UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 01-7089-CIV-LENARD/SIMONTON

BETH FORRY and UNITED STATES EQUAL EMPLOYMENT COMMISSION,

Plaintiffs,

vs.

FEDERATED FINANCIAL SERVICES, INC.,

Defendant.
_____/

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT, ADOPTING REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE, DENYING MOTION TO FILE SUPPLEMENTAL PLEADING AND AMENDMENT TO COMPLAINT, DENYING MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF EEOC'S TITLE VII CLAIMS, AND GRANTING CROSS-MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANT'S SECOND AFFIRMATIVE DEFENSE

THIS CAUSE is before the Court on Defendant Federated Financial Services, Inc.'s Motion for Summary Judgment (D.E. 42), filed on January 3, 2003; Defendant Federated Financial Services, Inc.'s Motion for Summary Judgment as to Plaintiff EEOC's Title VII Claims (D.E. 45), filed on January 10, 2003; Plaintiff Equal Employment Opportunity Commission's Cross-Motion for Summary Judgment as to Defendant's Second Affirmative Defense (D.E. 52), filed on January 27, 2003; and the Report and Recommendation of United States Magistrate Judge Lurana S. Snow (D.E. 89), issued on June 3, 2003. The Motions and

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the Report have been fully briefed and are ripe for consideration by the Court. Based on a de novo review of the Report and Objections, as well as a thorough review of the Motions and Cross-Motion for Summary Judgment, the Responses, Replies, and the record, the Court finds as follows.

I. Background

A. Plaintiff Beth Forry

On June 27, 2001, Plaintiff Beth Forry filed a Complaint against Defendant Federated Financial Services, Inc., alleging claims of sexual discrimination/harassment and retaliation, in violation of Title VII of the Civil Rights Act of 1964("Title VII"), 42 U.S.C. § 2000e, et seq., and the Florida Civil Rights Act ("FCRA"), Fla. Stat. § 760.01, et seq. (2002). (D.E. 1.) In her Complaint, Plaintiff Forry alleges that she was employed by Defendant from January 2000 through March 2000. She claims that during that time she was sexually harassed by Steve Miller, President of Defendant corporation, and that her employment was terminated on or about March 15, 2000. On or about January 2, 2001, Plaintiff simultaneously filed claims of sexual discrimination and harassment based on gender with the Equal Employment Opportunity Commission ("EEOC") and the Florida Commission on Human Relations ("FCHR"). On March 30, 2001, the EEOC issued a Notice of Dismissal and Right to Sue letter to Plaintiff.

On July 23, 2001, Defendant answered Plaintiff's Complaint. (D.E. 4.) On January 23, 2002, the Court consolidated this case with a related action brought by the EEOC against the same Defendant. (D.E. 34.)

B. Plaintiff EEOC

On September 28, 2001, the EEOC filed a Complaint against Defendant Federated Financial Services, Inc. under Title VII and Title I of the Civil Rights Act of 1991 ("Title I"), 42 U.S.C. § 1981A, to correct unlawful employment practices on the basis of sex and retaliation and to provide appropriate relief to Sarah Hoffman, Taren Busick, Brandy Wilcox, Linda Fleek and similarly situated individuals who were adversely affected by such practices. (Case No. 01-7542-CIV-LENARD, D.E. 1.) On October 4, 2002, Defendant answered the Complaint. (D.E. 23.) On January 23, 2002, the Court consolidated this case with a related action brought by Plaintiff Forry against the same Defendant and instructed the parties that all filings in the Consolidated Case be filed under the lower case number, Case No. 01-7089-CIV-LENARD. (D.E. 34.)

