

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

PEGGY M. McKNIGHT,)	
)	
Plaintiff,)	
)	
v.)	Case No. 2:11CV00041
)	
JIM DAUGHERTY, ET AL.,)	
)	
)	
)	
Defendants.)	

PEGGY M. McKNIGHT,)	
)	
Plaintiff,)	
)	
v.)	Case No. 2:11CV00032
)	
)	
RIDGECREST MANOR, INC.,)	
)	
Defendant.)	

OPINION AND ORDER

Carl E. McAfee, Carl E. McAfee, P.C., Norton, Virginia, for Plaintiff; Joan C. McKenna and James K. Cowan, Jr., LeClairRyan, P.C., Richmond, Virginia and Blacksburg, Virginia, for Defendants Jim Daugherty and Ridgecrest Health Group, LLC, in Case No. 2:11CV00041.

Peggy M. McKnight, a former employee of Ridgecrest Health Group, LLC, contends that she was fired on account of her age in violation of the Age

Discrimination in Employment Act of 1967 (“ADEA”), 29 U.S.C.A. § 623 (West 2008). In Case No. 2:11CV00041, the defendants have moved to dismiss on the ground that the action is untimely. For the following reasons, I will defer ruling on the motion in order to allow plaintiff McKnight to move to amend her Complaint in Case No. 2:11CV00032 to add the proper party defendant.

I

The facts, as set forth in the plaintiff’s complaints or as agreed by the parties at oral argument, are as follows.

McKnight was employed as a licensed practical nurse by Ridgecrest Health Group, LLC (“Ridgecrest Health Group”). She was terminated on March 17, 2011, and on March 30, 2011, she filed a charge with the Equal Employment Opportunity Commission (“EEOC”) alleging age discrimination pursuant to the ADEA. The EEOC sent McKnight a letter on June 8, 2011, informing her that she had ninety days in which to file suit if she wanted to further pursue her claim of discrimination.

On July 11, 2011, McKnight filed her Complaint in Case No. 2:11CV00032 alleging age discrimination. However, rather than naming Ridgecrest Health Group as the defendant in her claim, she mistakenly listed the defendant as Ridgecrest Manor, Inc. (“Ridgecrest Manor”). There is evidence showing that the

name “Ridgecrest Manor” was listed on the employment separation form provided to McKnight by her employer, and that the business on occasion operated under this trade name. Yet, after some inquiry McKnight’s counsel discovered that her employer was actually Ridgecrest Health Group. On October 4, 2011, she filed a new case, Case No. 2:11CV00041, with the proper name of her employer. Aside from the substitution of defendants, the allegations of the two complaints are identical.

Ridgecrest Health Group has moved to dismiss the second case for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) or, in the alternative, pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. It is argued that, because McKnight’s complaint was not filed until October 4, 2011, it is outside of the ninety-day period and is time barred. The motion has been briefed and argued and is ripe for decision.

II

Pursuant to 42 U.S.C.A. § 2000e-5(f)(1) (West 2003), an ADEA plaintiff has ninety days to sue her employer following her receipt of a right-to-sue letter from the EEOC. Because the ninety-day limit is not jurisdictional, it is subject to equitable tolling. *See Truitt v. Cnty. of Wayne*, 148 F.3d 644, 646 (6th Cir. 1998). Equitable

tolling is a narrow limitations exception. The limitations period will not be tolled unless an employee's failure to timely file results from either a "deliberate design by the employer or . . . actions that the employer should unmistakably have understood would cause the employee to delay filing h[er] charge." *Price v. Litton Bus. Sys., Inc.*, 694 F.2d 963, 965 (4th Cir. 1982).

In this case, although her first Complaint was timely, McKnight mistakenly named the wrong entity as the defendant. McKnight did not bring the claim against her actual employer within ninety days of her receipt of the right-to-sue letter. McKnight argues that the use of the term "Ridgecrest Manor" as a trade name of the business, and on the employment separation form given to her at the time of her termination, is grounds for equitable tolling.

