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NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued July 12, 2023
Decided August 1, 2023

Before

DIANE S. SYKES, *Chief Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

No. 22-3183

ELVIN FARRIS,
Plaintiff-Appellant,

v.

VECTOR CONSTRUCTION, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Central District of Illinois.

No. 22-cv-2107

Colin S. Bruce,
Judge.

ORDER

Elvin Farris, a construction worker, sued Vector Construction, his former employer, for discrimination and retaliation alleging that it fired him rather than accommodate his work-related disability. The district judge granted Vector's motion to dismiss, concluding that Farris's charge with the Equal Employment Opportunity Commission was untimely. Farris appeals, arguing that the judge should have found his charge timely or granted him leave to amend his complaint. Because the charge is untimely and amendment would have been futile, we affirm.

We accept the allegations in the complaint as true and draw all reasonable inferences in Farris's favor. *Chaidez v. Ford Motor Co.*, 937 F.3d 998, 1004 (7th Cir. 2019). Farris worked for Vector Construction for decades until August 2018 when he was discharged. Farris inhaled chemical insulation spray after he was denied an appropriate respirator given his preexisting asthma. Farris complained to his supervisor that safety regulations were being ignored, and on August 5 he was "sent home" from work until further notice. It is unclear what reason Vector gave Farris, but he believed Vector discriminated and retaliated against him by laying him off for raising safety concerns.

Farris learned later that his removal from work was permanent. In October 2018, believing he was still employed, Farris sought a loan from his company retirement plan. On October 25 a Vector employee informed him that Vector had fired him in August.

On July 29, 2019, nearly a year after being sent home, Farris filed a charge with the Equal Employment Opportunity Commission. He alleged that Vector had violated the Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213, by discriminating against him for his asthma and retaliating against him for reporting unsafe working conditions. In the charge Farris listed August 5, 2018, as the date of Vector's latest discriminatory act; he did not mention that he learned he was fired in October. The EEOC dismissed Farris's charge and issued a Right to Sue letter.

Farris then filed a complaint under the ADA in federal court, and Vector moved to dismiss on timeliness grounds. Vector argued that Farris's EEOC charge was untimely because he filed it more than 180 days after August 5 when he alleged that Vector last discriminated against him. Farris responded that the EEOC found his charge timely and included an EEOC investigator's declaration acknowledging his claim as filed within 300 days of October 25 when he learned that his discharge was permanent. Farris also included corroborating notes from his intake interview and emails from the Vector staffer who informed Farris in October that he had been fired.

The judge granted Vector's motion and dismissed Farris's complaint with prejudice. Noting that Illinois is a "deferral" state, the judge explained that Farris had to file his EEOC charge within 300 days of the last allegedly unlawful act. *See Stepney v. Naperville Sch. Dist. 203*, 392 F.3d 236, 239 (7th Cir. 2004). The judge ruled that even if Farris did not know that he was fired until October 2018, his claims accrued in August when he suspected that Vector had discriminatory and retaliatory motives for sending him home from work. And because he could not amend his complaint to revive his

time-barred claims, the judge considered amendment futile and dismissed the complaint with prejudice. *See Atkins v. City of Chicago*, 631 F.3d 823, 832 (7th Cir. 2011).

On appeal Farris argues that the judge erred by rejecting his EEOC charge, and therefore his federal claims, as time-barred. Farris argues primarily that the judge erred by conflating two "separate and distinct adverse actions": the layoff in August and the firing in October. He argues that regardless of whether a "discriminatory layoff" claim accrued in August, a "discriminatory termination" claim did not accrue until he learned in October that he was fired.

The judge correctly dismissed Farris's claims as time-barred. In his EEOC charge, Farris alleged that Vector last discriminated against him by sending him home on August 5. He had 300 days—until June 1, 2019—to file a charge against Vector for doing so "or lose the ability to recover for it." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110–11 (2002); 42 U.S.C. § 2000e-5(e)(1). Because he filed his charge on July 29, 2019, nearly two months late, Farris may not bring federal claims arising from his removal from work.

Farris's later discovery of new information about the precise scope of the injury does not start a new limitations clock. A claim accrues when a plaintiff "knows or should know" that he has been injured. *See Draper v. Martin*, 664 F.3d 1110, 1113 (7th Cir. 2011). Here, that's August 5, 2018, when Farris first "awaken[ed] to the possibility" that Vector had illegally removed him from work. *Beamon v. Marshall & Ilsley Tr. Co.*, 411 F.3d 854, 861 (7th Cir. 2005). To rely on the discovery rule, Farris would have to show that he could not have learned sooner through reasonable diligence that Vector considered his position terminated. Farris makes no such showing, and he cannot use his October "discovery" that he was fired in August "to pull in the time-barred discriminatory act." *Nat'l R.R. Passenger Corp.*, 536 U.S. at 113.

Farris's October notice was not a separate and distinct adverse act: there is no meaningful difference between his "layoff" and his "termination" when it comes to Vector's alleged motive. Vector's allegedly discriminatory discharge, not its characterization, was the relevant conduct. *See Draper*, 664 F.3d at 1115. Farris was injured when Vector sent him home—and never called him back—not in October when he learned that he had been fired. *Id.* at 1113.

And if October were significant, it is too late for Farris to pursue a claim based on a "discrete" act then. We have long held that an EEOC charge limits and defines any

subsequent federal claims. *See Riley v. City of Kokomo*, 909 F.3d 182, 189 (7th Cir. 2018) (citing *Green v. Nat'l Steel Corp.*, 197 F.3d 894, 898 (7th Cir. 1999)). Farris filed one EEOC charge, which identifies only the removal from work as Vector's last discriminatory act. Any claims arising from "separate and distinct" actions in October, then, fall outside the scope of the charge and may not be brought in federal court. *Nat'l R.R. Passenger Corp.*, 546 U.S. at 113; *Riley*, 909 F.3d at 189. Because no amended complaint could state a claim for relief, the judge correctly dismissed Farris's complaint with prejudice.

