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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LORI LYONS, **PLAINTIFF,** **v.** **JANET NAPOLITANO, SECRETARY, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, JOHN DOES 1-10, XYZ CORP. 1-10,** **DEFENDANTS.**	HON. ESTHER SALAS *Civil Action No.* 12-2913 (ES) (CLW)

PLAINTIFF'S BRIEF IN OPPOSITION TO
DEFENDANTS' PARTIAL MOTION TO DISMISS

On the Brief:

Ty Hyderally, Esq.
Francine Foner, Esq.

Plaintiff, Lori Lyons, respectfully submits this brief in opposition to Defendants' motion to dismiss the Complaint in part for failure to state a claim.

PRELIMINARY STATEMENT

Plaintiff's belated contact of the EEO counselor with regard to her October 2005 claim of discrimination is not a jurisdictional bar to inclusion of that claim in her federal complaint. Exhaustion of administrative remedies is prudential, not jurisdictional, and dismissal of Plaintiff's October 2005 claim is not required because Plaintiff was not required to file a separate administrative complaint for her second charge of discrimination. In addition, principles of equitable tolling permit inclusion of Plaintiff's October 2005 claim in her federal complaint.

STATEMENT OF FACTS

Plaintiff incorporates Defendants' Statement of Facts, with the following additions: Both the April 2005 claim and the October 2005 claim arose out of the same discriminatory methodology selected by TSA, which had a disparate impact of discriminating against Plaintiff and disparately treating her based on her gender. (Complaint, ¶¶ 27-33). In her determination of February 6, 2007, Chrystal R. Young, Manager, Formal Complaint Division of the Office of Civil Rights, stated that "[a] thorough review has been conducted of your client's formal discrimination complaint, the request to amend, and the EEO Counselor's report. The matter raised in your client's request to amend, the October 2005 bid process, is like or related to the matter previously raised in her complaint. Accordingly, this complaint is amended to include the October 2005 bid process."

(Declaration of Raymond A. Desmone , submitted by Defendants in support of their Motion to Dismiss Plaintiff's Complaint in Part ("Desmone Dec."), Ex. B, page 1).

LEGAL STANDARDS: MOTION TO DISMISS

In determining a motion to dismiss, the court should view the record in favor of the non-moving party. *Lexington Nat'l Ins. Corp. v. Ranger Ins. Co*., 326 F.3d 416 (3rd Cir. 2003); *Baldassare v. New Jersey*, 250 F.3d 188, 191 n. 1 (3d Cir. 2001) (citing *Fogarty v. Boles*, 121 F.3d 886, 887 (3d Cir. 1997); *Azzaro v. County of Allegheny*, 110 F.3d 968, 970 (3d Cir. 1997) (en banc)). Thus, all reasonable inferences should be drawn in favor of the plaintiff. *Persico v. City of Jersey City*, 2003 U.S. App. LEXIS 8101 (3d Cir. Apr. 29, 2003). This is so because if a motion to dismiss is granted, it would deprive plaintiff to be allowed to offer evidence to support his or her claims. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)); *In re Burlington Coat Factory Sec. Litig*., 114 F.3d 1410, 1420 (3d Cir. 1997) (*citing Bartholomew v. Fischl*, 782 F.2d 1148, 1152 (3d Cir. 1986)). Since this is a preliminary stage of the litigation, the Court should not concern itself with the ability of plaintiff to prove any allegation contained in the Complaint but rather assume that all such allegations are true. *Somers Const. Co. v. Board of Educ*., 198 F. Supp. 732, 734 (D.N.J. 1961). Thus, "A motion to dismiss pursuant to Rule 12(b)(6) may be granted only if, accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief." *See Maio v. Aetna, Inc*., 221 F.3d 472, 482 (3d Cir. 2000). Based upon such a standard, Defendants' motion to dismiss must fail.

ARGUMENT

I. EXHAUSTION OF ADMINISTRATIVE REMEDIES DOES NOT REQUIRE DISMISSAL OF PLAINTIFF'S OCTOBER 2005 CLAIM, AS IT COULD REASONABLY BE EXPECTED TO GROW OUT OF THE INITIAL CHARGE OF DISCRIMINATION

The Third Circuit recognizes an exception to the requirement of exhaustion of administrative remedies when the later charge of discrimination "can reasonably be expected to grow out of the initial charge of discrimination." *Hill v. United States Gen. Servs. Admin*., No. 05-2092, 2008 WL 4371761, at *5 (D.N.J. Sept. 17, 2008) (citing *Ostapowicz v. Johnson*, 541 F.2d 394, 398-99 (3d Cir. 1976). Where subsequent alleged acts of discrimination "occur during the pendency of the case which are fairly within the scope of an EEOC complaint or the investigation growing out of that complaint" then plaintiff "has satisfied the administrative prerequisites to bring suit in federal court" on those new acts. *Id.*, citing *Parsons v. Philadelphia Coordinating Office of Drug & Abuse Programs*, 822 F. Supp. 1181, 1184 (E.D. Pa 1993) (citing *Waiters v. Parsons*, 729 F.2d 233, 237 (3d Cir. 1984); *Ostapowicz*, 541 F.2d at 398-99)).

