IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JENNIFER CHAVEZ Plaintiff, v. CREDIT NATION AUTO SALES, LLC f/k/a SYNERGY MOTOR COMPANY, Defendant.	)	CIVIL ACTION NO. 1:13-CV-0312-WSD/JCF

BRIEF OF THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF

STATEMENT OF INTEREST

The Equal Employment Opportunity Commission ("EEOC") is the agency charged by Congress with administering and enforcing Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq. ("Title VII"), and other federal employment discrimination laws.

This case involves issues related to the EEOC's administrative charge-filing process. Such issues are of particular concern to the EEOC. Under Title VII as well as other federal anti-discrimination statutes, the EEOC ordinarily can investigate alleged discrimination only in response to a charge filed by an aggrieved individual within the limitations period set by Title VII

— here, 180 days from the alleged unlawful act. See, e.g., 42 U.S.C. § 2000e-5(b). Thus, the EEOC's ability to enforce these laws largely depends on the ability of aggrieved individuals to file charges. In addition, for an aggrieved individual, filing a timely charge with the EEOC normally is a condition precedent to bringing a lawsuit challenging the alleged discrimination. See, e.g., Zipes v. TWA, 455 U.S. 385, 393 (1982). Suits by private individuals are essential to the effective enforcement of Title VII. See, e.g., New York Gaslight Club v. Carey, 455 U.S. 54, 63 (1982) (stating that "Congress has cast the Title VII plaintiff in the role of 'a private attorney general,' vindicating a policy 'of the highest priority'").

In this case, it is essentially uncontested that the EEOC mistakenly refused to accept an otherwise timely charge proffered by the plaintiff. Accordingly, the plaintiff could not satisfy this condition precedent, despite her best efforts to do so. In our view, in such circumstances, limitations for the charge-filing requirement should be equitably tolled, both as a matter of fairness to the plaintiff and as a means of securing enforcement of the law. See Jennings v. Am. Postal Workers Union, 672 F.2d 712, 715 (8th Cir. 1982) (reasoning that an "uncounseled plaintiff should not be penalized for the EEOC's mistake of law").

The defendant is arguing that, even under these circumstances, the plaintiff should be barred from proceeding with her Title VII lawsuit. This argument, if accepted by this Court, could undermine enforcement of Title VII. We therefore offer our views.

STATEMENT OF THE ISSUE[1]

Should the limitations period for a Title VII charge be equitably tolled where the aggrieved individual made diligent efforts to file a timely charge but the EEOC investigators responsible for taking the charge refused to do so, thereby preventing the plaintiff from filing a charge within 180 days of the alleged discriminatory conduct?

STATEMENT OF THE CASE

1. Statement of the Facts

Louis (Jennifer) Chavez began working as an auto mechanic for Credit Nation Auto Sales in June 2008. Chavez's work was well regarded. See generally R.61 (Chavez Decl. ¶¶2-10). In the fall of 2009, Chavez alerted the Vice-President, Cindy Weston, and the Service Director, Phil Weston, as well as several coworkers that she planned to transition from male to female. Id. (¶¶28, 36). These individuals, she stated, were supportive. Id. (¶¶29, 36).

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[1] The EEOC takes no position on any other issue in this case.

In contrast, Chavez testified, James Torchia, the company's owner/majority stockholder, was hostile or, at best, uncomfortable when he learned of the "situation" regarding her gender transition. Id. ¶¶37, 62-69; see also id. ¶46 (noting that Cindy Weston told her to "'be careful'" because Torchia "'didn't like'" the "'situation'"). As a result, Chavez contends, she became concerned that her job was "in jeopardy." Id. ¶¶47, 71, 73; see also id. at ¶¶62-69 & R.61-8 (Chavez Decl. Ex.H: meeting notes) (describing difficult meeting between herself, Torchia, and the Westons). Beginning in around mid-November, her work was subjected to special scrutiny and she was disciplined for trivial matters. See generally id. ¶¶48-61, 72, 74, 76-79.

In early January 2010, Chavez dozed off in a car while waiting for parts to be delivered for vehicles she had been assigned to repair. Id. ¶¶83, 91, 98, 101. Her supervisor took a picture of her asleep in the car. Id. ¶102. On January 11, 2010, she was terminated. Id. ¶105.