AFFIRMED

E-FILED
Monday, 28 November, 2022 11:34:47 AM
Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

ELVIN FARRIS,	)	
	)	
Plaintiff,	)	
v.	)	**Case No. 22-CV-2107**
	)	
VECTOR CONSTRUCTION, INC.,	)	
	)	
Defendant.	)	

ORDER

Plaintiff, Elvin Farris, filed a pro se Complaint (#1) on May 20, 2022, against Defendant, Vector Construction, Inc., alleging that he was discriminated against and retaliated against in violation of the Americans with Disabilities Act ("ADA") (42 U.S.C. § 12101, et seq.). Defendant filed a Motion to Dismiss (#12) on July 6, 2022, to which Plaintiff filed Responses (#18, 20) on August 1 and 3, 2022. Defendant filed a Reply (#23) on August 15, 2022. For the following reasons, Defendant's Motion to Dismiss (#12) is GRANTED.

BACKGROUND

The following background is taken from the allegations in Plaintiff's Complaint. At this stage of the proceedings, the court must accept as true all material allegations of the Second Amended Complaint, drawing all reasonable inferences therefrom in Plaintiff's favor. See *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 966 (7th Cir. 2016).

Plaintiff's Complaint

Plaintiff's Complaint is a Central District of Illinois employment discrimination form complaint, the kind of which this court often sees in pro se discrimination cases. Plaintiff alleges that he was employed by Defendant, and that the discrimination occurred at his place of employment in Decatur, Illinois on August 3, 2018. Under the "JURISDICTION" heading, Plaintiff checked the box for disability discrimination pursuant to the ADA. Plaintiff checked a box indicating that he had filed a Charge of Discrimination before the U.S. Equal Employment Opportunity Commission ("EEOC"), but then checked a box indicating that he had *not* filed a Charge of Discrimination before the Illinois Department of Human Rights ("IDHR"). Plaintiff checked a box indicating he had received his Right to Sue Notice, which he received on March 3, 2022.

Under the "FACTS IN SUPPORT OF CLAIM" section, Plaintiff checked boxes that Defendant intentionally discriminated against him by: (1) terminating his employment; (2) failing to reasonably accommodate his disabilities; and (3) retaliating against him because he did something to assert rights protected by the laws. In the narrative portion of the form complaint, Plaintiff states:

> Safety policies wasn't followed 08/03/2018 sent home for reporting safety issues/injury to my safety supervisor 10/25/2018 I learned I had been terminated. This was after I reported my workers comp claim.

Plaintiff also attached a Right to Sue Notice letter to his Complaint (#1-1). The letter was dated March 4, 2022, and indicated that Plaintiff's EEOC representative was Eva Baran.

Attached to the Right to Sue Notice letter was a copy of Plaintiff's EEOC Charge. The Charge indicates it was filed July 29, 2019, and Plaintiff checked boxes stating that he was retaliated against and discriminated against based on disability on August 5, 2018. In the narrative box Plaintiff stated:

> I was hired by Respondent in or around May 1996. My most recent position was Field Technician. Respondent was aware of my disability. During my employment, I requested a reasonable accommodation which was not provided. I was subsequently forced to work with inadequate safety equipment, exposed to noxious chemicals in my lungs, and discharged on or about August 5, 2018. I believe I have been discriminated against because of my disability and in retaliation for engaging in protected activity, in violation of the Americans with Disabilities Act of 1990, as amended.

A stamp indicates the Charge was received in the Chicago EEOC office on July 29, 2019, the same day it was signed and sworn to by Plaintiff.

Attachments to Plaintiff's Responses

As will be discussed below, one of the arguments Defendant raises in favor of dismissal is that Plaintiff's EEOC Charge was untimely, and thus his ADA claim must be dismissed. In response to this argument, Plaintiff attached the Declaration of Eva Baran to his Response (#18).

Baran is an investigator with the Chicago District of the EEOC, and was assigned to investigate Plaintiff's Charge of Discrimination against Defendant, filed on July 29, 2019. Baran states that the intake interview notes by former EEOC investigator Zachary Florent reflect that Plaintiff told Florent that, although he was laid off by Defendant on August 5, 2018, he was not informed that he was terminated until about October 24,

2018. Florent's notes state that Plaintiff "said he was laid off on August 5, 2018[,]" and that Plaintiff said "around October 24, 2018, he found out that he had actually been terminated." Baran concludes that "[a]s [Plaintiff's] charge was filed within 300 days of when he became aware he had been terminated, EEOC found [Plaintiff's] charge to be timely filed."

In his second Response (#20), Plaintiff attached what looks to be his notes from his EEOC intake interview, although it is dated August 1, 2022. In the interview, Plaintiff states that he was laid off by Defendant on August 5, 2018, although he did not find out that he was actually terminated until around October 24, 2018. Plaintiff stated that on August 3, 2018, he "inhaled something and felt a strong pain in his side." Plaintiff said that he was told by his immediate supervisor and Defendant's foreman, Danny Menders, that he (Plaintiff) "had been removed from the job or laid off."

Plaintiff also attached text messages between himself and Evan Poland, who worked for a billing processing company that administered Defendant's 401K plan, informing Plaintiff that he had not just been laid off on August 5, 2018, but terminated. The messages are dated October 25, 2018.

