

**STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES
OFFICE OF PUBLIC HEARINGS**

Commission on Human Rights &
Opportunities ex rel. Dennis Perri,
Complainant

CHRO No. 0750113
Fed No. 01-07-0248-8

v.

George Peluso,
Respondent

June 13, 2008

Ruling on Motion to Dismiss

Background

On March 9, 2007 an affidavit of illegal discriminatory practice (the complaint) was filed with the commission on human rights and opportunities (commission or CHRO) alleging that the respondent discriminated against the complainant, Dennis Perri, in refusing to provide a reasonable accommodation for his physical disabilities (deaf and mute). Included in the complaint is the allegation that the complainant's wife, Sonia Perri also suffers from an (undisclosed) disability.¹ The respondent filed his answer on November 20, 2007 denying any discriminatory action along with two (2) affirmative defenses. Neither of which has any bearing on this ruling.

On January 4, 2008 the commission and the complainant filed a joint motion requesting leave to amend the pending complaint by adding a named complainant, Sonia Perri, arguing that there was no prejudice to the respondent as the reasonable cause finding

¹ While the initial complaint referenced Sonia Perri and that she suffered from an "undisclosed" disability subsequent pleadings and exhibits reveal that she is deaf and mute.

referenced Sonia Perri and that the proposed amendment was timely. The respondent objected to the motion to amend on January 23, 2008. The basis for the objection was that Sonia Perri had not filed with CHRO within the 180 day filing period as stated in Connecticut General Statute § 46a-82(e)². This tribunal on February 8, 2008 issued a ruling denying the proposed amendment and sustaining the objection thereto. The undersigned based the ruling on the fact that General Statutes § 46a-82 (e) requires that any complaint filed pursuant to § 46a-60 is to be filed within 180 days of the alleged act of discrimination absent any claim of waiver and or equitable tolling. *Williams v. Commission on Human Rights and Opportunities*, 257 Conn. 258, 264 (2001). The record at that moment revealed no claims or facts to support a claim of waiver, or equitable tolling. The 180 days having expired and no claim of waiver or equitable tolling having been made I sustained the respondent's objection.

The commission on February 15, 2007 pursuant to General Statutes § 46a-84 and Connecticut Regulations of State Agencies § 46a-54-79a (e) filed a timely request for reconsideration of the denial of its motion to amend. The commission argued that the 180 day filing period should be extended based on the principle of equitable tolling citing *Williams v. Commission on Human Rights and Opportunities*, supra. In support of its argument in favor of equitable tolling the commission proffered that Sonia Perri's failure to execute an affidavit of illegal discrimination was not the fault of the would be complainant but that of the commission itself.

² Any complaint filed pursuant to this section must be filed within one hundred and eighty days after the alleged act of discrimination except that any complaint by a person claiming to be aggrieved by a violation of subsection (a) of section 46a-80 must be filed within thirty days of the alleged act of discrimination.

In support of tolling the 180 day filing requirement, the commission offered as exhibits to its motion to reconsider the following: 1) intake call sheet indicating Sonia Perri contacted the commission 2) commission memo referencing call from both Dennis and Sonia Perri 3) affidavit from Diane Carter who investigated Dennis Perri's complaint, stating that she was of the belief that Sonia Perri was a named complainant and investigated the matter as if she was; 4) a portion of the draft of the reasonable cause finding indicating that Sonia Perri was a complainant; 5) comments to the draft finding prepared by the respondent's attorney referring to the complaints (plural) and with no objection to Sonia Perri being identified as a complainant; 6) portion of the final reasonable cause finding designating Sonia Perri as a complainant; and 7) letter from Attorney Thomas pertaining to the draft finding and referencing complainants (plural).

Because the motion to reconsider has not been objected to and because the commission's conduct could cause one to believe that Sonia Perri was a named complainant, the motion to reconsider the denial of the motion to amend was granted as was the motion to amend.

