UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Anthony Armstead	:	
	:	
v.	:	**No. 3:01cv1489 (JBA)**
	:	
The Stop & Shop Companies, Inc., a/k/a The Stop & Shop Supermarket Company	:	

RULING ON DEFENDANT'S MOTION FOR JUDGMENT
[# 15]

Plaintiff Anthony Armstead filed this diversity action against his former employer, The Stop & Shop Companies, Inc. ("Stop & Shop"), alleging violations of the Americans with Disabilities Act ("ADA"), the Connecticut Fair Employment Practices Act, and state law claims, arising out of defendant's alleged refusal to permit plaintiff to return to work with limitations following his injury in a car accident. Defendant has now moved for judgment on the pleadings on the grounds that plaintiff's claims are untimely. For the reasons set forth below, the Court agrees and defendant's motion is GRANTED.[1]

I. Factual background

Plaintiff began working for Stop & Shop as a deli clerk in

[1]In an endorsement order dated today, the Court grants plaintiff's motion to strike from defendant's motion all arguments other than those relating to the untimeliness of plaintiff's state and federal disability discrimination claims, as originally contemplated during the pre-filing conference held November 7, 2001.

April or May of 1999. After a car accident in 2000, plaintiff took a medical leave of absence from May through July 2000. In July 2000, plaintiff submitted a doctor's note clearing him to return to work with bending and lifting restrictions. Defendant refused to accommodate plaintiff's restrictions and would not permit him to return to work unless he was completely recovered. While precisely when plaintiff was terminated has been put at issue by plaintiff's amendment of his complaint, which originally alleged that he was terminated on July 23, 2000 and now alleges that the same events occurred on August 23, 2000, the parties agree that plaintiff was eventually terminated, although defendant never issued a written notice of termination and never gave plaintiff a pink slip.

It is undisputed that plaintiff met with the store manager, Mark Gursen, on July 24, 2000, to discuss plaintiff's interest in returning to work. At that meeting, Gursen apparently refused to accept plaintiff's Work Capabilities Report indicating that he was cleared for work with some restrictions, advised plaintiff that since his injury had not occurred at work, Stop & Shop was under no obligation to take plaintiff back, and suggested to plaintiff that he take a medical leave. See Pl. Opp. to S.J., Ex. 3. It is further undisputed that following that meeting, plaintiff's attorney wrote to defendant on July 28, 2000, stating: "If it is your intention to terminate Mr. Armstead as you indicated in your meeting with him then please contact him so

that he can pick up his pink slip." Id. On July 27, 2000, a "Request for Leave of Absence" form was completed and signed by Mark Gursen, based on plaintiff's inability to return to work full duty without restrictions as a result of a car accident. Pl. Ex. 5.

While the deposition testimony of Mark Gursen suggests no specific recollection of when plaintiff was actually terminated, see Gursen dep. at 29, 42, Gursen also testified that he did recall explaining to Armstead that the process by which he would be terminated had begun, see id. at 12.

In connection with plaintiff's application for unemployment benefits filed with the Connecticut Department of Labor on August 23, 2000, plaintiff described under oath the following circumstances of his termination:

> I was terminated from my job on approx 7/23/00. I had been out of work because of medical reasons since approx 3/15/00 due to injuries to my neck from 2 separate car accidents. I was released for work with restrictions . . . . I brought this to Mark Gursen, General Store Manager. He told me that he wasn't obligated to take me back since it was not a workman's compensation case. He told me he would be able to rehire me back when I was back at 100%. . . . My job was held for me up until the end of 7/00. After that they would not schedule me for work because of my restrictions.

Def. Mem. in Supp. of S.J., Ex. 4. Plaintiff's benefits application was subsequently approved. Later, in a claim for wages filed with the Connecticut Department of Labor and dated October 7, 2000, plaintiff identified the date of separation as "July or August, 2000." Pl. Ex. 4.

Finally, Armstead filed a sworn complaint with the EEOC, signed June 13, 2001, and received by the EEOC on June 15, 2001, in which he stated that:

> Respondent refused to provide me with the reasonable accommodations of lifting and bending restrictions. On or about July 23, 2000, I was terminated from my position. The stated reason for my termination was 'I am firing you.' Respondent did not provide me with a pink slip, despite my repeated requests for one. Finally, on August 23, 2000, I filed for unemployment.