C. Consolidated Case

After the two cases had been consolidated, Plaintiff Beth Forry filed a Motion to File Supplemental Pleading and Amendment to Complaint on December 12, 2002. (D.E. 36.) On January 3, 2003, Defendant responded to Plaintiff Forry's Motion (D.E. 40) and filed its Motion for Summary Judgment (D.E. 42). On January 10, 2003, Defendant also filed a Motion for Summary Judgment as to Plaintiff EEOC's Title VII Claims. (D.E. 45.) On January 21, 2003, Plaintiff Forry replied to Defendant's Response to her Motion to File Supplemental Pleading (D.E. 51) and responded to Defendant's Motion for Summary Judgment (D.E. 49). Plaintiff EEOC responded to Defendant's Motion for Summary Judgment as to Plaintiff EEOC's Title VII Claims on January 27, 2003. (D.E. 52.) On

January 31, 2003, Defendant filed its Reply to Plaintiff Forry's Response to its Motion for Summary Judgment. (D.E. 54.) On February 7, 2003, Defendant replied to Plaintiff EEOC's Response to its Motion for Summary Judgment as to Plaintiff EEOC's Title VII Claims. (D.E. 55.)

On June 3, 2003, U.S. Magistrate Judge Lurana S. Snow issued her Report recommending that the Court deny Plaintiff Beth Forry's Motion to File Supplemental Pleading and Amendment to Complaint. (D.E. 89.) On June 16, 2003, Plaintiff Forry filed her objections to the Magistrate's Report. (D.E. 95.)

II. Motion for Summary Judgment and Motion to File Supplemental Pleading and Amendment to Complaint

A. Parties' Arguments

In its Motion for Summary Judgment, Defendant argues that Plaintiff Forry's claims brought under the FCRA are barred for failure to exhaust administrative remedies. Defendant contends that because Plaintiff Forry filed her Complaint in this case in the absence of a FCHR finding of reasonable cause and less than 180 days after filing charges with the FCHR, her FCRA claims were premature under the statute and should be dismissed for failure to exhaust administrative remedies. Defendant further asserts that the premature filing of FCRA claims cannot be cured by the amendment that Plaintiff has requested in her Motion to File Supplemental Pleading and Amendment to Complaint (D.E. 36), filed on December 12, 2002.

In her Response, Plaintiff Forry argues that the EEOC's determination of "unable to conclude" contained in the Right to Sue Letter Plaintiff received on March 30, 2001, is binding on the FCHR for the purposes of the determination of Plaintiff's rights under the FCRA. Plaintiff Forry contends that under the EEOC/FCHR Worksharing Agreement, the EEOC acted as the agent of the FCHR and that therefore its determination was binding on both agencies. Plaintiff further argues that the EEOC's determination of "unable to conclude" prior to the expiration of the 180 days, combined with the fact that her intent in filing early was not to "affirmatively thwart the FCHR's duty to investigate," distinguishes the facts of her case from those of the cases cited by Defendant in favor of dismissal. (Response at 1-2.)

Plaintiff's Motion to File Supplemental Pleading and Amendment to Complaint involves the same legal issue. In her Motion, Plaintiff requests leave to amend her Complaint to include a paragraph alleging that on October 24, 2002, FCHR issued a Notice of Dismissal and Right to Sue letter. Plaintiff also wishes to attach a copy of that letter as Exhibit C of the Complaint. Plaintiff's Motion was referred to Magistrate Judge Lurana S. Snow, who issued her Report and Recommendation on June 3, 2003. In her Report, the Magistrate Judge recommends that the Court deny Plaintiff's request. The Magistrate Judge relies on the case law which deems the premature filing of FCRA claims, prior to the exhaustion of administrative procedures, to be a fatal flaw that cannot be cured by amendment or otherwise. (Report at 4)(citing Ayers v. Wal-Mart Stores, Inc., 941 F.Supp. 1163, 1167 (M.D. Fla. 1996); Dixon v. Sprint-Florida, Inc., 787 So.2d 968, 971 (Fla. 5th DCA 2001); Sweeny v.

Florida Power and Light Co. , 725 So.2d 380, 381 (Fla. 3rd DCA 1998). Plaintiff's Objections to the Report essentially reiterate her arguments in opposition to Defendant's Motion for Summary Judgment. In addition, she argues that in reviewing the Motion to File Supplemental Pleading and Amendment to Complaint, the Magistrate Judge impermissibly decided Defendant's Motion for Summary Judgment, which was not referred to her.

