UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

Stephanie Chappell,

Plaintiff,

v.

Butterfield-Odin School District #836; Education Minnesota; Butterfield-Odin Education Association; American Federation of Teachers; AFL-CIO; Lisa Shellum; and Vonda Rinne,

Defendants.

Court File No. 08-851 PJS/RLE

PLAINTIFF'S MEMORANDUM OF LAW OPPOSING DISTRICT DEFENDANT'S FED. R. CIV. P. 12(B)(6) MOTION TO DISMISS

INTRODUCTION

Acting pro-se, the Plaintiff filed a Complaint against the Butterfield-Odin School District #836 and others, alleging violations of the Americans with Disabilities Act, the Minnesota Human Rights Act and the Rehabilitation Act. The Complaint alleges that she was subjected to different terms and conditions of -- and separated from -- employment because she suffers from epilepsy. Plaintiff's complaint also alleges a claim for retaliation.

Defendants Butterfield-Odin School District #836, Lisa Shellum and Vonda Rinne, have filed a motion to dismiss the complaint under Fed. R. Civ. Proc.

12(b)(6) for failure to state a claim upon which relief can be granted, arguing that her claims are barred by a release of claims that she signed; the MHRA claim is time-barred; her ADA claim is premature; and that the individual defendants cannot be sued for discrimination under the MHRA, ADA or Rehabilitation Act. The defendant also argues that counts 3, 4 and 5 should be dismissed because they duplicate the Plaintiff's other claims.

ARGUMENT

On a motion to dismiss for failure to state a claim upon which relief may be granted, under Fed. R. Civ. P. 12(b)(6), the court takes as true all of the allegations in the Complaint. Westcott v. Omaha, 901 F.2d 1486, 1488 (8th Cir.1990); In re Milk Products Antitrust Litigation, 84 F. Supp. 2d 1016, 1019-20 (D.Minn.1997); Radisson Hotels International, Inc. v. Westin Hotel Company, 931 F. Supp. 638 (D. Minn. 1996); Midwestern Machinery v. Northwest Airlines, Inc., 167 F. 3d 439, 441 (8th Cir. 1999); Davis v. Hall, 992 F. 2d 151, 152 (8th Cir. 1993). The court "may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 (1984) *citing* Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2 L. Ed. 2d 80 (1957); *accord*: Morton v. Becker, 793 F. 2d. 185, 187 (8th Cir. 1986.) In making this

determination, all allegations in the Complaint must be construed in the light most favorable to the plaintiff, Mutual Creamery Ins. Co. v. Iowa Nat. Mut. Ins. Co., 427 F.2d 504 (8th Cir. 1970; Burton v. Richmond, 276 F. 3d 973, 975 (8th Cir. 2002); and all reasonable inferences arising from the allegations must be made in the plaintiff's favor. Morton v. Becker, 793 F.2d 185, 187 (8th Cir.1986); Fusco v. Xerox Corp., 676 F. 2d 332, 334 (8th Cir. 1982).

Plaintiffs' complaint states claims for which relief can be granted and therefore should not be dismissed.

I. PLAINTIFF'S CLAIMS ARE NOT BARRED BY THE RELEASE OF CLAIMS BECAUSE IT WAS SIGNED UNDER DURESS AND WITHOUT ADEQUATE CONSIDERATION.

A. The release is not presumptively valid.

Defendant correctly observes that settlement of disputes without resort to litigation is generally favored in the law. The cases cited by the defendant, however, do not establish a legal presumption that all settlement agreements are presumed to have been entered into knowingly and voluntarily. Petrovic v. Amoco Oil Co. 200 F. 3d 1140 (8th Cir. 1999) involved a class action settlement negotiated by legal counsel for the parties. In Eggleston v. Keller Drug Co., 120 N.W. 2d 305 (Minn. 1963) and Kujawski v. U.S., 2001 WL 893918, *6 (D. Minn. 2001), also cited by

the defendant, the parties to the settlement were represented by independent counsel. In the final case cited by the defendant for the proposition that settlement agreements are presumed to be knowing and voluntary, Somora v. Marriott Corp., 812 F. Supp. 917 (D. Minn. 1993), the court stated the rule as follows:

> [W]hen a plaintiff is represented by counsel who actively negotiate the release, plaintiff must be found to have executed the release or settlement voluntarily and knowingly, unless vitiating circumstances such as fraud or duress existed to nullify plaintiff's ascent to the settlement.