The next day, Chavez, acting pro se, went to EEOC's Atlanta District Office and attempted to file a charge alleging that she was terminated because she is a transgender woman. The EEOC investigator's log for that day confirms that the investigator met with a "Luis Chavez," but no formal charge was filed, and the investigator has no recollection of the visit. R.60-20 (Plaintiff's Statement of Material Facts ("PSOMF") Ex.20: B. Williams-

Kimbrough 12/19/2013 Letter); R.60-1 (PSOMF Ex.1: log); R.60-2 (PSOMF Ex.2: investigator's statement). Chavez testified that she provided the investigator with a copy of her separation notice, a pay stub, and excerpts of the employee handbook as well as a hand-written account of what happened during a meeting with Torchia and the Westons after Torchia learned she was transgender. Chavez Decl. ¶108. Chavez also orally asked that the EEOC take action against her employer. Id. ¶113. According to Chavez, the investigator took some notes and filled out an intake questionnaire but, after talking to her supervisor, informed Chavez that she could not file a charge because, as a transgender woman, she was "not protected against discrimination on the basis of sex" under Title VII. Id. ¶¶114-16.

In September 2010, Chavez went back to the Atlanta District Office and attempted, again, to file a charge, explaining that she had heard that transgender status was protected by federal law. Chavez Decl. ¶119-21. Once again, she stated, an investigator filled out an intake questionnaire but then refused to take the charge, based on lack of coverage. Id. ¶¶122-24. According to Chavez, the investigator then referred her to the Department of Labor, but an attorney there explained that that agency could not help her. Id. ¶¶125-26.

Finally, on April 25, 2012, Chavez returned to the EEOC and was able to file a charge. Chavez Decl. ¶¶128-29; R.60-6 (PSOMF Ex.6: charge). However, the EEOC dismissed the charge as untimely. R.48-6 (Defendant's Statement of Material Facts ("DSOMF") Ex.4). In May, now represented by counsel, Chavez requested revocation of the recent dismissal and notice of rights. See R.48-7 (DSOMF Ex.5). In June, the EEOC agreed to reopen its investigation of Chavez's charge. R.48-7 (DSOMF Ex.5).

In November 2012, the EEOC issued a second dismissal and notice of rights. R.48-9 (DSOMF Ex.7). Chavez then filed a second request for reconsideration. By letter on December 19, 2012, the EEOC denied the second request. The letter clarified that the agency had "determined the charge should be dismissed on the merits — not because it was untimely filed." R.60-20 (PSOMF Ex.20) (letter from B. Williams-Kimbrough). Shortly thereafter, Chavez brought this lawsuit alleging that she was fired because of her gender in violation of Title VII.

Defendant moved to dismiss, arguing that Chavez failed to exhaust her administrative remedies and that transgender discrimination is not protected by Title VII. R.6. Plaintiff opposed the motion. R.10. Both parties submitted substantial evidence to support their positions.

2. The Rulings on the Motion to Dismiss

In a detailed order, the magistrate recommended that the motion be denied without prejudice pending further discovery. See R.20 (4/29/2013 Order and Non-Final Report and Recommendation) ("Report"). In pertinent part, the magistrate evaluated whether equitable tolling principles could excuse the otherwise untimely filing of Plaintiff's charge. The magistrate reasoned that the Eleventh Circuit has recognized that the Title VII limitations period may be equitably tolled inter alia when "'the EEOC misleads a complainant about the nature of his rights under Title VII.'" Id. at 15 (quoting Jones v. Wynne, 266 Fed. App'x. 903, 906 (11th Cir. 2008) (unpublished) (quoting Chappell v. Emco Mach. Works Co., 601 F.2d 1295, 1302-03 (5th Cir. 1979))).

In considering whether Plaintiff had shown that the EEOC misled her about her rights, the magistrate noted that several appellate and trial courts have recognized that Title VII affords protection to "transgender victims of sex discrimination." Moreover, in 2011, the Eleventh Circuit held that "'discrimination against a transgender individual because of her gender non-conformity is sex discrimination . . . and constitutes sex-based discrimination under the Equal Protection Clause' of the Fourteenth Amendment." Report at 16 (citing Glenn v. Brumby, 663 F.3d 1312, 1316-17 (11th Cir. 2011)).