ANALYSIS

Defendant raises three arguments in support of its Motion to Dismiss: (1) Plaintiff's claims are time-barred and must be dismissed with prejudice; (2) Plaintiff has failed to plead sufficient facts to state a valid discrimination claim under the ADA because: (a) he failed to establish he was disabled as defined by the ADA, (b) he failed

to allege he was a qualified individual under the ADA, and (c) he failed to sufficiently plead a failure to accommodate claim under the ADA; and (3) his retaliation claim is a mislabeled disability discrimination claim and similarly fails.

Whether Plaintiff's Claims Are Untimely

Defendant first argues that Plaintiff's claims are untimely. Defendant argues that Plaintiff's EEOC Charge was untimely filed, because it was not filed within 180 days of the last alleged act of discrimination. Defendant argues that because a timely EEOC Charge is a prerequisite to maintaining a disability action under the ADA, Plaintiff's Complaint must be dismissed. Plaintiff responds that the appropriate limitation period is 300 days after the last act of discrimination, and that he did not know he was actually terminated until October 25, 2018, and thus his EEOC Charge was timely.

A motion to dismiss based on an untimely EEOC Charge is made pursuant to Federal Rule of Civil Procedure 12(b)(6). See *Byrne v. Aurora Health Care Inc.*, 2019 WL 7185754, at *1 (E.D. Wis. Dec. 23, 2019). Under Federal Rule of Civil Procedure 8(a)(2), a pleading stating a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" Fed. R. Civ. P. 8(a)(2). Federal Rule of Civil Procedure 12(b)(6) allows for dismissal of a pleading if it fails "to state a claim upon which relief can be granted[.]" Fed. R. Civ. P. 12(b)(6). "Dismissal for failure to state a claim under Rule 12(b)(6) is proper 'when the allegations in a complaint, however true, could not raise a claim of entitlement to relief.'" *Virnich v. Vorwald*, 664 F.3d 206, 212 (7th Cir. 2011), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558

(2007). "[T]he complaint must contain allegations that 'state a claim to relief that is plausible on its face' or it is subject to dismissal under Rule 12(b)(6). *Virnich*, 664 F.3d at 212, quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). The complaint's factual allegations must be enough to raise a right to relief above the speculative level, meaning the complaint must contain allegations plausibly suggesting, not merely consistent with, an entitlement to relief. *Virnich*, 664 F.3d at 212. "A claim has facial plausibility when the plaintiff pleads 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Virnich*, 664 F.3d at 212, quoting *Iqbal*, 556 U.S. at 678.

While, in reviewing a plaintiff's claim, the court must accept the well-pleaded facts in the complaint as true and draw all reasonable inferences in the plaintiff's favor, the court is not bound to accept legal conclusions as true, and conclusory allegations merely reciting the elements of the claim are similarly not entitled to the presumption of truth. *Burger v. County of Macon*, 942 F.3d 372, 374 (7th Cir. 2019); *Virnich*, 664 F.3d at 212.

As an initial matter, the court must address Defendant's argument that Plaintiff had 180 days, not 300 days, to file his Charge of Discrimination in this matter. Because Illinois has its own anti-discrimination laws and a state agency (the IDHR) to investigate discrimination complaints, it is classified as a deferral state, and in a deferral state, a plaintiff has 300 days from the date of the alleged adverse employment practice to file a complaint with the EEOC. *Herr v. City of Chicago*, 447 F.Supp.2d 915, 918 (N.D.

Ill. 2006); 42 U.S.C. § 2000e-5(e)(1).

This 300-day period applies to claims brought under the ADA as well as under Title VII. *Herr*, 447 F.Supp.2d at 918, citing *Stepney v. Naperville Sch. Dist. 203*, 392 F.3d 236, 239 (7th Cir. 2004); see also *Monroe v. Columbia College Chicago*, 855 Fed.Appx. 284, 289 (7th Cir. Mar. 19, 2021) ("Title VII claims of race discrimination and retaliation set forth in Counts I and II of Monroe's complaint are subject in practice to a 300-day limitations period in Illinois, in view of the EEOC's work-sharing arrangement with the Illinois Department of Human Rights."); *Escobedo v. Metropolitan Water Reclamation District of Greater Chicago*, 2018 WL 4931687, at *1 (N.D. Ill. Oct. 11, 2018) ("ADA claims must be filed with the [EEOC] within 300 days after the alleged unlawful employment practice occurred.").

Alleged discriminatory acts that do not fall within the relevant 300-day period are considered untimely and are precluded from consideration by the court. *Herr*, 447 F.Supp.2d at 918.

Defendant argues that Plaintiff had 180 days to file his Charge of Discrimination with the EEOC. In support, Defendant cites to cases from the United States Court of Appeals for the Ninth Circuit and the District Court of the District of Columbia. As demonstrated above, for claims arising in Illinois, the case law in the Seventh Circuit is that under the ADA Plaintiff had to file a charge of discrimination within 300 days of the discriminatory act and any subsequent lawsuit must be filed within 90 days of receipt of a Notice of Right to Sue from the EEOC. See *Howell v. Local 773 Laborers*

International Union of North America, 2020 WL 128676, at *2 (S.D. Ill. Jan. 10, 2020). A prior version of Illinois law provided that a Charge with the IDHR must be filed within 180 days of the alleged civil rights violation, but that deadline was extended to 300 days on June 8, 2018, prior to the filing of Plaintiff's EEOC Charge. See *Howell*, 2020 WL 128676, at *2 n.1. In any event, the 300-day limitation period clearly applies to Plaintiff's case.