B. Analysis

According to the statutory language of FCRA, when a complaint is filed with the FCHR one of three outcomes is possible: (1) if the FCHR "determines that there is reasonable cause to believe that a discriminatory practice has occurred in violation of the Florida Civil Rights Act of 1992, the aggrieved person may either: (a) Bring a civil action against the person named in the complaint in any court of competent jurisdiction; or (b) Request an administrative hearing," Fla. Stat. § 760.11(4); (2) "[i]f the commission determines that there is not reasonable cause to believe that a violation of the Florida Civil Rights Act of 1992 has occurred, the commission shall dismiss the complaint," and the claimant may only request an administrative hearing within 35 days of the dismissal, Fla. Stat. § 760.11(7); and (3) "[i]n the event that the commission fails to conciliate or determine whether there is reasonable cause on any complaint under this section within 180 days of the filing of the complaint, an aggrieved person may proceed...as if the commission determined that there was reasonable cause," Fla. Stat. § 760.11(8). In other words, a claimant may only file a civil action under FCRA if: (1) the FCHR has determined that reasonable cause exists,

or (2) the FCHR has failed to make a determination as to reasonable cause and 180 days have elapsed since the filing of charges.

In the instant case, Defendant argues that because the FCHR never made a determination of reasonable cause and Plaintiff's Complaint in this case was filed on the 177th day after she filed charges with the FCHR, Plaintiff's FCRA claims are irreversibly barred. Plaintiff Forry concedes these facts but contends that the premature filing of her Complaint should not be considered fatal to her claims under FCRA. Defendant cites a number of cases as authority for its position that Plaintiff Forry's FCRA claims are irreversibly barred, including: Ayers, 941 F. Supp. 1163; Brice-Northard v. The Sports Authority, 1998 U.S. Dist. LEXIS 20408, 12 Fla. L. Weekly Fed. D 8 (S.D. Fla. 1998); Sweeny, 725 So.2d 380; Brewer v. Clerk of the Circuit Court, Gadsden County, 720 So.2d 602 (Fla. 1st DCA 1998).

In Ayers, the plaintiff filed a civil suit under FCRA only 117 days after filing charges of discrimination with EEOC and FCHR. 941 F. Supp. at 1166-67. She justified her actions by arguing that FCRA's filing requirements were not jurisdictional prerequisites, but were conditions precedent, subject to equitable modification. Id. The Ayers court noted that "the procedural requirements of FCRA are very different from those of Title VII" and held that Ayers' "Demand for Right to Sue Letter" effectively halted the administrative investigation into her claim and prevented her from completing FACA's procedural requirements. Id. at 1167. Thus, the District Court for the Middle District of Florida granted the defendant's motion for summary judgment on Ayers' FCRA claims.

Two years later, a district court in this district granted summary judgment on FCRA claims under similar circumstances. Brice-Northard, 1998 U.S. Dist. LEXIS 20408, at *8-9. The Brice-Northard Court held that the plaintiff had failed to exhaust her administrative remedies under FCRA on two grounds. First, the court held that the plaintiff in that case had failed to file a charge of discrimination with FCHR in the first place. Second, the court held that even if plaintiff's charges were deemed properly filed under the EEOC/FCHR Worksharing Agreement, Plaintiff had filed her civil complaint before the 180 day waiting period had expired and, therefore, her claims were barred. Id.

Moreover, Florida appellate courts have adopted reasoning similar to that of Ayers and Brice-Northard. In Sweeny, 725 So.2d at 381, the Third District Court of Appeal of Florida affirmed the dismissal of an action brought under the FCRA "because it had been prematurely filed before the expiration of the 180 day period provided by section 760.11(3)." The Sweeny Court held that the premature filing of the complaint in that case was fatal because "the very act of filing the complaint served to 'divest the commission of jurisdiction' to proceed." Id. (citing Fla. Stat. § 760.11(5)). The Court further held that "although we might desire to do so, we cannot apply the rule that a premature action should not be dismissed, but rather abated until the appropriate time has run." Id. In Brewer, 720 So.2d at 604, the First District Court of Appeal of Florida affirmed the dismissal of discrimination claims under FCRA where the court found that the statutory prerequisites had not been met. In that case, the Court quoted and relied on the Ayers decision. Id. at 604-05.