The magistrate further noted that, as the parties acknowledged, in 2012 the EEOC issued a decision unequivocally stating that discrimination against a transgender individual is discrimination on the basis of sex in violation of Title VII. Report at 17 (citing Macy v. Holder, Appeal No. 0120120821, EEOC Doc. 012012081, 2012 WL 1435995 (April 20, 2012)). The magistrate added that it was unclear whether Macy also expressed EEOC's policy in 2010 when the investigators refused to accept Plaintiff's charge and whether the investigators "acted pursuant to EEOC policy" or "pursuant to a misunderstanding of policy." Report at 17-18. In the magistrate's view, however, this might not make a difference. Since other courts had recognized that Title VII protects transgender individuals in 2010, the magistrate reasoned, "if EEOC personnel in fact prohibited Plaintiff from filing a charge of discrimination based on her status as a transgender individual, they may have mis[led] her concerning her rights sufficient to trigger equitable tolling of the 180-day statute of limitations. Id. at 18.

Turning to the evidence, the magistrate noted that the investigator's log listing Plaintiff's January 2010 visit "lends credence" to her declaration describing her interactions with the EEOC. "If credited," the magistrate continued, "Plaintiff's testimony tends to show that [she] attempted to exhaust her administrative remedies in a timely manner, but was thwarted

by the EEOC" — which "would warrant the application of equitable tolling to the statute of limitations." Report at 18-19. Nevertheless, the magistrate declined to make that finding on a motion to dismiss, concluding that the "better approach" would be to "allow the parties to engage in discovery concerning Plaintiff's efforts to exhaust her administrative remedies" and then, if appropriate, revisit the issue with a more fully developed record. Id. at 20.

Because neither party took exception to these aspects of the magistrate's recommended decision, this Court adopted the recommendations and denied defendant's motion to dismiss. R.35 (8/19/2013 Opinion and Order).

Following discovery, defendant moved for summary judgment. As before, defendant argued that the suit should be dismissed because Plaintiff failed to exhaust administrative remedies by filing a charge with the EEOC within 180 days of her termination.

ARGUMENT

The Limitations Period For Plaintiff's Title VII Charge Should Be Equitably Tolled Because, By Refusing to Take Her Otherwise Timely Charge, The EEOC Thwarted Her Efforts To Exhaust Administrative Remedies.

This Court should equitably toll the limitations period for Jennifer Chavez's Title VII charge alleging that she was fired because of her gender.

Evidence indicates that Chavez tried diligently to preserve her claim by attempting to file a charge shortly after her termination. Despite her best efforts, however, EEOC investigators prevented her from satisfying this condition precedent to suit by refusing to accept the charge. If credited, this evidence would establish that equitable tolling is appropriate in this case. Chavez should not be precluded from pursuing her lawsuit by any failure to file a timely charge.

Title VII generally requires that plaintiffs in non-deferral states such as Georgia must file charges with the EEOC within 180 days of the alleged discriminatory act. 42 U.S.C. § 2000e-5. This requirement is not jurisdictional, however, but rather a condition precedent to bringing a federal lawsuit challenging the alleged discrimination. Zipes, 455 U.S. at 393 (noting that requirement "is subject to waiver, estoppel, and equitable tolling"). Accordingly, equitable tolling, if available, can rescue a claim that would otherwise be untimely where a plaintiff can show that she exercised due diligence in pursuing and preserving her claim but was prevented from filing in a timely manner by sufficiently "inequitable" circumstances. See, e.g., Bost v. Fed. Ex. Corp., 372 F.3d 1233, 1242 (11th Cir. 2004) (age discrimination case); see also Justice v. U.S., 6 F.3d 1474, 1479 (11th Cir. 1993) (noting that tolling is appropriate where "interests of justice require

that a plaintiff's rights be vindicated"; plaintiff acted diligently but "an inequitable event ... prevented plaintiff's timely filing") (cited in Bost). The plaintiff bears the burden of showing that tolling is appropriate. Bost, 372 F.3d at 1242. Here, Plaintiff has carried this burden.

As the magistrate noted (Report at 15-16), in the Title VII context, the Eleventh Circuit and others have recognized a number of circumstances where equitable tolling may be appropriate. See Chappell v. Emco Mach. Works Co., 601 F.2d 1295, 1302-03 (5th Cir. 1979) (listing circumstances); cf. Coke v. Gen'l Adjustment Bureau, 616 F.2d 785, 791 n.6 (5th Cir. 1980) (suggesting that list is not exhaustive).[2] One such circumstance is where the EEOC misled the individual regarding the charge-filing requirements or otherwise prevented the individual from filing a timely charge. See Jackson v. Seaboard Coast Line R.R., 678 F.2d 992, 1006-09 (11th Cir. 1982) (discussing White v. Dallas Indep. Sch. Dist., 581 F.2d 556, 562 (5th Cir. 1978), and Coke, 616 F.2d at 587).[3] Indeed, at least two circuit courts have

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[2] Decisions of the Fifth Circuit handed down before October 1, 1981, are binding precedent in the Eleventh Circuit. Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981).