To bring a claim under the ADA, a plaintiff must first file a Charge alleging the unlawful employment practice with the EEOC and receive notice of right to sue. *Denson v. Village of Bridgeview*, 19 F.Supp.2d 829, 833 (N.D. Ill. 1998). Failure to file an EEOC Charge within 300 days of the last discriminatory act will result in a subsequent ADA or Title VII claim being dismissed as time-barred. See *Chaudhry v. Nucor Steel-Indiana*, 546 F.3d 832, 836-37 (7th Cir. 2008). Plaintiff's Charge of Discrimination was filed July 29, 2019. To be timely, the last discriminatory act Plaintiff complains of would have had to occur on or after October 2, 2018.

Here, it is undisputed that Plaintiff was actually terminated on August 5, 2018, and thus his ADA claims would appear to be time-barred. However, the timely filing of an administrative charge is not a jurisdictional requirement, and the 300-day statute of limitations is subject to a number of tolling mechanisms, including the discovery rule and the doctrines of equitable tolling and equitable estoppel. *Byrne*, 2019 WL 7185754, at *2; *Howell*, 2020 WL 128676, at *1.

Plaintiff, in his Responses, argues that, although he was terminated by Defendant on August 5, 2018, he did not actually know he was terminated until October 25, 2018. Thus, of the three equitable doctrines mentioned above, the most appropriately applicable is the discovery rule. The discovery rule functions to delay the initial running of the statutory limitations period, but only until the plaintiff has discovered or, by exercising reasonable diligence, should have discovered that (1) he or she has been injured, and (2) this injury has been caused by another party's conduct. *Byrne*, 2019 WL 7185754, at *2.

The parties point to competing documentation in support of their respective positions on when Plaintiff knew, or should have known, of the alleged discriminatory action taken against him. Defendant relies on Plaintiff's EEOC Charge, wherein Plaintiff plainly states that he was discharged on August 5, 2018, and that the latest date on which the discrimination took place was August 5, 2018. Although the court, as a general rule on Rule 12(b)(6) motions, may only consider the plaintiff's complaint, there is an exception which permits a court to treat as part of the pleadings documents that are referred to in the plaintiff's complaint and are central to the plaintiff's claim. *Howell*, 2020 WL 128676, at *2. Here, Plaintiff's EEOC Charge is central to his claim, was referred to in and was attached to his Complaint, and therefore will be considered. See *Howell*, 2020 WL 128676, at *2.

Plaintiff, on the other hand, relies on the Declaration of Eva Baran, the intake form, and the text messages between himself and Evan Poland, wherein Plaintiff states that he was laid off on August 5, 2018, and did not find out that he was actually terminated until October 25, 2018. These documents were not referenced in, and were not central to, Plaintiff's Complaint. However, "'[a] plaintiff need not put all of the essential facts in the complaint;' he may add them by affidavit or brief in order to defeat a motion to dismiss if the facts are consistent with the allegations of the complaint." *Help At Home, Inc. v. Medical Capital, LLC*, 260 F.3d 748, 752-53 (7th Cir. 2001), quoting *Hrubec v. National Railroad Passenger Corp.*, 981 F.2d 962, 963-64 (7th Cir. 1992).

Defendant argues that the Declaration, intake form, and the text messages should not be considered because they are inconsistent with Plaintiff's assertions in the Complaint and the EEOC Charge that he was terminated on August 5, 2018. Defendant's argument holds purchase, to a certain extent.

On the surface, Baran's Declaration that the EEOC Charge was timely because Plaintiff only learned of his termination on October 25, 2018, and the intake interview statements by Plaintiff that he did not learn of the termination until October 25, do seem to contradict or at least to be inconsistent with the Complaint's statement that Defendant discriminated against Plaintiff on August 3, 2018, and the EEOC Charge's allegation of the same.[1]

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[1]The EEOC Charge says Plaintiff was discriminated against and terminated on August 5, 2018, while the Complaint uses the August 3, 2018, date also found in the EEOC intake investigation record and Baran's Declaration. This is a minor discrepancy

The EEOC Charge contains no mention of October 25, 2018, being the date Plaintiff actually learned of his termination.

However, upon closer examination, Plaintiff's documents are not *entirely* inconsistent with the Complaint and EEOC Charge. Plaintiff's documents acknowledge that Plaintiff was discriminated against on August 5, 2018, but that he did not know he was actually terminated until October 25, 2018. The Complaint, in the narrative description section, states that, while Plaintiff was sent home for reporting safety issues and for his injury on August 3, he did not learn he had been terminated until "10/25/18[.]" Thus, there is a consistency between the facts stated in Plaintiff's exhibits and in the allegations of Plaintiff's Complaint.

While the EEOC Charge contains no mention of October 25, 2018, this is likely because Plaintiff, proceeding pro se, did not know it was relevant or at issue. At the time of the EEOC Charge, Defendant had made no argument concerning the relevance of what date the alleged discrimination occurred, or when Plaintiff learned of his termination.

The court is mindful that the pleading standards for pro se plaintiffs are considerably relaxed, even in the wake of the U.S. Supreme Court's decisions in *Twombly* and *Iqbal*. *Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014, 1027 (7th Cir. 2013). Applying that relaxed standards, the court will consider Plaintiff's exhibits.

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and of no consequence to the court's analysis.

Even considering Plaintiff's exhibits, the court finds that Plaintiff's EEOC Charge was time-barred. Though Plaintiff may be correct that he did not learn that he was actually terminated from employment until being notified as such on October 25, 2018, the time for filing his EEOC Charge of Discrimination began at the time he was "laid off" for complaining about safety issues and suffering his injury on August 5, 2018. See *Myers v. Metropolitan Water Reclamation District*, 2005 WL 991899, at *2 (N.D. Ill. Apr. 11, 2005). "A claim of discrimination accrues when the discriminatory act occurs, not when the consequences of that act become painful." *Myers*, 2005 WL 991899, at *2, citing *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981).