On a question of Florida law, where the Florida Supreme Court has not spoken on the issue, a federal district court is bound by the decisions of Florida intermediate appellate courts applying state law absent "persuasive indication that [the Supreme Court] would decide the issue differently." Galindo v. Ari Mutual Insurance Company, 203 F.3d 771, 775 (11th Cir. 2000). Thus, this Court is bound by the Sweeny and Brewer decisions unless Plaintiff can persuasively demonstrate that the Florida Supreme Court would decide the issue differently. The Court finds that Plaintiff has failed to satisfy this standard.

Plaintiff argues that under the current Worksharing Agreement between the EEOC and the FCHR each agency designates the other as its agent and, therefore, "a determination by the EEOC is a determination by the FCHR." (Response at 5)(citing Dawkins v. BellSouth, 53 F. Supp. 2d 1356, 1358-59 (M.D. Fla. 1999)(holding that plaintiff's FCRA charges in that case were deemed filed with the FCHR on the same day they were filed with the EEOC, because plaintiff checked the box indicating that she wished her charges to be dually-filed under the Worksharing Agreement)). Plaintiff reasons that based on the language of the Worksharing Agreement and the letter she received from FCHR informing her that her discrimination claim would be processed by the EEOC, [1] the EEOC's determination of "unable to conclude" is binding on the FCHR.

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[1] Plaintiff has attached a copy of a letter she received from FCHR dated January 16, 2001, which informed her that her complaint would be processed by the EEOC and that "[t]he Florida Commission on Human Relations will refrain from commencing an investigation into your complaint while it is before the EEOC." (1/16/01 Letter, Response, Ex. C.)

Even assuming that Plaintiff is correct and that the EEOC's Dismissal and Notice of Rights is a binding determination under FCRA, Plaintiff has failed to show that it was a determination which authorized her to file her complaint prior to the expiration of the 180-day statutory period. In its Dismissal and Notice of Rights, the EEOC notified Plaintiff that it was "unable to conclude that the information obtained establishes violations of the statutes." (EEOC Dismissal, Response, Ex. D.) In Woodham v. Blue Cross Blue Shield of Florida, Inc., 829 So.2d 891, 897 (Fla. 2002), the Florida Supreme Court found that the "unable to conclude" language of the EEOC Dismissal form is not equivalent to a finding of no reasonable cause under § 760.11(7) of FCRA. Id. That Court further found that the language of the EEOC form "does not comply with the notice requirement in subsection (3) [of § 760.11], which requires FCHR to 'promptly notify the aggrieved person...of the options available under this section." Id. The Florida Supreme Court treated the EEOC's determination of "unable to conclude" as a failure to make a reasonable cause determination under § 760.11(8). Id.

Thus, in the instant case, the Court finds that the Dismissal and Notice of Rights Plaintiff Forry received from the EEOC should also be construed as a failure by FCHR to made a reasonable cause determination. The language of the statute is clear. Where FCHR has failed to make a reasonable cause determination, a claimant may file a civil suit under FCRA only after the 180-day waiting period has expired. See Fla. Stat. § 760.11(8). Since Plaintiff Forry prematurely filed her complaint on the 177th day after she had dually-filed charges with the EEOC and FCHR, her FCRA claims are barred. See Sweeny, 725 So.2d

at 381; Brewer, 720 So.2d at 604. In her Response, Plaintiff attempts to distinguish the facts of her case from those of Sweeny, Brewer, Brice-Northard, and Ayers, but her arguments are unconvincing. No matter how liberally one interprets the language of the statute, Plaintiff was not entitled to file a civil complaint until the full 180-day statutory period had run. Thus, pursuant to § 760.11(8), the Court finds that Plaintiff Forry's FCRA claims are barred for failure to exhaust administrative remedies and grants Defendant's Motion for Summary Judgment. Moreover, the Court adopts the Magistrate Judge's Report and denies Plaintiff Forry's Motion to File Supplemental Pleading and Amendment to Complaint as futile.