Pl. Ex 7. Because the complaint of discriminatory termination and refusal to accommodate was filed over 300 days after July 23, 2000, the EEOC refused to investigate this claim as untimely and on June 28, 2001, issued plaintiff a right to sue letter. Pl. Ex. 8. The present lawsuit was timely filed within 90 days of the issuance of the right to sue letter.

II. Discussion

A. Standard of Review

As a preliminary matter, the Court notes that while defendant has styled its motion as a Rule 12(c) motion for judgment on the pleadings, the Court permitted limited discovery on the statute of limitations issue, and both sides have submitted supporting evidence outside the complaint. Thus, as plaintiff recognizes in opposition, the motion is more properly described as a motion for summary judgment under Fed. R. Civ. P. 56. As plaintiff has had the opportunity to submit evidence

supporting his claim of timely filing with the EEOC, the Court treats the motion as one for summary judgment.

Summary judgment will be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The moving party carries the initial burden of demonstrating an absence of a genuine issue of material fact. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Facts, inferences therefrom, and ambiguities must be viewed in a light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Ametex Fabrics, Inc. v. Just In Materials, Inc., 140 F.3d 101, 107 (2d Cir. 1998). A genuine issue of fact is one that, if resolved in favor of the non-moving party, would permit a jury to return a verdict for that party. R.B. Ventures, Ltd. v. Shane, 112 F.3d 54, 57 (2d Cir. 1997) (citing Anderson, 477 U.S. at 248).

After the moving party meets this burden, the burden shifts to the non-moving party to come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); accord Rexnord Holdings, Inc. v. Bidermann, 21 F.3d 522, 525-26 (2d Cir. 1994). The non-moving party must "do more than simply show that there is some metaphysical doubt as to the

material facts." Matsushita, 475 U.S. at 586. Instead, that party must "come forward with enough evidence to support a jury verdict in its favor, and the motion will not be defeated merely ... on the basis of conjecture or surmise." Trans Sport v. Starter Sportswear, 964 F.2d 186, 188 (2d Cir. 1992) (citation and internal quotations omitted); see also Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 11 (2d Cir. 1986). "The possibility that a material issue of fact may exist does not suffice to defeat the motion; upon being confronted with a motion for summary judgment the party opposing it must set forth arguments or facts to indicate that a genuine issue--not merely one that is colorable--of material fact is present." Gibson v. American Broadcasting Cos., 892 F.2d 1128, 1132 (2d Cir. 1989).

B. Disability Discrimination Claims

Defendant asserts that plaintiff's ADA claim must be dismissed because plaintiff did not timely file a complaint with the EEOC, notwithstanding plaintiff's recent efforts to create a factual dispute surrounding the date of his termination. According to defendant, because plaintiff previously submitted sworn statements that he was terminated on July 23, 2000, the EEOC charge had to be filed within 300 days, or by May 19, 2001. As the EEOC charge was not filed until June 15, 2001, defendant's argument goes, it is necessarily untimely.

The parties agree that under the ADA, plaintiff was required to file a charge with the EEOC within 300 days of the date of the alleged discriminatory action. See 42 U.S.C. § 12117(a) (incorporating Title VII procedures for ADA claims); 42 U.S.C. § 2000e-5(e)(1). This requirement functions as a statute of limitations, in that discriminatory incidents not timely charged before the EEOC will be time-barred upon the plaintiff's suit in a district court. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982); Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708, 712 (2d Cir. 1996).

In Delaware State College v. Ricks, 449 U.S. 250, 256-58 (1980), the Supreme Court held that the period for filing an EEOC charge begins on the day an employee receives notice of an adverse employment action rather than on the effective date of the action. Following Ricks, the Second Circuit has held that the operative date for determining the beginning of the 300-day period is when plaintiff had notice of the discriminatory termination, rather than the actual date of discharge. Miller v. International Tel. & Tel. Corp., 755 F.2d 20, 23 (2d Cir. 1985); Smith v. United Parcel Svc. of Am., Inc., 65 F.3d 266, 268 (2d Cir. 1995); Economu v. Borg-Warner Corp., 829 F.2d 311, 315 (2d Cir. 1987).