In other words, the 300-day limit begins to run when the employee knows he has been injured, not when he determines the injury was unlawful. *Escobedo*, 2018 WL 4931687, at *2, citing *Stepney*, 392 F.3d at 240. In Plaintiff's case, that was when he was sent home and laid off from work, not when he belatedly learned that he had been officially terminated by Defendant. See *Myers*, 2005 WL 991899, at *2.

In fact, Plaintiff's own Complaint and EEOC Charge acknowledges this, as he states the date of the discriminatory act as either August 3 or 5, 2018, when he was sent home and "discharged" for reporting safety issues and for being injured by the inhalation of noxious chemicals in his lungs. Baran's Declaration itself states that Plaintiff was laid off on August 5, 2018.

Thus, Plaintiff knew on August 5, 2018, that allegedly discriminatory and retaliatory action had been taken against him, in the form of being sent home and laid off from work by Defendant, even if he did not yet know he was officially terminated from employment.[2]

"'[W]hen the first decision is connected to and implies the second-when, in other words, a single discriminatory decision is taken, communicated, and later enforced despite pleas to relent-the time starts with the initial decision.'" *Myers*, 2005 WL 991899, at *2, quoting *Lever v. Northwestern University*, 979 F.2d 552, 556 (7th Cir. 1992). The discriminatory act claimed by Plaintiff was the one taken by Defendant in August 2018, and Plaintiff's learning of his actual termination in October 2018 simply confirmed this allegedly discriminatory act. See *Myers*, 2005 WL 991899, at *2; *Escobedo*, 2018 WL 4931687, at *2. Plaintiff's work and pay status were disrupted when he was laid off and sent home when Defendant acted in August 2018, and because he did not file his EEOC within 300 days of August 3/5, 2018, his ADA claims are time-barred. See *Myers*, 2005 WL 991899, at *2; *Escobedo*, 2018 WL 4931687, at *2.

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[2]"For employment discrimination purposes there is no distinction between termination and layoff." *Haupt v. International Harvester Co.*, 571 F.Supp. 1043, 1046 n.9 (N.D. Ill. 1983). There is often no distinction between "layoff" and "termination" in the employment context. In any event, even if in this instance there is a distinction between the two, Plaintiff did know as of August 5, 2018, that some adverse action had occurred that did not allow him to continue working after that date, and he did concede on all filings and documentation that August 5, 2018, was the latest date that any adverse action actually occurred.

The court must now determine whether Plaintiff's Complaint should be dismissed with prejudice. Again, the court is mindful of Plaintiff's pro se status, and is aware that "district courts have a special responsibility to construe pro se complaints liberally and to allow ample opportunity for amending the complaint when it appears that by so doing the pro se litigant would be able to state a meritorious claim." *Donald v. Cook County Sheriff's Department*, 95 F.3d 548, 555 (7th Cir. 1996). Even so, pro se plaintiffs are not excused from meeting the basic requirements of Federal Rule of Civil Procedure 8(a), and "a pro se complaint still must provide fair notice of the plaintiff's claims and at least suggest a plausible right to relief." *Stuckey v. Housing Authority of Cook County*, 2017 WL 11606727, at *2 (N.D. Ill. Sept. 18, 2017). Further, "a pro se complainant can plead himself out of court by pleading facts that undermine the allegations set forth in his complaint." *Henderson v. Sheahan*, 196 F.3d 839, 846 (7th Cir. 1999); *McCready v. eBay, Inc.*, 453 F.3d 882, 888 (7th Cir. 2006) ("In other words, if a plaintiff pleads facts which show he has no claim, then he has pled himself out of court."); *Peters v. Satkiewicz*, 2017 WL 2958221, at *3 (N.D. Ill. July 11, 2017).

Plaintiff has plead himself out of court in the instant case. Plaintiff's Complaint, EEOC Charge, and his own attached exhibits clearly indicate that Plaintiff was aware of the allegedly discriminatory action taken against him when he was sent home from work and laid off in August 2018. This establishes that his July 29, 2019, EEOC Charge was untimely, and thus his ADA claim must be barred as untimely. Because the court's dismissal is on limitations period grounds, "there is no 'practical distinction here

between a dismissal with prejudice and a dismissal without prejudice because, even if the court dismissed without prejudice, refiling would be futile[.]'" *Frak v. Stanley*, 2020 WL 6508987, at *3 (N.D. Ill. Nov. 5, 2020), quoting *David v. Wal-Mart Stores, Inc.*, 2016 WL 2344576, at *3 (N.D. Ill. May 4, 2016). "However, as a technical matter the [c]ourt nevertheless formally dismisses Plaintiff's claim with prejudice because any amendment" would be barred by the applicable limitations period. *Frak*, 2020 WL 6508987, at *3, citing *Rodriguez v. United States*, 286 F.3d 972, 980 (7th Cir. 2002); see also *Mull v. Abbott Laboratories*, 563 F.Supp.2d 925, 930 (N.D. Ill. 2008) (finding a discrete act of discrimination was actionable when it occurred, and the plaintiff's "failure to file an EEOC charge within 300 days of the date of this incident preclude[d] her from pursuing this claim[,]" and, for these reasons, the plaintiff's "demotion and failure-to-promote claims are time-barred, and are therefore dismissed with prejudice.").