Ibid. at 923-24 (*quoting* Riley v. American Family Mut. Ins. Co., 881 F. 2d 368, 371 (7th Cir. 1989.) In Somora, as in all the other cases cited by the defendant, the presumption was held to apply only when the parties were represented by counsel who actively negotiated the release.

In the case at bar, the plaintiff was not represented by counsel at the time she signed the release. Accordingly, the presumption does not apply in this case.

B. The release is invalid because it was signed under duress.

Although the legal presumption does not apply in this case, it is still generally true that settlement agreements containing releases are usually enforced if they are shown to have been entered into knowingly and voluntarily. Somora v. Marriott Corp., 812 F. Supp. 917, 921-23 (D. Minn. 1993); Kujawski v. U.S., 2001 WL 893918, *6

(D. Minn. 2001). In applying the "knowing and voluntary" standard, "courts consider several factors as indications of a valid release of claims: (1) the language of the release; (2) the presence of legal counsel; and (3) the presence of exceptional circumstances, such as fraud, duress, or other inequitable conduct." Somora, *supra*; Pilon v. University of Minnesota, 710 F. 2d 466, 467-68 (8th Cir. 1983); Riley v. American Family Mut. Ins. Co., 881 F. 2d 368, 371 (7th Cir. 1989); Sorenson v. Coast-to-Coast Stores (Central Organization), Inc., 353 N.W. 2d 666, 669-70 (Minn. App. 1984.) In addition, "[t]he court should also consider whether the release was supported by adequate consideration...and whether the party challenging validity 'was permitted to change language in the release.'" Somora, *supra, quoting* Schmidt v. Smith, 216 N.W. 2d 669, 678-74 (Minn. 1974); Sorenson, *supra* at 670.

Plaintiff's Complaint specifically alleges that she resigned from her position under duress. Complaint, ¶28. The defendant may not believe that she did, and the court might not be convinced, at this stage of the proceeding, that she did. A complaint, however, "should not be dismissed merely because the court doubts that a plaintiff will be able to prove all of the necessary factual allegations." Fusco v. Xerox Corp., 676 F. 2d 332, 334 (8th Cir. 1982), *quoting* Jackson Sawmill Co. v. United States, 580 F. 2d 302, 306 (8th Cir. 1978), *cert. denied* 439 U.S. 1070, 99 S.Ct. 839, 59 L. Ed. 2d 35 (1979).

The plaintiffs in Somora and the other cases cited by the defendant were represented by counsel at the time they signed the release, the terms of the release were negotiated by counsel, and there was no allegation of duress. The situation in the case at bar is different because here the plaintiff was not represented by counsel at the time of the release, the terms of the release were not negotiated, the plaintiff was not permitted to change the language in the release, and the plaintiff has specifically alleged in her complaint that the release was signed under duress. Unlike those cases, in this case the plaintiff's Complaint raises a genuine issue of fact as to whether the Separation Agreement containing the putative "release" was entered into voluntarily or not.

C. The release is invalid because it is not supported by adequate consideration.

As noted above, in addition to duress, "[t]he court should also consider whether the release was supported by adequate consideration...." Somora, *supra, quoting* Schmidt v. Smith, 216 N.W. 2d 669, 678-74 (Minn. 1974); Sorenson, *supra* at 670. Although not specifically alleged in her Complaint, it is possible for the Plaintiff to amend her Complaint to allege facts which, if believed, would show that the Separation Agreement was not supported by adequate consideration.

Plaintiff has the right to amend her complaint to allege additional facts relevant to the issues whether the Separation Agreement was entered into voluntarily or not, and whether it was supported by adequate consideration or not. Fed. R. Civ. Proc. 15(a). It is premature to dismiss the Complaint at this time. *cf.* Hishon v. King & Spalding, 467 U.S. at 73 (court "may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.")