As defendant notes, plaintiff’s original complaint initiating this lawsuit alleged that he was terminated on July 23, 2000, and plaintiff previously swore in his EEOC charge and

in the claim submitted to the Department of Labor that he was terminated on July 23, 2000. Plaintiff, however, argues that the use of July 23, 2000 in the first complaint was a typographical error, and that August 23, 2000 is the accurate date of termination. Plaintiff makes no effort to explain the inconsistency between his affidavit and his two sworn statements, but instead points to evidence that the store manager does not recall the actual date of plaintiff's termination and that a request for leave of absence was submitted on July 27, 2000 as creating a material issue of fact in dispute as to the timing of his termination. Plaintiff now claims in an affidavit submitted in opposition to summary judgment that he did not consider himself terminated until August 23, 2000, when, following defendant's continued refusal to schedule him for work, he deemed himself constructively discharged and filed for unemployment. See Doc. # 22, ¶¶ 14-15.

This claim of constructive discharge as of August 23, 2000 conflicts with the other statements made by plaintiff, which consistently asserted that July 23, 2000 was the date at which plaintiff was informed that defendant would not schedule him for work and terminated him. "[I]n opposing summary judgment, a party who has testified to a given fact in his deposition cannot create a triable issue merely by submitting his affidavit denying the fact." Palazzo ex rel Delmage v. Corio, 232 F.3d 38, 43 (2d Cir. 2000) (citing Perma Research & Development Co. v. Singer

Co., 410 F.2d 572, 578 (2d Cir. 1969)). To rule otherwise would "greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." Perma Research, 410 F.2d at 578; see also Hayes v. New York City Department of Corrections, 84 F.3d 614, 619 (2d Cir. 1996) ("factual issues created solely by an affidavit crafted to oppose a summary judgment motion are not 'genuine' issues for trial") (quoting Perma Research, 410 F.2d at 578). In light of the rule that a party cannot create a factual dispute simply by contradicting his own previous testimony, it seems inconsequential that the inconsistent statements were made in sworn statements to two state agencies, rather than in a deposition. Cf. Margo v. Weiss, 213 F.3d 55, 61 (2d Cir. 2000) ("There is no reason to distinguish, for purposes of the Perma Research principle, between an attempt to conjure up a triable issue of fact through the proffer of a late affidavit and an attempt to achieve the same end through the submission of delayed errata sheets or supplemental answers to interrogatories. None will defeat a motion for summary judgment.").

In any event, even if plaintiff's contradictory affidavit could create a factual dispute as to when plaintiff was actually terminated, the 300-day period "starts running on the date when the employee receives a definite notice of the termination, not upon his discharge." Miller v. International Tel. & Tel. Corp., 755 F.2d 20, 23 (2d Cir. 1985). On the record here, the Court

finds that it is undisputed that following the July 24, 2000 meeting with Gursen plaintiff was aware that defendant was refusing to let him return to work until he was cleared of all restrictions, and that defendant intended to terminate him. The letter sent by plaintiff's counsel on July 28, 2000 confirms that this was the substance of the meeting, as do the two sworn statements submitted by plaintiff to the Department of Labor and the EEOC. Thus, notwithstanding the inaccuracy of July 23, 2000 as the claimed date of termination, as the meeting between plaintiff and Gursen occurred July 24, 2000, there is simply nothing in the record suggesting that plaintiff was not, as he claimed in his EEOC and Department of Labor statements, informed by Gursen that he could not return to work on July 24, 2000. Indeed, plaintiff's affidavit submitted in opposition to summary judgment confirms that Gursen advised him at that meeting that he would not schedule plaintiff for work until he could work with no restrictions. See Doc. # 22, ¶ 12. Thus, regardless of when plaintiff now claims to have considered himself "constructively discharged," it is undisputed that he had notice that defendant refused to permit him to return to work and was terminating him as a result after meeting with Gursen on July 24, 2000, and his filing with the EEOC in June 2001 was therefore untimely.[2]

[2]With respect to the state discrimination claim, plaintiff was required to file a charge of discrimination with the Connecticut Commission on Human Rights within 180 days of the alleged discriminatory actions. See Conn. Gen Stat. § 46a-82(e).

III. Conclusion

For the foregoing reasons, defendant's motion for judgment [# 15] is GRANTED as to the ADA and state discrimination counts.

IT IS SO ORDERED.

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Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut, this ___ day of April, 2002.

As it is undisputed that plaintiff did not file a charge with the CHRO within 180 days of either July 23, 2000 or August 23, 2000, this claim is also dismissed.