege in a generalized fashion that all the conditions precedent to a cause of action, whatever they may be, have either occurred or been performed."). While this court has recognized that parties can waive procedural defects by agreeing to treat motions to dismiss like motions for summary judgment, *see Brewer*, 720 So.

2d at 604, there is nothing in the record suggesting Appellant made such a concession. To the contrary, Appellant repeatedly objected to the court's use of the discrimination charge to question whether she complied with the necessary conditions precedent. For this additional reason, the trial court erred in dismissing Appellant's complaint for failure to exhaust administrative remedies.

III.

As an alternative basis for its order, the trial court dismissed Appellant's complaint because Appellant failed to state causes of action for associational discrimination and retaliation. But in making this determination, "[i]t [was] not for the court to speculate whether the allegations [were] true or whether the pleader ha[d] the ability to prove them." *Universal Underwriters Ins. Co. v. Body Parts of Am., Inc.*, 228 So. 3d 175, 176 (Fla. 1st DCA 2017) (citations, internal quotation marks, and emphasis omitted). Instead, the "question for the trial court . . . [was] simply whether, assuming all the allegations in the complaint to be true, the plaintiff would be entitled to the relief requested." *Newberry Square Fla. Laundromat LLC v. Jim's Coin Laundry & Dry Cleaners, Inc.*, 296 So. 3d 584, 589 (Fla. 1st DCA 2020) (citation and internal quotation marks omitted). Under this standard, Appellant pleaded a claim for associational discrimination under the ADA. *See* 42 U.S.C. § 12112(b)(4) (prohibiting an employer from discriminating against a "qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association"). She also stated a claim for retaliation under Title VII. *See Thompson v. N. Am. Stainless, L.P.*, 562 U.S. 170, 177–78 (2011) (holding that an employee could bring a retaliation claim as an "aggrieved person" under Title VII where the employee alleged that the employer fired him in order to retaliate against his coworker and fiancée for filing a sex discrimination charge).

Accordingly, we reverse and remand for further proceedings on Appellant's ADA associational discrimination claim and her Title VII retaliation claim. However, we affirm the dismissal of Appellant's remaining claims without discussion.

AFFIRMED in part, REVERSED in part, and REMANDED.

MAKAR and NORDBY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Marie A. Mattox and Ashley N. Richardson of Marie A. Mattox, P.A., Tallahassee, for Appellant.

Erick M. Drlicka and Jennifer Shoaf Richardson of Emmanuel, Sheppard & Condon, Pensacola, for Appellee.