II. PLAINTIFF HAS EXHAUSTED HER ADMINISTRATIVE REMEDIES

Defendant concedes that Plaintiff was not required to exhaust administrative remedies before filing her Rehabilitation Act 504 claim. Miener v. Missouri, 673 F. 2d 969 (8th Cir. 1982). Nor does defendant argue that exhaustion of administrative remedies is a prerequisite to filing an MHRA claim. Defendant's sole contention, then, is that Plaintiff's ADA claim is barred because she allegedly failed to exhaust administrative remedies. Specifically, defendant contends that Plaintiff's ADA claim is premature because she failed to obtain a right-to-sue letter.

Defendant does not contend that Plaintiff failed to a charge with the EEOC, as alleged in the Complaint. Rather, the sole basis for the defendant's argument on this point is that the Plaintiff did not receive a right-to-sue letter from the relevant federal

agency, in this case, the United States Department of Justice. 29 C.F.R. §1640.7(a)(2).

Preliminarily, it should be noted that exhaustion of administrative remedies is not a jurisdictional prerequisite to filing a claim in federal court for violations of the ADA. *See* Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393, 102 S. Ct. 1127, 71 L.Ed. 2d 234 (1982)("filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to a suit in federal court....")[1] More to the point:

> Where a plaintiff fails to completely exhaust her administrative remedies prior to filing suit, but exhausts them after filing and before dismissal, the Court should excuse the plaintiff's prior failure to exhaust.

Holmes v. PHI Service Co., 437 F. Supp. 2d 110 (D.D.C. 2006); *see also* Williams v. Washington Metro. Area Transit Auth., 721 F. 2d 1412, 1418 n. 12 (D.C. Cir. 1983)("[r]eceipt of a right-to-sue notice during the pendency of the Title VII action cures the defect caused by the failure to receive a right-to-sue notice before filing a Title VII claim in federal court"); *accord* Perry v. Beggs, 581 F. Supp. 815, 816 (D.D.C. 1983).

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1 Only where "a statute ... contain[s] sweeping and direct statutory language indicating that there is no federal jurisdiction prior to exhaustion" may courts conclude that a particular exhaustion requirement is jurisdictional. Weinberger v. Salfi, 422 U.S. 749, 757, 95 S. Ct. 2457, 45 L. Ed. 2d 522 (1975). *Compare* Aubaugh v. Y & H Corp., ___ U.S. ___, 126 S. Ct. 1235, 163 L.Ed. 2d 1097 (2006)("when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.")

The Eighth Circuit has adopted this rule. Jones v. American State Bank, 857 F. 2d 494, 499-500 (8th Cir. 1988)("We hold that receipt of a right-to-sue notice is a condition precedent to a filing of a Title VII claim, curable after the action has commenced.")

In the case at bar, the Plaintiff intends to file an amended Complaint alleging the issuance and receipt of a right-to-sue letter by the U.S. Department of Justice (the first one mailed on June 6, 2008; re-issued on July 24, 2008.) Upon doing so, the Plaintiff will have cured any defect allegedly caused by her commencement of suit after filing charges with the appropriate federal agency but before receiving a right-to-sue letter. *Ibid*. The Complaint, therefore, should not be dismissed under Rule 12(b)(6) for failure to exhaust administrative remedies.

III. PLAINTIFF'S MHRA CLAIM SHOULD NOT BE BARRED BY HER FAILURE TO BRING THIS ACTION WITHIN 45 DAYS AFTER RECEIPT OF NOTICE FROM THE COMMISSIONER OF HUMAN RIGHTS.

Defendant correctly observes that Minn. Stat. 363A.33, subd. 1(2) permits a plaintiff to bring a civil action "within 45 days after receipt of notice that the commissioner...has decided not to reopen [the] dismissed case" and that "receipt of notice is presumed to be five days from the date of service by mail of the written

notice." Since the MDHR notice declining to reopen her case was mailed on February 1, 2008, the defendant is correct that the plaintiff is presumed to have received the Commissioner's notice on February 6, 2008. Minn. R. Civ. Proc. 6.01 provides that when the last day of a period of time prescribed by statute for filing a claim falls on a Saturday or Sunday, "the period runs until the end of the next day that is not one of the aforementioned days." 45 days from February 6, 2008 was March 22, 2008, which was a Saturday. Accordingly, plaintiff was required to commence her action by the end of the day on the following Monday, March 24, 2008.