The discriminatory acts upon which Plaintiff's October 2005 claim are based occurred during the pendency of the case and were fairly within the scope of the initial EEOC complaint. As the investigation's determination expressly stated, "[a] thorough review has been conducted of your client's formal discrimination complaint, the request to amend, and the EEO Counselor's report. The matter raised in your client's request to amend, the October 2005 bid process, is like or related to the matter previously raised in her complaint. Accordingly, this complaint is amended to include the October 2005 bid process." (Desmone Dec., Ex. B, page 1). In addition, as the gender discrimination issues surrounding the October 2005 bidding are the same as the gender discrimination issues surrounding the April 2005 bidding, no further investigation was required with regard to this subsequent bidding.

Thus, Plaintiff was not required to exhaust her administrative remedies by filing a second administrative complaint for the October 2005 discriminatory bid process, or to contact her EEO counselor within 45 days of the October 2005 shift bid discrimination, as a pre-requisite to inclusion of the October 2005 shift bid claim in her federal complaint.

II. IN THE ALTERNATIVE, THE COURT SHOULD EQUITABLY TOLL ANY EXHAUSTION REQUIREMENT

The time limitations for administrative exhaustion deadlines in Title VII cases are prudential rather than jurisdictional requirements, "similar to statutes of limitations and subject to equitable modifications, such as waiver, estoppel, tolling, and the continuing violations theory." *Hill*, at *4, citing 29 C.F.R. § 1614.604(c); *West v. Philadelphia Elec. Co*. 45 F.3d 744, 754 (3d Cir. 1995) (citing *Zipes v. Trans World Airlines*, Inc., 455 U.S. 385, 393 (1982); *Rodriguez v. U.S. Postal Serv*., No. 04-916, 2005 WL 486610, at *4 n. 8 (E.D. Pa. Mar. 1, 2005)); *Robinson v. Dalton*, 107 F.3d 1018, 1021 (3d Cir. 1997). The Third Circuit has held that it is within the Court's discretion to equitably toll the requirement to exhaust administrative procedures, such as the condition of contacting an EEO counselor within 45 days of the alleged actionable conduct, if the circumstances so warrant. *Patnaue v. Gonzalez*, 478 F. Supp. 2d 643, 648 (D. Del. 2007) (quoting *Robinson*, 107 F.3d at 1018).

One basis for applying equitable tolling is where a defendant's actions mislead plaintiff. *Oshiver v. Levin Fishbein Sedran & Berman*, 38 F.3d 1380, 1387-9 (3d Cir. 1994). The October 2005 bid process claim was dismissed based solely upon Plaintiff's belated contact of the EEO counselor 22 days beyond the 45-day period. Ms. Young's letter of September 30, 2005 to Plaintiff's counsel stated that, "The complainant has the right to amend the complaint *at any time*

prior to the conclusion of the investigation to include issues or claims like or related to those raised in the complaint." (See accompanying Declaration of Francine Foner, Esq. ("Foner Dec."), Ex. A). **Nowhere** in this paragraph does it reference a 45-day period even though it does reference other dates. Certainly, the paragraph gives the reader *the reasonable belief that a complainant can amend at any time prior to the conclusion of the investigation*. Further, because Plaintiff and her counsel had been working with the EEO counselor with regard to the April 2005 claim, they were operating under the assumption that the EEO was fully apprised of consecutive bidding that had occurred at the TSA. (Foner Dec., Ex. B). Thus, Plaintiff was led to believe by Defendants that there was no requirement for her to re-notify the EEO counselor of the October 2005 claim and the delay in notification was not due to a lack of due diligence on Plaintiff's part. The Court should therefor equitably toll the 45-day period to permit inclusion of the October 2005 claim in Plaintiff's Complaint herein.

CONCLUSION

For the foregoing reasons Plaintiff respectfully requests that this Court deny Defendants' partial motion to Dismiss Plaintiff's Complaint insofar as it purports to state any cause of action arising out of her October, 2005 administrative claim.

Respectfully submitted,

Hyderally & Associates, P.C.
Attorneys for Plaintiff, Lori Lyons

Dated: September 28, 2012 By: _____
FRANCINE FONER, ESQ.
for the Firm

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