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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA, JACKSONVILLE DIVISION

ELIAS MAKERE, FSA, MAAA)
)
Plaintiff) Case No (LT)
) **3:20-cv-00905-MMH-JRK**
)
v.)
)
ALLSTATE INSURANCE COMPANY,) ****{Duplicate Filing}**
)
Defendant)

**PLAINTIFF’S MEMORANDUM OF LAW
REGARDING EQUITABLE TOLLING ON
PLAINTIFF’S FULL VERIFIED COMPLAINT****

Plaintiff, ELIAS MAKERE, on this 9th day of March 2021, hereby files this memorandum of law in support of Plaintiff’s “*Verified Complaint*” (hereinafter “This Complaint”). Pursuant to Local Rule 5.7 USFLND, a complaint may be filed together with any memorandum of law^{1/}.

Key Points:

- A.) Grounds Equitable Tolling – Extraordinary Circumstances.
- B.) Points Phantom Notice. Government Impropriety. COVID19.

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**** This is a duplicate of the *Memorandum of Law* that Plaintiff filed in 3:21-00242-MMH-JBT (Doc No 3; 3/11/21). Duplicated here only to keep the record intact. Plaintiff believes this memorandum discusses a **MOOT** point.**

Note: ~~strikethroughs~~ were added to minimize confusion (due to mootness).

Background:	Plaintiff filed suit upon receipt of the EEOC’s RTS Letter
Problem:	The RTS Letter had a confounding date
Request:	This Court recognizes that equity applies

5.7(b) | Local Rules USFLND | Pro Se Civil-Rights Cases...

“A party may, but need not, also file a memorandum with the petition, motion, or complaint.”

29 CFR §1601.76 | Right of a Party to Request Review (highlights added)

“The [EEOC] shall notify the parties whose cases are to be processed by the designated, certified FEP agency of their right, if aggrieved by the agency's final action, to request review by the [EEOC] within 15 days of that action.”

Precedence

- 2:17-cv-00400-SPC-MRM - USFLMD (9/28/20)
- 2:19-cv-00182-JES-PDB - USFLMD (11/18/20)
- 2:20-cv-00920-JLB-NPM - USFLMD (11/24/20)
- 6:20-cv-01757-RBD-DCI - USFLMD (1/26/21)
- 6:19-cv-00861-RBD-DCi - USFLMD (1/27/21)
- 8:18-cv-02244-TPB-AEP - USFLMD (2/12/21)
- 8:19-cv-02410-CEH-TGW - USFLMD (2/25/21)
- 8:20-cv-02215-TPB-AAS - USFLMD (2/18/21)

USFLMD recently accepted supporting memoranda

Abbreviations

- 1DCA - Florida’s First District Court of Appeal
- 4DCA - Florida’s Fourth District Court of Appeal
- DOAH - Division of Administrative Hearings
- FAC - Florida Administrative Code
- FCHR - Florida Commission on Human Relations
- FEPA - Fair Employment Practices Agency
- FS - Florida Statute
- USFLMD - US District Court, Florida, Middle District
- USFLND - US District Court, Florida, Northern District

PROCEDURAL HISTORY

I. Administrative

1. On April 10, 2019, Plaintiff sent the FCHR his employment discrimination complaint via email (please see **Exhibit A**).
2. The first attachment was EEOC Form 5.
3. The second was a document detailing his complaint. Which the FCHR received immediately; blessing it with a 2:35PM timestamp (**Exhibit B**). Also, in accordance with the workshare agreement^{2/}, Plaintiff's charge was dual-filed with the EEOC (FCHR 2019-019238, EEOC 15D-2019-00685).
4. The FCHR failed to make a determination within the 180-day statutory window (see §760.11(3) FS). Despite that (as Plaintiff later discovered^{3/}) the FCHR still issued a notice of determination (on the 191st day).
 - a. The state agency mailed Plaintiff's notice ("Phantom Notice") to an attorney in Orlando, FL. Plaintiff has never had an attorney for the instant action. Plus, Plaintiff has never lived in Orlando.
5. After some diligence (calls, emails, formal motions), Plaintiff filed charges in state court (Florida, Duval County; 16-2020-CA-3770-XXXX-MA) on June 30, 2020.