Defendant acknowledges that the complaint was timely filed, but argues that under the Minnesota Rules of Civil Procedure, the portions of the Complaint alleging violations of the Minnesota Human Rights Act were timely only if they were, in addition, actually served on the defendant within the 45-day period, as well.

It is true that, for purposes of the MHRA, to "bring a civil action" means to "commence a civil action" in the manner provided by Minn. R. Civ. Proc. 3.01. Ochs v. Streater, Inc., 568 N.W. 2d 858, 859-60 (Minn. App. 1997); McKenzie v. Lunds, Inc., 63 F. Supp. 2d 986, 1002 (D. Minn. 2999). It is also true, as the defendant argues, that service by mail is complete on the date of acknowledgement

of service. Minn. R. Civ. Proc. 3.01(b). The full text of Minn. R. Civ. Proc. 3.01 is as follows:

> A civil action is commenced against each defendant:
> (a) when the summons is served upon that defendant, or
> (b) at the date of acknowledgement of service if service is made by mail, or
> (c) when the summons is delivered to the sheriff in the county where the defendant resides for service; but such delivery shall be ineffectual unless within 60 days thereafter the summons is actually served on that defendant or the first publication thereof is made.

Although service on the defendants was technically untimely, the 45-day statute of limitations is equitably tolled in appropriate cases. Anderson v. Unisys Corp., 47 F. 3d 302, 305-6 (8th Cir. 1995). Equitable tolling "is premised on the plaintiff's excusable neglect, which...may not be attributable to the defendant." *Ibid*. at 306.

The doctrine of equitable tolling is properly applied when the circumstances leading to the delay were outside of the plaintiff's control. Shempert v. Harwick Chem. Corp., 151 F. 3d 793, 798 (8th Cir. 1998).

In the case at bar, the Plaintiff filed a motion for leave to proceed *in forma pauperis* at the same time she filed her complaint in the federal district court, alleging, *inter alia*, that she was unable to afford the costs of service of process. Pursuant to the Equal Access to Justice Act, the court granted her motion by an

Order issued on March 28, 2008, four days after the 45-day period had expired. On April 28, 2008 the court issued an Order directing the Marshall to serve process on the defendants. Even before that Order was issued, the Plaintiff executed and delivered to the U.S. Marshal's Service, on April 10, 2008, the necessary Marshal Service Forms, together with instructions for serving the defendants personally. Rather than serve the defendants personally, the Marshal's Service, however, elected to mail the defendants forms requesting acknowledgment of service, which they did on May 5, 2008.

Plaintiff's conduct was reasonably diligent under the circumstances. She timely filed her complaint and timely filed the papers necessary to request the court to issue an order waiving the cost of service of process on the grounds of indigency. She provided the necessary forms to the Marshal Service for service promptly upon her receipt of them from the court. Her initial filing was timely, and the delay between her filing of a request for an Order directing service by the Marshal Service and the defendants' actual receipt of service was not due to any conduct on her part, certainly not any conduct taken in "bad faith." *cf.* Koss v. Young Men's Christian Association of Metropolitan Minneapolis, 504 F. Supp. 2d 658 (D. Minn. 2007); Pecoraro v. Diocese of Rapid City, 435 F. 3d 870, 875 (8th Cir. 2006.)

Equitable tolling is inappropriate "if the prejudice to the defendant outweighs

the equities in favor of allowing the claim to proceed." Koss, *supra* at 662; *see also* Pecoraro, *supra* at 875; Ochs, *supra*. The defendant has not alleged or shown any prejudice caused by the brief delay between the time the plaintiff filed her complaint and the time it was served, a period of 42 days. Since the only kind of prejudice relevant to equitable tolling is a change in position "that would not have occurred had the plaintiff not delayed," Koss, *supra* (*quoting* Land Grantors in Henderson, Union and Webster Counties v. United States, 64 Fed. Cl. 661, 716 (Fed. Cl. 2005), any prejudice to the defendant, or any of them, is not readily apparent.