The respondent on March 7, 2008 filed a motion to reconsider the granting of the motion to amend. In his motion the respondent argued that the commission is without jurisdiction to adjudicate Sonia Perri's claim and that the facts alleged as to the claim of equitable tolling are irrelevant. The commission on March 7, 2008 objected to the motion to reconsider pointing out that the respondent failed to object to the

commission's motion to reconsider and that respondent's claim of lack of jurisdiction was without any authority either statutory or under caselaw. This tribunal on March 17, 2008 denied the respondent's motion for reconsideration.

The complainants on March 19, 2008 filed with this tribunal an amended complaint pursuant to an earlier order. The respondent on April 30, 2008 filed a motion to dismiss the amended complaint for lack of subject matter jurisdiction due to the failure of Sonia Perri to file a complaint within 180 days of the act of discrimination.

The complainants and the commission on May 14, 2008 filed a joint objection to the pending motion to dismiss. For the reasons that follow the respondent's motion to dismiss is Denied.

Discussion

A. Standard

A motion to dismiss is an appropriate means to challenge a tribunal's jurisdiction to hear an action. *Jolly, Inc. v. Zoning Board of Appeals*, 237 Conn. 184 (1996); *Upson v. State*, 190 Conn. 622, 624 (1983). The motion admits all facts well-pleaded and invokes any record that accompanies the motion, including supporting affidavits that contain undisputed facts. *Malasky v. Metal Products Corp.*, 44 Conn. App. 446, 451-52, cert. denied. 241 Conn. 906 (1997). In evaluating the motion, the complainant's allegations and evidence must be accepted as true and interpreted in a light most favorable to the complainant and every reasonable inference is to be drawn in his favor;

New England Savings Bank v. Bedford Realty Corp., 246 Conn. 594, 608 (1998); and “[e]very presumption favoring jurisdiction shall be indulged.” *Conn. Light & Power Co. v. Costle*, 179 Conn. 415, 421 (1980).

B. Jurisdiction

The primary argument advanced by the respondent to dismiss the claims of Sonia Perri contained in the amended complaint is that this tribunal is without subject matter jurisdiction to adjudicate this matter. The respondent arrives at the conclusion that no subject matter exists due to Sonia Perri having failed to execute an affidavit of discrimination (commonly referred to as a complaint) within 180 days of the act of discrimination. The respondent relies on several cases which stand for the proposition that failure to comply with statutory or practice book provisions deprives that court of jurisdiction and in particular that “failure to file an appeal within the time constraints... results in an absence of subject matter jurisdiction that cannot be waived by the parties or by the court.” *Ambrose, et al. v. William Raveis Real Estate, Inc.*, 226 Conn 757, 767 (1993). The respondent’s argument could prevail and support the granting of his motion to dismiss except for caselaw that dictates otherwise on the 180 day filing requirements. The Connecticut Supreme Court in determining whether the filing limitation in § 46a-82 (e) involves subject matter jurisdiction found “...that the 180 day time limit, although mandatory in nature, is not also subject matter jurisdictional.” *Williams v. Commission on Human Rights and Opportunities*, 257 Conn 258, 271 (2001). The court further found that the 180 day filing requirement was more a statute of limitations subject to waiver and equitable tolling. *Id.* at 658. This determination is not limited to this state’s

courts but is found in the decisions of the United States Supreme Court in addressing the time filing requirement under the federal counterparts to our states discrimination laws. See *National Railroad Passengers Corp. v. Morgan*, 536 U.S. 101, 113 (2002) which held that “the time period for filing a charge is subject to equitable doctrines such as tolling or estoppel; *Zipes v. Trans World Airlines, Inc.*, 455, U.S. 385, 393 (1982) holding that the filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit... but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.”

C. Equitable Tolling

Having determined that the statutory filing requirement in § 46a-80 (e) is subject to equitable tolling, analysis must be made as to whether based on the facts alleged by the commission (and in no way disputed by the respondent) that pertain to why Sonia Perri did not file, warrant the tolling of the 180 day requirement. Equitable tolling is in the discretion of the court and to be used only in extraordinary circumstances. *Wallace v. KY Industries*, 1999 WL 1421659. When determining whether to exercise its discretion, a court must consider whether the party seeking the application of the equitable tolling doctrine has 1) acted with reasonable diligence during the time period sought to be tolled and 2) has proved the circumstances to be so extraordinary so as to warrant the application of the doctrine. *Mulero v. Bridgeport Board of Education*, 2008 WL 2185928. The burden to establish that equitable tolling is with the complainant. *Id.*

Equitable tolling may be appropriate where a plaintiff's medical condition or mental impairment prevented timely filing. *Id.* In this instance while both the complainants suffer from the same disabilities (deaf and mute) the record before me at this time prevents me from concluding that Mrs. Perri's disabilities caused the delay. While speculating at this point, I can only guess that problems associated with communicating between the world of the hearing and that of the deaf may have contributed to this matter.