6. Out of an abundance of caution (pertaining to the 35-day window prescribed by §760.11(6) FS), Plaintiff filed a *Petition for Relief* with DOAH on July 6, 2020. That state agency relinquished jurisdiction back to the FCHR the following day. Whereby Plaintiff renewed his efforts to cut administrative ties in exchange for:
 - a. an FCHR **Election of Rights** form (“ER”); and
 - b. an EEOC **Right to Sue** Letter (“RTS”; EEOC Form 161).
7. Given the FEPA’s track record (lost federal funding, delay, phantom notices, reluctance to relinquish jurisdiction, etc.)^{4/}, Plaintiff filed a *Petition for Writ of Prohibition* at 1DCA on September 11, 2020 (1D20-2658).
8. On November 25, 2020 – while that extraordinary writ was still pending – the FCHR issued an administrative dismissal of Plaintiff’s charge (ie, 2019-19238). This constituted the ‘*final agency action*’ that Plaintiff was seeking (see ¶5 *supra*).
9. Thus, pursuant to 29 CFR §1601.76, Plaintiff mailed the EEOC his request for a **Substantial Weight Review** (“SWR”) on December 7, 2020. He followed up the next month; in which he learned that the EEOC was being hampered by the ongoing global pandemic (COVID19).
 - a. Specifically, the agency’s employees could not pick up mail because they were not in the office. This meant further delay on the SWR.

- b. A phone operator advised Plaintiff to request his charge file in the meantime.
10. ~~Last Tuesday,~~ March 2, 2021, Plaintiff received those documents. Whereby he contacted his designated representative and asked for his RTS Letter. It arrived ~~today~~ (March 9, 2021).

II. Judicial

11. Running parallel to this activity was Plaintiff's federal complaint at USFLMD ("Original Complaint"). On August 12, 2020, Plaintiff sued Defendant in this Honorable Court (3:20-cv-00905-MMH-JRK). His cause was under 42 USC §1981 and §760 FS. Soon thereafter, Defendant attached/consolidated Plaintiff's state complaint (§5).
12. On February 8, 2021, this Court ordered Plaintiff to file an amended complaint ("That Complaint"). Plaintiff obliged (2/26/21)^{5/}.
13. ~~On March 9, 2021, Plaintiff filed the instant lawsuit (ie, This Complaint). This Complaint and That Complaint are identical in both substantive fact and intent. The only difference is that This Complaint is filed under Title VII of the Civil Rights Act of 1964 ("Title VII"; 42 USC §2000e et seq.)~~
14. Plaintiff had not [previously] been able to attach Title VII because of the aforementioned episodes with the FCHR (§4-7).^{6/}

15. It must be emphasized that Defendant was involved in all of this activity.

In fact, ~~just yesterday~~ (3/8/21) Defendant filed a document in the federal case (3:20-cv-00905-MMH-JRK).

III. Legal Application

16. The RTS Letter states that Plaintiff has ninety (90) days to file suit.

Pursuant to 29 CFR §1603.106 (*Computation of Time*), Plaintiff would have until June 8, 2021 to commence action. With This Complaint already in tow, Plaintiff has thus filed a timely complaint.

17. First glance of the RTS Letter, however, may lead someone to think otherwise. The date affixed to it is January 23, 2020. It also has a certified mail receipt – linked to a delivery date of January 27, 2020.

18. Further analysis, though, will show that Plaintiff never received the letter. The EEOC mailed it to an attorney in Orlando, FL. The same person that the FCHR mailed Plaintiff's Phantom Notice to (¶4a).

19. So, equitable tolling must be applied to prevent Plaintiff from falling victim to the improprieties of the government (specifically, the FCHR).

Equitable Tolling

20. Of course, Equitable Tolling is the remedy that is based on the principles of essential justice:

“The doctrine of equitable tolling abates the harsh operation of the statute of limitations under certain circumstances in which barring a plaintiff’s potentially meritorious action would be unjust.”

- Justice v US, 6 F. 3d 1474, 1480 (11th Cir. 1993)

21. Appellate decisions have instituted this doctrine on the pillars of extraordinary circumstances and lack of prejudice:

“Generally, the tolling doctrine has been applied when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum.”

- Machules v. Dept of Admin, 523 So. 2d 1132 (Fla. 1988)

22. Pursuant to the US Supreme Court, EEOC filing deadlines are not jurisdictional; and non-jurisdictional matters are open for Equitable Tolling:

“Filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling. The structure of Title VII, the congressional policy underlying it, and the reasoning of this Court’s prior cases all lead to this conclusion.”

- Zipes v Trans World Airlines, Inc., 455 US 385 (1982)

23. Importantly, Equitable Tolling can be used to address the government's conduct:

“For instance, equitable tolling may be appropriate where a plaintiff has been "lulled into inaction by her past employer, state or federal agencies, or the courts.”