IT IS THEREFORE ORDERED:

(1) Defendant's Motion to Dismiss (#12) is GRANTED. Plaintiff's Complaint (#1) is dismissed with prejudice.

(2) This case is terminated.

ENTERED this 28th day of November, 2022.

s/ COLIN S. BRUCE
U.S. DISTRICT JUDGE

D C

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

September 22, 2023

Before

DIANE S. SYKES, *Chief Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

No. 22-3183

ELVIN FARRIS,
Plaintiff-Appellant,

v.

VECTOR CONSTRUCTION, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Central District of Illinois.

No. 22-cv-2107

Colin S. Bruce,
Judge.

ORDER

On consideration of the petition for rehearing, all judges voted to deny rehearing. It is therefore ordered that the petition for panel rehearing is DENIED.

D

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen
United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

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ORDER

September 28, 2023

By the Court:

No. 22-3183	ELVIN FARRIS, Plaintiff - Appellant v. VECTOR CONSTRUCTION, Defendant - Appellee

Originating Case Information:

District Court No: 2:22-cv-02107-CSB-EIL
Central District of Illinois
District Judge Colin S. Bruce

Upon consideration of the **MOTION FOR CLARIFICATION**, filed on September 25, 2023, by the pro se appellant,

IT IS ORDERED that the motion for clarification is **DENIED**.

E No.22-3183

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued July 12, 2023
Decided August 1, 2023

Before

DIANE S. SYKES, Chief Judge

ILANA DIAMOND ROVNER, Circuit Judge

DIANE P. WOOD, Circuit Judge

No. 22-3183

ELVIN FARRIS,
Plaintiff-Appellant

v.

VECTOR CONSTRUCTION, INC.
Defendant-Appellee.

Appeal from the United States District Court for the Central District of Illinois

No. 22-cv-2107

Colin S. Bruce
Judge.

PETITION FOR REHEARING

The Plaintiff is asking that the panel give him the opportunity for a rehearing on his case for the following reasons:

The District Court Judge should have allowed the Plaintiff leave to amend his charge.

1. Eva Baran, with the Chicago EEOC Office, gave the plaintiff a declaration that the EEOC found the Plaintiff's charge to be timely. It was found that the EEOC should have changed the August 05, 2018, date to the October 24, 2018, date. By not allowing for the amendment to be made the District Court Judge punished the Plaintiff for the mistake made by the Chicago EEOC office. Also, if the Plaintiff would have been allowed to proceed to court the Plaintiff could have presented the court with evidence that the Chicago EEOC Office received the Plaintiff's complaint April 25, 2019, from the United States Department of Justice Civil Rights Division. This complaint was given the charge number 440-2019-04311. The July 29, 2019, date that the Plaintiff used on his charge is the date the Plaintiff had an interview with the EEOC investigator, which is a different date than when the EEOC received the complaint from the Plaintiff. This was a miscommunication that could have been cleared up if the plaintiff would have been allowed to

amend his charge. Considering the facts stated above, this would mean that the Plaintiff did in fact file the EEOC charge in a timely manner, even if the August 5, 2018, date was used.

The evidence will show that Plaintiff's charge should have had either equitable tolling, or equitable estoppel, or the relation back theory applied to the charge.

1. The Fifth Circuit primarily applies equitable tolling or estoppel when the Plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights" Coleman vs. Johnson, 184 F.3d 398, 402 (Fifth Cir. 1999), quoting Rashidi vs. AM. President Line, 96 F.3d 124, 128 (Fifth Cir. 1996). More specifically the Court has recognized three possible and non-exclusive bases for tolling the time period for filing a charge: (1) The pendency of a suit between the same parties in the wrong form; (2) Plaintiff's unawareness of the facts given rise to the claim because of the defense intentional concealment of them; (3) The EEOC's misleading the Plaintiff about the nature of his or her rights. Wilson vs. Secy, Dept. of Veteran's Affairs 65 F.3d 402, 404 (Fifth Cir. 1995). The party who invokes equitable tolling bears the burden of demonstrating that it applies in his case. Conway vs. Control Data Corp., 955 F.2d 358, 362 (Fifth Cir. 1992) The relation back theory may apply to Plaintiff's EEOC charge considering that the EEOC received Plaintiff's charge information and timestamped the April 25, 2019, date. Such information is sufficient to constitute an administrative charge. The relation back theory has often been used in amended pleadings in a lawsuit. Price vs. Southwestern Bell Telephone Company 687 F.2d 74 (Fifth Cir. 1982) (Title VII); 29C.F.R.1601.12; Brammer vs. Martinaire, Inc., 838 S.W.2d 844.

2. The Defendant mislead the Plaintiff that his layoff was to be temporary. The Defendant's branch manager explained to the Plaintiff that he would be laid off and would come back to work when more work was available. Some courts consider the text messages sent as a written contract between the parties involved in the conversation. It was not until October 24, 2018, that the Plaintiff learned that his employer of twenty-two years had made the decision to terminate his employment, this communication happened when he attempted to take a loan out of his 401K. This Panel mistakenly stated that a Vector Employee had made the Plaintiff aware of his termination, the evidence will show that a representative from R. L. Billings told the Plaintiff he had been terminated. On October 10, 2018, the Defendants were made aware of the Plaintiff's Illinois Workman Compensation Claim with the commission. Fourteen days later is when they informed the 401K administrator that the Plaintiff's employment had been terminated. The Defendant's had an opportunity to share this information with the Plaintiff in August and September of 2018 when the defendant were in contact with the Plaintiff, evidence will show the defendants have never informed the plaintiff of his termination.