In many cases that deal with equitable tolling it's the actions of the respondent that are scrutinized to determine if in fact the filing requirement must be tolled. *Williams v. Commission on Human Rights and Opportunities*, 67 Conn. App. 316, 329 (2001); *Rodriguez v. Connecticut Board of Education*, No. OPH/WBR 2007-065 (ruling on motion to dismiss, February 6, 2008). However, the actions of the commission or the EEOC are not beyond reproach and may form the basis for equitable tolling. Courts have found equitable tolling applicable, "[w]hen there is affirmative misconduct on the governments' part [upon which] the plaintiff... demonstrated that he had relied... to his detriment." *O'Connor v. Pan Am*, 1990 WL 118286 (complainant filed 7 days beyond filing deadline relying on inaccurate statement from EEOC employee that her complaint was filed as of her initial interview); *Spira v. Ethical Culture School*, 888 F.Supp. 601 (1995) (plaintiff alleged EEOC employee provided erroneous information regarding filing his complaint, and motion to dismiss was granted, as the plaintiff failed to substantiate his claims or submit affidavits to support his allegations).

The question to resolve is was the error of the commission's investigator in naming Sonia Perri as a complainant and investigating this matter as if she was a complainant of a degree that if relied on by Sonia Perri warrants the tolling of the filing requirement. I find from the undisputed submissions by the commission with its motions to reconsider that the burden of establishing equitable tolling has been satisfied.

In arriving at my conclusion that equitable tolling is applicable in this matter I emphasize the following: the fact that at anytime during the investigation of this matter up to and including the finding of reasonable cause (dated July 30, 2007), Sonia Perri, had she been alerted to the fact she was not a complainant was still within the 180 timeframe to file a complaint. Additionally, I believe that an individual who is consistently being referred to as a complainant, and who is told her claim is being investigated and reads in both a draft investigative report/reasonable cause finding and the final investigative report that she is a complainant would cause a reasonable lay person to conclude that she in fact was a complainant. The above must be considered and understood in the context that there is no claim that Sonia Perri, did anything wrong or caused the commission's investigator to believe she was a complainant by any statement or action.

From the exhibits that were appended to commission's motion for reconsideration, I find there was a clear intent by Sonia Perri at the inception of initiating contact with the commission to be a named complainant.

In addition to the respondent's argument that this tribunal lacks subject matter jurisdiction he proffers that he has been denied an investigation of Sonia Perri's claims which included providing a reasonable cause finding to the respondent; settlement attempts by the investigator; and the ability to elect a civil action. I find that each of these "safeguards" as referred to by the respondent was available and/or complied with by the commission's investigator and that this is reflected in her affidavit when she states she believed Sonia Perri was a complainant and that her investigation would have been exactly the same if in fact Sonia Perri had executed a complaint.

As to the respondent's argument regarding service of the amended complaint I find that while no certification of service was appended to the amended complaint so as indicate that it was mailed to respondent's counsel, the cover letter attached to the amended complaint provides the same information and confirmation that a certification of service would accomplish. In this instance I choose not to elevate form over substance and find the method of providing notice of the amended complaint satisfies this agency's regulations.³

For the reasons stated the respondent's motion to dismiss is hereby DENIED. The respondent is hereby ordered to file his answer to the amended complaint if he hasn't already done so within 20 days from the date of this ruling.

³ See Regulations of Connecticut State Agencies § 46a-54-79a(3) and 46a-54-85a(c).

It is so ordered this 13th day of June 2008.

Thomas C. Austin, Jr.
Presiding Human Rights Referee

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