Commission on Human Rights and Opportunities, *ex rel*. Ahmadali Tabatabai, Complainant : CHRO Case No. 0830168

v.

RainDance Technologies, Inc., Respondent : August 28, 2012

RULING ON RESPONDENT'S MOTION TO DISMISS

Procedural History

On November 2, 2007, Ahmadali Tabatabai (complainant) filed a complaint with the Commission on Human Rights and Opportunities (CHRO or the Commission) pursuant to the Connecticut Fair Employment Practices Act (CFEPA) (C.G.S. § 46a-60(a)(1)) and Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e et seq.), alleging that Raindance Technologies, Inc. (respondent) discriminated against him based on his national origin (Iranian) and religion (Muslim). Specifically, complainant claimed to have been harassed by co-workers, denied raises and promotions on an ongoing basis, poorly evaluated in March 2007 and terminated on May 11, 2007. On February 2, 2010, complainant amended his complaint to claim that respondent's conduct, as cited in the original complaint, was retaliatory, in violation of C.G.S. § 46a-60(a)(4), the result of complainant having complained about discriminatory conduct during his period of employment.

On March 19, 2012, respondent filed a motion to dismiss the harassment, poor evaluation and retaliation claims as untimely under Connecticut General Statute (C.G.S.) § 46a-82(f) (requiring claims to be filed within one hundred and eighty days after the occurrence of the alleged discriminatory act).

April 23, 2012 and May 2, 2012 respectively, complainant and the Commission[1] filed objections to the motion to dismiss. The Commission argued that the claims

[1] In a February 21, 2012 letter to complainant, legal counsel for the Commission indicated that (pursuant to Section 8 of Public Act 11-237) it had determined that the interests of the state would not be adversely affected by having complainant or, should he choose to retain counsel, complainant's counsel present the

pertaining to harassment and poor performance evaluations could reasonably be read to allege ongoing behavior which, if proven to be sufficiently related to discriminatory acts that had taken place within the limitations period, could toll the statute of limitations. The Commission also argued that the retaliation claim, the sole subject of an amended complaint that neither raised nor required supporting facts beyond those originally pled to support its specific allegation, i.e., that complainant had been terminated in retaliation for having voiced opposition to discrimination, was timely as it related back to the original filing. Respondent replied to both objections on May 11, 2012.

For the reasons set forth below, respondent's motion to dismiss is denied with respect to the harassment and poor performance claims and granted with respect to the amended complaint.

Legal 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). During evaluation, there should be "presumption in favor of subject matter jurisdiction." Williams v. Commission on Human Rights & Opportunities, 257 Conn. 258, 266, 777 A.2d 645, 651 (2001). *See also* Kelly v. Albertsen, 114 Conn. App. 600, 606, 970 A.2d 787, 790 (2009) (stating that "every presumption favoring jurisdiction should be indulged.").

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case in support of the complaint. In that letter, the Commission also reserved its right to make arguments it deemed necessary to protect the interests of the state. The Commission has opposed respondent's motion to dismiss, submitting a memorandum of law in which it sets forth the relevant legal standards for dismissal, but does not specifically address these within the context of complainant's objection to respondent's motion, particularly with respect to the subject matter and basis of the complaints he made to respondent.

The applicable requirement for filing a timely discrimination complaint, set forth at C.G.S. § 46a-82(f), is that the complaint be filed with the CHRO within one hundred and eighty days after the alleged discriminatory act. The filing requirement is not jurisdictional, but comparable to a statute of limitation with which one must comply, absent factors such as waiver, consent or equitable tolling. National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113, 112 S.Ct. 2061 (2002) (discussing EEOC filing deadlines); Williams v. Commission on Human Rights & Opportunities, 257 Conn. at 284 (discussing the CFEPA filing deadlines). An exception to timeliness must be invoked by either the respondent's waiver or the complainant's argument for equitable tolling. Nader v. Brunalli Const. Co., fn 6, 2002 WL 724597 (D. Conn. Mar. 26, 2002). When equitable tolling applies, the CHRO has jurisdiction to bring the claim before the Office of Public Hearings if one of the discriminatory acts occurred within the 180 day limitation. State v. Commission on Human Rights and Opportunities, 211 Conn. 464, 468, 559 A.2d 1120, 1123 (1989). *See also* Majewski v. Bridgeport Bd. of Educ., 2005 WL 469135 (Conn. Super. Ct. Jan. 20, 2005).

The Harassment and Poor Evaluation Claims

Respondent contends that the relevant filing deadlines for complainant's harassment and poor performance evaluation claims expired well before the original complaint was filed, arguing accordingly that the two claims are time barred. The Commission counters that complainant experienced harassment and received poor evaluations, not as discrete acts, but as part of an ongoing policy or pattern of discrimination leading up to and including his termination, supporting its contention with reference to allegations of the complaint, set forth in the following paragraphs: complainant's continuous exclusion from integral fluidics meeting (¶7); harassment by co-workers from 2005-2006 (¶8); respondent's non-compliance with the policy requirements of its employee handbook in failing to address the harassment claims (¶8); and, respondent's pretextual claim to have terminated complainant for failure to show improved productivity, although his performance had been on a par with that of his co-workers (¶'s 9,12 and 13).