3. This Panel has stated that a claim procures when a Plaintiff "knows or should know" that he has been injured. The key words the Plaintiff would like to point out to this Panel is both "knows and know" this shows that there must be a clear understanding of what the injury is to the employee. Evidence will show the Plaintiff knew he was injured by being laid-off, this meant that the Plaintiff would not keep working on the job site. The Plaintiff could file for unemployment, as he was told to do by his branch manager, Devon Simpson. This Panel also stated that the injury date was on August 5, 2018 "when Farris had awakened to he had been illegally removed from work, the evidence will show that the Plaintiff awakened to the wrongful lay off on August 3, 2018. Evidence will show that the Plaintiff asked to leave on August 5, 2018, he also asked for

a phone conference August 5, 2018 to ask why he was the one being laid off. The branch manager sent the Plaintiff a text stating he was being put on lay-off until more work became available. The evidence will show that the Plaintiff could not have known of his termination until October that his injury was the termination of his employment. This Panel referenced the Draper vs. Martin case, in that case the employees were all given written notices that their positions were being targeted for abolishment and they were being laid off on June 30, 2004. Plaintiff was never given any type of notice that his employment was in jeopardy of ending with Vector Construction. The Panel also stated the reasons why Plaintiff could not use the discovery rule. The Plaintiff believes his evidence shows why he could not have known sooner that Vector Construction had terminated his employment cause the Plaintiff was only told he was being laid off and we would be called back to work when more work became available.

The Plaintiff's October notice was a separate and distinct adverse act that was being investigated by the EEOC investigator.

1. There is a meaningful difference between the Plaintiff's lay-off and later termination when it comes to Vector's alleged motive. The first injury the Plaintiff awaked too was the wrongful lay-off and this decision was made by Danny Meinders, the on-site foreman. This decision was made on August 3, 2018. Danny Meinders made this decision after the Plaintiff reported him to the safety supervisor, in retaliation. The second injury the Plaintiff awakened too happened when his branch manager, Devin Simpson, agreed with Danny Meinders to lay him off on August 3, 2018 and refused to have a telephone conference on August 5, 2018. The third injury the Plaintiff awakened too was his termination notice that he received in Octobert from the Winnipeg office through R. L. Billings.

2. On January 24, 2019, Devon Simpson admitted that the Plaintiff was not working and was terminated when the Plaintiff tried to sue Vector. Devon Simpson also admitted at this hearing that the Plaintiff was laid off due to issues within the crew and that the Plaintiff was not out of work due to any fault of his own. The only evidence that the Plaintiff has to affirm these conversations is a text message that was sent immediately after the hearing to Devon Simpson.

3. Also, in Vector's policy manual for employees in section 210 it states, "while the employee is on an approved leave of absence from Vector Construction, Inc. the employee is still considered an employee and should not seek an alternative job away from Vector Construction, Inc. unless prior authorization has been granted by management."

4. There is a clear difference in the use of lay-off and termination and the evidence show that in the beginning Vector's motive was a temporary lay-off that later turned into a termination. The Plaintiff could not awaken to the termination any sooner than the October date. The Panel used Draper vs. Martin, however, in that case the employees were given notice that their position was up for abolishment, which was not the case with the Plaintiff who was told by Devon Simpson that he would be called back to work at some point, describing a lay-off. The Panel stated Farris was injured when Vector sent him home and never called him back and not in October when he learned he had been fired. The Plaintiff would like to make the argument that the Panel's own statement shows two separate acts. The Plaintiff was given notice that he was being laid off and sent home and then it was later decided to not bring the Plaintiff back to work as the plaintiff was told and agreed to. Evidence shows that the Plaintiff was told he would be called back to work when more work became available, so the statue of limitations for the

wrongful termination should not have started until the Plaintiff was giving notice about his termination which was in October. The panel is correct the Plaintiff was injured when Devon Simpson laid him off I believe the panel overlooked the fact the Plaintiff was told he would be called back to work when more work became available. The panel simply stated that the Plaintiff was laid off until futhet notice which is misleading and not the truth. The Plaintiff was then injured again when Keith Stewart decided the Plaintiff would never be called back.

5. Since Devon Simpson told the Plaintiff he would be called back when more work became available the clock shouldn't have stated until the Plaintiff was made aware that more work had became available and the Plaintiff wasn't called back or Vector Construction made the decision to never call the Plaintiff back and the Plaintiff was giving notice of that decision. The panel is looking at the lay off and later termination as a single thought when it was two separate thoughts with seperated consequences. Vector Construction had to make the decision not to call the Plaintiff back first so the panel is correct the Plaintiff was injured when Vector Construction laid him off and never called him back. I believe the panel is overlooking that Vector Construction had to first make the decision to never call the Plaintiff back then the decision had to become known to the Plaintiff Cada v. Baxter Health Corp., 920 F.2d 446, 450(7th Cir.1990)).

6. This panel misunderstood the characterization of the Plaintiff lay off and later termination by calling it a discriminatory layoff and discharge. In Draper, 664 F.3d at 1115 the case this panel cited also speaks of a discriminatory discharge. Draper those not fit this situation nor do calling what happened to the Plaintiff after 22 years of faithful employment a discriminatory layoff and discharge. The evidence will show clearly and even the Plaintiff EEOC charge will show the same that the Plaintiff was retaliated against for engaging in protected activity in violation of the Americans with Disabilities Act of 1990, as amended by being discharged. Again in Draper all affected employees were given notices by way of a letters. Saying Draper fits this case where an employee was allowed to do work his employer knew he wasn't medically cleared to do. Then refuse the same employee the proper safety equipment to do the job and later knowing how severely damaged the employee lungs was cut off the employees insurance and deny the employee's workers compensation claim only shows a servere disconnect from the truth.