[3] See also Schleuter v. Anheuser-Busch, 132 F.3d 455, 458-59 (8th Cir. 1998) (tolling appropriate where EEOC mistakenly misled charging party into believing that timely-filed document could be considered a charge); Gray v. Phillips Petrol. Co., 858 F.2d 610, 616 (10th Cir. 1988) (tolling appropriate

expressly held that equitable tolling might well be appropriate where, as here, the plaintiff attempted to file a charge but the EEOC refused to accept it. See McKee v. McDonnell Douglas Tech. Servs., 700 F.2d 260, 263 (5th Cir. 1983) (noting that EEOC employee referred plaintiff to Department of Labor); Jennings, 672 F.2d at 715 (noting that rather than refuse to accept a charge against union, EEOC "should have processed [plaintiff's] charge when she first contacted the agency").

In such circumstances, the Jackson Court reasoned, equitable tolling would be appropriate because EEOC's faults or "'mistakes should not redound to [an aggrieved individual's] detriment'" particularly where, as here, the individual was proceeding pro se. 678 F.2d at 1007-08 (citing White, 581 F.2d at 562); accord Jennings, 672 F.2d at 715 (reasoning that an "uncounseled plaintiff should not be penalized for the EEOC's mistake of law"); but cf. McKee, 700 F.2d at 264 n.7 (stating that regardless of whether EEOC was "at fault," what matters is that "the charge that an aggrieved

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where for its own convenience, EEOC scheduled an intake meeting with a large group of potential charging parties that was beyond the 180-day period for a number of them); Early v. Bankers Life & Cas. Co., 959 F.2d 75, 81 (7th Cir. 1992) (tolling appropriate to the extent that EEOC misled plaintiff into believing that document he had timely completed and left with EEOC was a charge).

party attempted to file, without counsel, was rejected 'through no fault of her own'").

This case presents a textbook example of when equitable tolling is appropriate based on EEOC's faults or mistakes. Only one day after her termination, Chavez arrived at an EEOC office with materials containing information that she assumed, correctly, would be required for a charge: her employer's name and address, the stated reason for her termination, and a brief account of the interaction between herself and Mr. Torchia which, she contends, eventually led to her termination. Chavez Decl. ¶108; compare 29 C.F.R. § 1601.12 (noting that charge should include such information). She then told the investigator on duty that she wanted to file a charge and requested that the EEOC take action against her employer. Id. ¶113. Instead, however, the investigator refused to take the charge, explaining that because Plaintiff was transgender, she "was not protected from discrimination on the basis of sex." Id. ¶¶119-21. Based on this uncontested evidence, this Court could easily find that Plaintiff exercised due diligence to protect her rights but was, as the magistrate suggested, "thwarted" from doing so by the EEOC's actions. See Report at 19. The Court should therefore hold that the limitations period for Chavez's charge was equitably tolled until May 2012, when she was finally permitted to file a charge.

In its memorandum in support of summary judgment, the defendant argues that equitable tolling is not appropriate. Mainly, the company contends that in refusing to take the charge, "EEOC did not mislead [Chavez] as to the nature of her rights" because the "state of the law" was "in flux," and the EEOC did not acknowledge that transgender persons were protected by Title VII until 2011, at the earliest. Moreover, the argument goes, the Eleventh Circuit's decision in Glenn v. Brumby was not issued until later that year — and it involved the Equal Protection Clause, rather than Title VII. Accordingly, the company reasons, "it cannot be said that the EEOC misinterpreted the state of the law in January 2010." R.48 (Memorandum in Support of Summary Judgment at 7-8). These arguments all are beside the point.

Initially, as the magistrate recognized, both the EEOC and the Eleventh Circuit have determined that discrimination against transgender women and men may constitute discrimination on the basis of sex/gender. See Macy, 2012 WL 1435995 (EEOC); Brief of the EEOC as Amicus Curiae in Pacheco v. Freedom Buick GMC Trucks, 10-cv-00116-RAJ (W.D. Tex.) (submitted Oct. 7, 2011); see also Glenn, 663 F.3d 1312. Moreover, while the defendant is correct that Glenn was issued only in 2011, the suit was actually filed in 2008, and the district court — here in the Northern District of

Georgia — denied the defendant's motion to dismiss in 2009, well before the 2010 date stressed by the defendant here. See Glenn v. Brumby, 632 F. Supp. 2d 1308, 1315-17 (N.D. Ga. 2009).