At this stage of the proceeding I cannot yet determine whether complainant will be able to support these allegations with proof sufficient to justify equitable tolling of the

relevant filing deadlines under the exception for continuing acts of discrimination that constitute a policy or practice. Accordingly, pending completion of the discovery process, I am denying, without prejudice, respondent's request that I dismiss the harassment and poor evaluation claims.

The Amended Complaint

Section 46a-54-38a(b) of the Regulations of Connecticut State Agencies (the regulations) allows reasonable amendments to discrimination complaints as a matter of right for, among other purposes, clarifying and amplifying allegations of the original complaint. The regulation specifies that "amendments alleging additional acts that constitute discriminatory practices which are reasonably like or related to or growing out of the allegations of the original complaint, including those facts discovered during the investigation of the original complaint . . . relate back to the date the complaint was first received."

An amendment which sets up a new and different cause of action, however, will be time barred unless it could have been timely filed as a separate charge. Keenan v. Yale New Haven Hospital, 167 Conn. 284, 285, 355 A.2d 253 (1974).

In this case, complainant amended his complaint more than two years after the original filing to charge that respondent had retaliated against him, terminating his employment because he had made complaints "about discriminatory conduct at Respondent."

Under Connecticut law it is a discriminatory practice for any employer to discharge, expel or otherwise discriminate against any person because such person has opposed any discriminatory employment practice or because such person has filed a complaint or testified or assisted in any CHRO proceeding. (C.G.S. § 46a-60(a)(4)).

Respondent moved to dismiss the charge contending that retaliation is a new cause of action not alleged in, or born of the same facts underlying complainant's original claim (discrimination based on national origin and religion), occurring, if at all, outside the statutory filing deadline and thus time barred pursuant to C.G.S. § 46a-82(f). see Maraczi v. Healthy Pet Corp., 2010 Conn. Super. LEXIS 2989 (Conn. Super. Ct.

Nov. 17, 2010) (amended complaint's retaliation charge relies upon statutory grounds distinct from those supporting the allegations of the original complaint and, as a result, does not relate back).

In objecting to respondent's motion, the Commission argues that the retaliation charge is not a new legal theory of the case, but a clarification, supported by the factual allegations of the original complaint, that retaliatory animus was also a motivating cause of complainant's termination which relates back to, and should be treated as if it had been raised in the original, timely filed complaint. Citing the original complaint's allegation that throughout his employment complainant had complained to respondent many times about exclusion from professional "meetings, discussions and email lists," the Commission argues that the facts of this case should be distinguished from those of Maraczi, and that it should have come as no surprise that "complainant would allege that the termination of his employment was in retaliation for complaining."

The Commission's legal conclusion, however, is not supported by complainant. In his objection to respondent's motion to dismiss, complainant reiterates allegations of the original complaint, attaching copies of contemporaneous interoffice emails to amplify and document the substance of the protests he made to respondent with respect to his treatment as its employee. The problem is that complainant doesn't claim to have made any complaints in opposition to a discriminatory practice, as required by statute. In fact, complainant's lengthy submission bespeaks an employment environment where he felt free to complain to respondent -- about his supervisors, his assignments, his evaluations and his relationships with co-workers, including incidents of alleged harassment – repeatedly. The submission clarifies complainant's history of protesting the fact that his perception of his own performance differed from that of his superiors and/or co-workers, but does not support the argument that the allegations of the original complaint are related to complainant's opposition to a discriminatory employment practice.

Thus, notwithstanding broadly stating that complainant "complained about discriminatory conduct at respondent," the amended complaint, viewed in its most favorable light, does not allege facts sufficient to establish a claim that relates back to

facts pled in the original complaint.[2] Nor is there anything in the record that would allow me to find that the retaliation charge describes anything other than a discrete act a "single completed activity that occurs at a specific time, and typically is actionable on its own." Elmenayer v. ABF Freight System, Inc., 318 F.3d 130, 135 (2nd Cir. 2003). Respondent is correct in stating that the retaliation claim, raised for the first time in the amended complaint, describes acts involving different factual and legal issues than those previously pled and constitutes a separate cause of action[3]. As such, the claim was not timely filed and is one over which we have no jurisdiction. **The retaliation claim is dismissed.**

It is so ordered this 28th day of August, 2012.

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Hon. Ellen Bromley
Human Rights Referee

Cc.

Ahmadali Tabatabai
David Kent, Esq.-via fax only
Edward Richters, Esq.-via fax only

[2] In his submission Complainant urges "leniency" because of his non-lawyer status. Although, notwithstanding its deferral of prosecution, it might be appropriate to defer to the Commission's legal analysis and arguments in opposition to the motion to dismiss, in this instance, I have relied on the facts as set forth by complainant, the person most familiar with them, the details of which fail to support the Commission's legal position with respect to the allegations.

[3] In order for the complainant to establish his retaliation claim, he must first establish a prima facie case that includes all of the following elements: 1) that he participated in an activity protected by the anti-discrimination statute, (2) that his participation was known to his employer, (3) that his employer thereafter subjected him to a materially adverse employment action, and (4) that there was a causal connection between the protected activity and the adverse employment action. Kaytor v. Electric Boat Corporation, 609 F.3d 537 (2nd Cir. 2010).