While it is true that the similarity between the names of both Ridgecrest entities causes some confusion, there is no evidence of deliberate design. Furthermore, it appears as if plaintiff's counsel was in some respects less than diligent in his efforts to timely ascertain the correct defendant. "[O]ne who fails to act diligently cannot invoke equitable principles to excuse lack of diligence." *Aziz v. Orbital Scis. Corp.*, No. 98-1281, 1998 WL 736469, at *1 (4th Cir. Oct. 19, 1998) (unpublished) (citing *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 27 (1989)).

Therefore, it appears that this is not one of the rare situations where equitable tolling of the limitations period for filing ADEA charges should apply.

Nevertheless, because the only distinguishing factor between McKnight's two complaints is a change in defendants, I am inclined to allow McKnight an opportunity to try to amend her first timely Complaint to name the proper defendant.¹

Should McKnight choose to amend her original Complaint, she must meet the relation back requirements of Rule 15(c) of the Federal Rules of Civil Procedure in order to save the amended complaint from being time barred under § 2000e-5(f)(1). For an amendment changing a party or the name of a party against whom a claim is asserted to relate back to the original date the complaint was filed, the amending party must show that (1) the claim or defense asserted in the amended complaint arose out of the same conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, and (2) the party to be brought in by amendment has received adequate notice of the action. Fed. R. Civ. P. 15(c); *see Goodman v. Praxair, Inc.*, 494 F.3d 458, 467 (4th Cir. 2007). Since the claim alleged against Ridgecrest Manor is the identical claim McKnight now wishes to litigate against

¹ I had given the plaintiff a time limit to obtain service on the defendant in her first Complaint, which was not met. The plaintiff has not responded, most likely because she does not desire service on the wrong defendant. I will take no action to dismiss the wrong defendant, pending the timely filing of a motion to add a new defendant.

Ridgecrest Health Group, McKnight's amended complaint might very well satisfy Rule 15(c)'s transactional requirement.

The court next would need to consider whether or not McKnight satisfied the notice requirements as to Ridgecrest Health Group. Rule 15(c)(3) has two distinct notice requirements: (1) the party to be brought in by amendment must be notified of the claim within the service period in Rule 4(m); and (2) the notice afforded must be such as not to prejudice the party in a defense on the merits and such that the party knew or should have known that the plaintiff intended to file the claim against that party. Fed. R. Civ. P. 15(c)(3).

McKnight appears to have satisfied the requirement that the defendant receive notice of substitution within the time period prescribed by Rule 4(m). The time limit for the plaintiff to serve the defendant with the summons and complaint pursuant to Rule 4(m) is 120 days from the time the complaint is filed. Fed. R. Civ. P. 4(m). McKnight filed the original complaint in this case on July 11, 2011. The 120-day time period therefore expired on November 7, 2011. McKnight filed her complaint against Ridgecrest Health Group on October 4, 2011, well within the 120-day period provided for in Rule 4(m).

With respect to the second notice requirement, several factors suggest that Ridgecrest Health Group's notice of the age discrimination claim was satisfactory to

protect it from potential prejudice. Ridgecrest Health Group was the entity that responded to McKnight's EEOC charge, and as such was aware that McKnight intended to pursue a charge of discrimination against it. The relatively brief history of this case — the suit was brought against Ridgecrest Health Group only three months after the original complaint was filed — also tends to suggest that Ridgecrest Health Group would not be prejudiced in a defense on the merits by its replacement of Ridgecrest Manor as the named defendant in this action. Furthermore, there is substantial similarity between the names of both Ridgecrest entities, and Ridgecrest Health Group does not dispute that the name Ridgecrest Manor was used on occasion by the business.

III

For these reasons, I will defer ruling on Ridgecrest Health Group's Motion to Dismiss in Case No. 2:11CV00041, in order to allow McKnight the opportunity to file a motion in Case No. 2:11CV00032 seeking to amend to add the correct party defendant. Any such motion must be filed within 14 days of the date of this Order.

It is so **ORDERED**.

ENTER: February 13, 2012

/s/ James P. Jones
United States District Judge