In any event, the question for tolling purposes is not whether the EEOC investigators "misinterpreted the statute" in 2010. Rather, it is whether the EEOC impeded Chavez's ability to enforce her federal rights by turning her away without accepting her charge. See McKee, 700 F.2d at 264 n.7 ("What is relevant is that the charge that an aggrieved party attempted to file, without counsel, was rejected 'through no fault of her own.'"); cf. Jennings, 672 F.2d at 715 (stating that an "uncounseled plaintiff should not be penalized for the EEOC's mistake of law"). Clearly it did. The filing of a timely charge is a condition precedent to filing a federal lawsuit. Thus, in refusing to take the charge, the EEOC misled Chavez into believing that she had no right to challenge her termination and prevented her from satisfying a condition precedent to suit, thus blocking her access to federal court.

Furthermore, whether an individual has a right to file a charge does not depend on whether a particular EEOC employee or even the Commission as a whole believes that the claim falls within the scope of the statute. Title VII makes the federal judiciary, not the EEOC, the "final arbiter" of that issue. See, e.g., Hutchings v. U.S. Indus., 428 F.2d 303, 313-14 (5th Cir.

1970). Thus, when an individual manifests a desire to file a charge within the charge-filing period, the EEOC instructs its investigators that even if they believe the individual's allegations do not satisfy threshold requirements for coverage under Title VII, investigators "should not refuse to accept a charge." EEOC Compl. Man., Sec. 2: Threshold Issues, 2-1 Overview & n.5 (2000), available at http://www.eeoc.gov/laws/guidance/compliance.cfm. Rather, although an investigator may, of course, advise the individual that her allegations might not add up to a Title VII claim, the investigator should nevertheless take the charge, dismiss it, and then "issue a notice of right to sue so that the charging party may file in federal court if desired." Id. [4] Since the investigators here instead did "refuse to accept a charge" that would otherwise have been timely, Plaintiff should not be penalized for failing to satisfy the timeliness requirement. Instead, the limitations period for filing the charge should be equitably tolled.

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[4] These instructions accord with the Fifth Circuit's discussion of 29 C.F.R. § 1601.6, which provides that the "appropriate [EEOC] office shall render assistance in the filing of a charge" where the charging party provides information disclosing that she "is entitled to file a charge." While that language could be read to allow investigators to exercise their judgment in deciding which charges to accept or reject, the Fifth Circuit concluded that it did "not vest Commission officials with discretion to turn away complainants." McKee, 700 F.2d at 263 (adding that "[n]owhere is the Commission given discretion to refuse a valid allegation of a Title VII violation" except as to claims under § 707).

Finally, the defendant asserts that "if the principals [sic] of equitable tolling were applicable in this case, they would likewise be applicable in any case brought after the Supreme Court decided Price Waterhouse decision [sic] in 1989." Memo in Support of Summary Judgment at 10. According to the defendant, "that is simply unsound reasoning." Id.

Like defendant's other arguments, this argument misses the point. What makes equitable tolling appropriate here is not that the alleged discrimination post-dated Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) — the Supreme Court decision recognizing that gender stereotyping may constitute sex discrimination — but that the EEOC refused to take the charge, thereby preventing Plaintiff from timely exhausting her administrative remedies despite her efforts to do so. In that narrow subset of cases where evidence establishes that the plaintiff exercised due diligence in pursuing and preserving her claim but the EEOC prevented her from filing a charge in a timely manner, the principles of equitable tolling would apply.

CONCLUSION

For the foregoing reasons, we respectfully urge the Court to hold that under the circumstances of this case, the limitations period for Plaintiff's Title VII charge should be equitably tolled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on **February 14**, 2014, I electronically submitted the foregoing Brief of the Equal Employment Opportunity Commission As Amicus Curiae, along with the EEOC's Motion for Leave to File, with the Clerk of Courts using the CM/ECF system which will automatically send email notification of such filing to the attorneys of record.

February 14, 2014

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CERTIFICATE OF LR 5.1B

The brief has been prepared with one of the font and point selections approved by the Court in L.R. 5.1B.

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