- Martinez v Orr, 738 F.2d 1107, 1112 (10th Cir. 1984)

24. As outlined in Machules – and repeated many times thereafter – there are three reasons to apply Equitable Tolling:

“[it applies] when the plaintiff has:

“(1) been misled or lulled into inaction;

“(2) in some extraordinary way been prevented from asserting his rights; or

“(3) timely asserted his rights mistakenly in the wrong forum.”

- Machules v. Dept of Admin, 523 So. 2d 1132 (Fla. 1988)

Appellant proffers reason “(2)” to justify the application of Equitable Tolling to his circumstances.

25. The FCHR's conduct was extraordinary in three ways.

26. First, the Phantom Notice was null & void; Florida's Supreme Court says so:

"...whenever the FCHR fails to make its determination within 180 days, even if the untimely determination is made before the filing of the lawsuit, the claimant may proceed to file a lawsuit under [§760.11(4) FS]."

- Woodham v BCBSFL, 829 So. 2d 891 (Fla. 2002)

But-for the FCHR's impropriety, Plaintiff would have retrieved his ER, notified the EEOC, obtained his subsequent RTS (with a non-confounding date), and attached Title VII to the Original Complaint. Thereby foregoing this memorandum ~~and This Complaint~~ altogether.

27. Second, the FCHR's continued activity (§8) was improper because it had already lost jurisdiction.

a. §760.11(3) FS states that The FCHR's determination must occur within the 180-day window (ie, "shall determine"). According to 4DCA, no administrative agency (including the FCHR) can contravene a Florida statute:

"An administrative agency may not enlarge, modify, or contravene the provisions of a statute."

- DeMario v Franklin, 648 So. 2d 210, 213-214

Thus, the FCHR was not permitted to evade the legal operations of §760.11(3).

b. In fact, §760.11(5) FS is more direct:

“The commencement of [a civil suit] shall divest the [FCHR] of jurisdiction of the complaint”

Thus, once Plaintiff filed his complaint in state court (§5), the agency lost all authority to act. It was improper and extraordinary for the FCHR to have done anything besides send Plaintiff his ER.

28. Third, the global pandemic created exigent circumstances. The EEOC cited an order from the US President when it explained its inability to perform Plaintiff’s SWR immediately upon receipt.

a. But-for COVID19, the EEOC would have already performed an SWR by now. Thereby yielding actionable results that would have rendered the date on the attached RTS obsolete.

b. In other words, the potential confusion regarding the inoperable date on the RTS would not exist.

Lack of Prejudice

29. Moreover, Defendant will not be prejudiced by This Complaint. The two parties are actively involved in litigating the same cause of action.

“Finally, the Employer, as the party relying on the time limitation, clearly was not prejudiced by the delay since the Employer obviously was on notice that petitioner intended to appeal its determination of abandonment. We conclude that equity requires relief from the twenty-day appeal period in this case”

- Machules v. Dept of Admin, 523 So. 2d 1132 (Fla. 1988).

Likewise. In the instant case, equity requires relief from any potential confusion surrounding the RTS’ date (1/23/20), because the EEOC did not send it to Plaintiff until ~~today~~ (3/9/21).

CONCLUSION

WHEREFORE, Plaintiff respectfully asks this Honorable Court to consider this memorandum of law while analyzing Plaintiff’s Verified Complaint (specifically, the “*Statutory Prerequisites*” section).

Dated this 9th day of March 2021.

Respectfully submitted,

/s/ Elias Makere

ELIAS MAKERE, FSA, MAAA, Plaintiff

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Jacksonville, FL 32224

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CERTIFICATE OF COMPLIANCE

I certify that the size and style of type used in this document is Times New Roman 14-point Font (caption) and ~~Courier New 12-point Font (contents)~~; thus complying with the font requirements of Local Rule ~~1.05(a)~~.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of March 2021, I electronically filed the foregoing with the Clerk of Courts by using its online filing page.

/s/ Elias Makere

Endnotes:

^{1/} Plaintiff acknowledges that the rule comes from a different district court (Northern vs Middle). Thus, in lieu of a direct rule, he offers it mainly as persuasive authority.

^{2/} 29 CFR 1626.10 (“*Agreements with State or Local Fair Employment Practices Agencies*”).