III. Defendant's Motion for Summary Judgment as to Plaintiff EEOC's Title VII Claims and Plaintiff EEOC's Cross-Motion for Summary Judgment as to Defendant's Second Affirmative Defense

A. Parties' Arguments

In its Motion for Summary Judgment as to Plaintiff EEOC's Title VII claims, Defendant asserts that the claimants on whose behalf Plaintiff EEOC seeks relief have failed to comply with the verification requirement under the statute, 42 U.S.C. § 2000e-5(b). Defendant argues that the charges of sexual harassment and gender discrimination made against Defendant by Taren M. Busick, Sarah Hoffman, Lynday Fleek, and Brandy Lynn Wilcox were not made "under oath or affirmation" as required by Title VII. Plaintiff agrees that the EEOC Charge of Discrimination forms completed by the four claimants and filed with the EEOC were not signed in the bottom right corner under the printed oath and notarized. Instead, Plaintiff points out that all four claimants signed their charges in the bottom left corner of the form, declaring "under penalty of perjury" that the charges were

"true and correct." (See EEOC forms, Motion for Summary Judgment, Ex. 1-4.) Plaintiff EEOC argues that this alternative form of verification is authorized by statute, see 28 U.S.C. § 1746, and recognized in section 1601.3 of the Code of Federal Regulations. Thus, Plaintiff contends that Defendant's Motion for Summary Judgment should be denied.

In addition, Plaintiff has made a Cross-Motion for Summary Judgment as to Defendant's Second Affirmative Defense. In its Second Affirmative Defense, Defendant asserts that "[t]he charges of discrimination filed with the EEOC were not made under oath or affirmation as required by 42 U.S.C. § 2000e-5(e)." (Answer at 3.) Defendant acknowledges that Plaintiff's Cross-Motion "presents and turns upon the identical legal issue presented by Defendant's Motion for Summary Judgment." (Reply at 1 n.1.)

B. Analysis

In Vason v. City of Montgomery, Ala., 240 F.3d 905 (11th Cir 2001), the Eleventh Circuit found that a Title VII claimant had not met the verification requirement under the statute where the charges of discrimination were made in a letter mailed to the EEOC. In that case, it was clear that the charges had not been made under oath or affirmation or verified in any manner, nor had they been amended to correct the failure to verify. Id. at 907.

In Fultz v. B.A. Mullican Lumber & Manufacturing Co., 197 F.Supp.2d 523, 524-25 (W.D. Va. 2002), a district court for the Western District of Virginia considered the question of whether or not an unsworn complaint signed "under penalty of perjury" meets the verification requirement under 42 U.S.C. § 2000e-5(b). That Court reasoned that because Title VII qualifies as a "law of the United States," an unsworn declaration under penalty of

perjury is sufficient verification pursuant to 28 U.S.C. § 1746. That statue states in relevant part:

> Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:...
>
> (2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).
>
> (Signature)".

28 U.S.C. § 1746 (emphasis added). TheFultz court observed that the EEOC had "obviously read this law," as it included the prescribed language in its EEOC Form 5.

In the instant case, the charges at issue were also signed "under penalty of perjury" on EEOC Form 5. The Court agrees with the Fultz court that this method of verification is explicitly authorized under 28 U.S.C. § 1746. Accordingly, it is

ORDERED AND ADJUDGED that:

1. Defendant Federated Financial Services, Inc.'s Motion for Summary Judgment (D.E. 42), filed on January 3, 2003, is **GRANTED**.

2. Plaintiff Beth Forry's claims brought under the Florida Civil Rights Act ("FCRA") are hereby dismissed with prejudice.

3. The Report and Recommendation of United States Magistrate Judge Lurana S. Snow (D.E. 89), issued on June 3, 2003, is hereby **ADOPTED.**

4. Plaintiff Beth Forry's Motion to File Supplemental Pleading and Amendment to Complaint (D.E. 36), filed on December 12, 2002, is **DENIED**

5. Defendant Federated Financial Services, Inc.'s Motion for Summary Judgment as to Plaintiff EEOC's Title VII Claims (D.E. 45), filed on January 10, 2003, is **DENIED**

6. Plaintiff EEOC's Cross-Motion for Summary Judgment as to Defendant's Second Affirmative Defense (D.E. 52), filed on January 27, 2003, is **GRANTED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 5 day of Nov. October, 2003.

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

cc: U.S. Magistrate Judge Andrea M. Simonton
U.S. Magistrate Judge Lurana S. Snow
All Counsel of Record
Case No. 01-7089-CIV-LENARD/SIMONTON