The doctrine of equitable tolling applies to this case. Therefore, Plaintiff's MHRA claim should not be dismissed on the grounds that it was not served within 45 days.

IV. PLAINTIFF'S CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS SHELLUM AND RINNE SHOULD NOT BE DISMISSED.

Plaintiff does not dispute the accuracy of the defendant's citations in support of the proposition that individuals generally cannot be sued for violations of the ADA, Rehabilitation Act or the MHRA in the absence of an allegation of aiding or abetting. *See* Lenhardt v. Basic Institute of Technology, Inc**.,** 55 F.3d 377 (8th Cir.

1995.) The claim should not be dismissed if the Plaintiff amends it to make a proper allegation of aiding and abetting.

Plaintiff does not agree, however, that in the absence of an allegation of aiding and abetting, individuals cannot be sued for retaliation. Unlike Section 363A.08, which by its terms applies only to employers[2], employment agencies and labor organizations, Minn. Stat. §363A.15, the statute relating to retaliation, has expressly been made applicable to individuals, as well as employers:

> It is an unfair discriminatory practice for any ***individual*** who participated in the alleged discrimination as a perpetrator, employer, labor organization, employment agency, public accommodation, public service, educational institution, or owner, lessor, lessee, sublessee, assignee or managing agent of any real property, or any real estate broker, real estate salesperson, or employee or agent thereof to intentionally engage in any reprisal against any person....

(emphasis added.)

V. COUNTS 3, 4 AND 5 SHOULD NOT BE DISMISSED.

Defendant argues, in essence, that counts 3, 4 and 5 of the Complaint should be dismissed because they allege violations of the same laws that are cited in Counts 1 and 2.

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2 Minn. Stat. 363A.03 defines an "employer" as "a person who has one or more employees."

It is true that the Civil Rights Acts of 1964 and 1991 do not provide additional remedies for disability discrimination that are not included in the ADA or the Rehabilitation Act. Counts 3, 4 and 5 set forth three different theories of liability under these laws -- discriminatory motive; discriminatory intent; and disparate impact. While there is no legal requirement that these be enumerated in separate counts, there is also no legal requirement that they cannot be.

The Federal Rules of Civil Procedure do not require a plaintiff to set out all of her claims under a particular statute in one and only one count of her complaint. Rather, Fed. R. Civ. Proc. 8(d)(2) specifically allows the use of more than one count to describe different theories of relief:

> A party may set out two or more statements of a claim or defense alternatively or hypothetically, either in a single count...or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

CONCLUSION

Plaintiff's claims are not barred by the release of claims she signed. The Complaint alleges that she resigned under duress. In addition, although not alleged in the Complaint, Plaintiff intends to amend her complaint to set forth allegations that she was not represented by counsel at the time; that she was not permitted to

alter the language of the release; and that the release was not supported by adequate consideration. As such, the release was not enforceable against her.

Plaintiff's ADA claim is not premature. Although she had not received a right-to-sue letter at the time she filed the Complaint, her subsequent receipt of one -- which she attends to set forth in an amended complaint -- cured that defect.

Plaintiff's MHRA claim is not defeated by the fact that it was filed, but not served, within 45 days of her receipt of a right-to-sue letter from the Minnesota Department of Human Rights. Plaintiff was reasonably diligent in effecting service under the circumstances and the defendant was not prejudiced by the delay between the time of filing and the time service was effected by the U.S. Marshal's Service. Accordingly, the doctrine of equitable tolling applies here.

Plaintiff's claims against the individual defendants under the MHRA should not be dismissed if the Complaint is amended to allege aiding and abetting. Plaintiff's claims against the individual defendants for retaliation should not be dismissed.

Fed. R. Civ. Proc. 8 allows a plaintiff to plead alternative theories of liability or relief in either the same count or in separate counts. Therefore, Counts 3, 4 and 5 of the Complaint should not be dismissed.

For all of the foregoing reasons, the court should deny the defendant's

motion to dismiss the Complaint under Fed. R. Civ. Proc. 12(b)(6).

Dated: August 18, 2008

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