^{3/} The FCHR “inexplicably” mailed the late notice to an attorney in Orlando, FL. Plaintiff has never lived in that city; nor has he ever had an attorney for this action. Plaintiff discovered this errant notification in May/June 2020.

^{4/} In June 2019, HUD ceased funding the FCHR, and ordered it to repay \$200,000.

^{5/} The amended complaint was not proofread. So, Plaintiff submitted a corrected version the next business day (≈ 8:08am 3/1/21).

^{6/} On February 9, 2021, though, Plaintiff did indicate that he was “*preparing to*” attach Title VII to ‘That Complaint’ (see “*Plaintiff’s Motion for Judicial Notice...*”)

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(defendant's trial lawyers)

EXHIBIT A

Plaintiff's Submission of Administrative Complaint
(pursuant to 60Y-5.001 FAC)

Email

4/10/2019

From: justice.actuarial@gmail.com
Sent: Wednesday, April 10, 2019, 8:00 AM
To: fchrinfo@fchr.myflorida.com
Subject: Complaint | Employment Discrimination | Makere v Allstate

Good Morning FCHR,

May you please investigate my employment discrimination complaint against Allstate Insurance Company?

Thank you,

Elias Makere, Complainant
904.294.0026 | justice.actuarial@gmail.com
3709 San Pablo Rd. S. #701
Jacksonville, FL 32224

EXHIBIT B

Plaintiff's Submission of Administrative Complaint
(pursuant to 60Y-5.001 FAC)

Certified/Stamped by State Agency (the FCHR)

4/10/2019

[first and last pages only]

[first page = officially stamped page]

[last page = acknowledgement of receipt]

Elias Makere, Complainant
3709 San Pablo Rd. S #701
Jacksonville, FL 32224

Phone: 904.294.0026
Fax:
Email: justice.actuarial@gmail.com

MAKERE
V
ALLSTATE

COMPLAINT ATTACHMENT

Employment Discrimination (Race, Sex, Retaliation)

Here is the attachment to the employment discrimination complaint.

Petitioner: Elias Makere
Dates: November 2013 – July 2018
Race: Black
Sex: Male
Retaliation: Yes

RECEIVED
FLORIDA COMMISSION ON
HUMAN RELATIONS
2019 APR 10 PM 2:35

Williams, DarLinda

From: justice.actuarial@gmail.com
Sent: Wednesday, April 10, 2019 8:00 AM
To: FCHR Website Email
Subject: Complaint | Employment Discrimination | Makere v Allstate
Attachments: EEOC-Form-5.pdf; 0a_Complaint_001_Employment.pdf

Good Morning FCHR,

May you please investigate my employment discrimination complaint against Allstate Insurance Company?

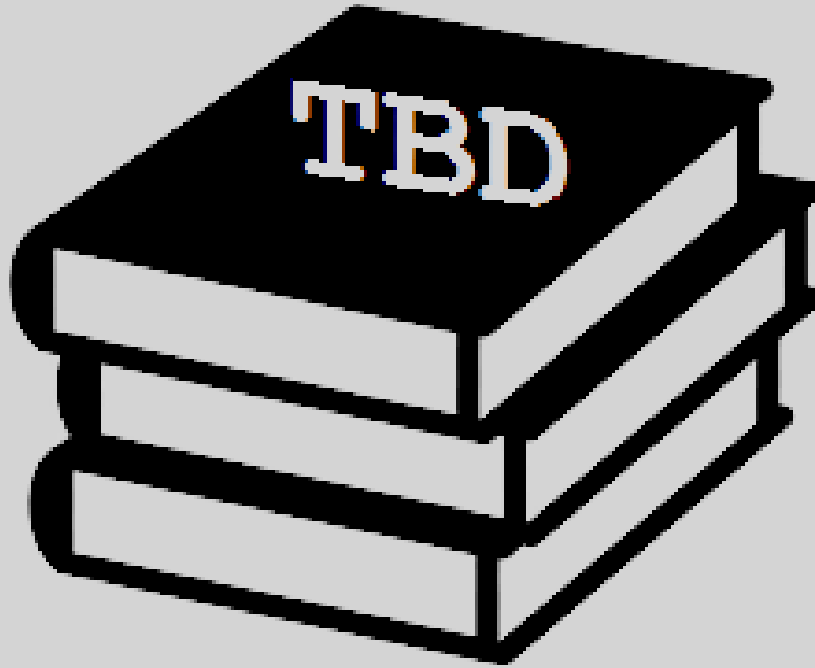
Thank you,

Elias Makere, Complainant
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