The October notice of Plaintiff's wrongful termination is not outside of the scope of the EEOC charge.

1. In the EEOC charge it states the Plaintiff was discharged on or about August 5, 2018. This was the last date of employment for the Plaintiff in Rhode Island only cause the Plaintiff started driving to Sioux City Iowa that day.The Plaintiff then drove from Providence Rhode Island to Sioux City Iowa so the actual last day of employment on paper is the day the Plaintiff made it to Sioux City Iowa. The Plaintiff has recently spoken to the EEOC investigator and learned that the EEOC was investigating the discharge on August 5, 2018 as the termination date of the Plaintiff's employment that the Plaintiff wasn't made aware of until October of 2018. The Panel sited Riley vs. City of Kokmo, in that case it was stated "a Plaintiff is barred from raising a claim in District Court that has not been raised in his or her EEOC charge unless the claim is reasonably related to one of the EEOC charges and can be expected to have develop from an investigation into charges actually raised" Whitaker v Milwaukee City., Wis., 772 F.3d 802, 812 (7th Cir. 2014) (quoting Green v Nat'l Steel Corp., Midwest Div., 197 F.3d 894, 898 (7th Cir. 1999)). The Plaintiff wrongfully termination charge is directly related to the other charges that makes up the Plaintiff EEOC charges of failure to accommodate and discrimination. The EEOC charge also

states the Plaintiff has been discriminated and retaliated against for engaging in protected activity. The Plaintiff believes this shows the EEOC investigator was investigating the charge as retaliation harrassment and ongoing acts.

The Plaintiff believes there has been too many errors made and there is too much confusion around the dates for the evidence to be weighed in any setting outside of a trail.

1. The best setting for this claim is a trail so all the evidence can be presented. It's clear the Plaintiff was told by his branch manager he was being laid of and would be called back to work when more work became available. It's clear that Vector Construction backed dated paper work in the Plaintiff file to say the Plaintiff was terminated on August 5, 2018. The Plaintiff can not stress this point enough August 5, 2018 was on a SUNDAY. The Plaintiff was working Monday to Friday on the Providence Rhode Island project. Keith Stewart reported to the Peoria Osha Office that the Plaintiff was terminated on a Sunday after 22 years for performance issues. The Plaintiff was never written up on the Providence Rhode Island project and evidence will show the Plaintiff was on the job site before his Forman even got out of bed.

2. This court has warned against weighing evidence at summary judgment, Kodish v. Oakbrook Terrace Fire Prot. Dist., 604 F.34 490,507 (7th Cir. 2010)).The Plaintiff feels this is the case here the evidence surrounding this charge needs to be weighed at a trail. This panel is focused on the August 5, 2018 date and over looking the declaration of the EEOC investigator. This panel is overlooking the fact the evidence clearly shows that the Plaintiff was told he was being laid off and the Plaintiff was mislead by the defendants. The evidence also shows that the information the plaintiff received in October is not the information the Plaintiff was told. Vector Construction crime here is completely obvious and Devon Simpson admitted as much at the Plaintiff hearing cause Keith Stewart was to scared to answer the phone. There is to much evidence for the Plaintiff to not use the discovery rule. The evidence shows the Plaintiff actions around what the Plaintiff was told the evidence speaks for itself. The Plaintiff asked when he would be returning back to work why isn't this enough to show due diligence? Devon Simpson said he didn't know how many people he would need for the project in December not you have been terminated. When the Plaintiff asked his safety supervisor how do his work injury affects his unemployment he was told to still file not you have been terminated. When talking to Keith Stewart in September 2018 Keith Stewart text he called the clinic not you was terminated. The evidence shows the Plaintiff did do his due diligence why would the Plaintiff be asking about if his position was terminated or have evidence that he did due diligence by asking if the Plaintiff was terminated? The evidence shows the Plaintiff did do his due diligence and could not have known Keith Stewart would terminate his employment.

3. Section 210 of the Vector Construction manual states employee on leave from Vector Construction are still Vector Construction employees and should not seek employment outside Vector Construction without prior authorization from Vector Construction. Knowing the Plaintiff was told he was being laid off by a text that the Plaintiff text back okay to how is it the last day that the Plaintiff was a Vector Construction employee August 5 2018? The Plaintiff was a Vector Construction employee until he was told in October 2018 by Evan Poland that the Winnipeg Vector Construction office was stating he was terminated. This panel stated the Plaintiff knew or should have known of his injury on Sunday August 5 2018 and that there was no meaningful difference between the lay off and later termination of the Plaintiff 22 years of employment. This panel based this decision that there was no meaningful difference off the evidence ,filings

and arguments that explained and showed Vector Construction alleged motive. The Plaintiff would have to argue that these statements makes the case for a trial so all the evidence can be presented. The evidence will show the Plaintiff had property that belonged to Vector Construction and was never asked to turn the property back in. The property the Plaintiff had was the key to Vector Construction locks..The evidence will also show the Plaintiff was told to take his tools and ppe which is Vector policy so the employee can have the equipment for the next job.

4. The lower court was made aware of the mental health issues that the Plaintiff is dealing with. Two mental health experts recommend that the Plaintiff have help with this case and describe why. The lower court judge found the Plaintiff competent to handle the proceedings on his own. The Plaintiff mental health has played a major role throughout this process and the Plaintiff asks the court to take this information in consideration.

The Plaintiff respectfully asks the Panel to consider this information and reverse this decision and allow the Plaintiff the time to move forward in seeking justice for his injury.

Plaintiff/Elvin M. Farris Date