UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

TARA JOYCE HARRIS,

Plaintiff,

v.

ACTION NO. 2:16cv499

THE SCHOOL BOARD OF THE CITY OF CHESAPEAKE[1],

Defendant.

DISMISSAL ORDER

Plaintiff, appearing *pro se*, filed suit against Defendant, asserting violations of Title VII of the Civil Rights Act ("Title VII") and the Americans With Disabilities Act ("ADA"). This matter is before the Court on Defendant's Motion to Dismiss. Mot. to Dismiss, ECF No. 7. The Court concludes that oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefing. Prior to addressing Defendant's Motion to Dismiss, however, the Court must first determine whether Plaintiff identified the proper entity as the named Defendant in this matter.

On November 15, 2016, Defendant filed a Motion to Dismiss in which it argued that Chesapeake Public Schools, the Defendant named in Plaintiff's Complaint, is "not an employer under Title VII or the ADA and is not a legal entity against which suit may be brought as attempted by Plaintiff." Mem. in Supp. of Mot. to Dismiss at 5, ECF No. 8. Defendant explained that pursuant to Virginia Code § 22.1-71, the School Board of the City of Chesapeake, not Chesapeake Public Schools, is authorized to sue and be sued. *Id.* at 5. Defendant asked

[1] For the reasons set forth on pages 1 and 2 of this Dismissal Order, the caption has been edited to reflect that "The School Board of the City of Chesapeake" is the proper Defendant in this matter.

the Court to dismiss Plaintiff's action based on the failure to bring suit against the proper entity. *Id.*

The Court agrees that Plaintiff should have named the School Board of the City of Chesapeake as the Defendant in this action. However, when a *pro se* litigant has alleged a cause of action which may be meritorious, "the district court should afford him [or her] a reasonable opportunity to determine the correct person or persons against whom the claim is asserted." *Gordon v. Leeke*, 574 F.2d 1147, 1152-53 (4th Cir. 1978). *See also Parsley v. Russell Cty. Sch. Bd.*, No. 1:13cv92, 2014 U.S. Dist. LEXIS 81110, at *9-11 (W.D. Va. June 12, 2014) (granting motion to amend in order to substitute a school board as the proper defendant in a Title VII case). Accordingly, as opposed to dismissing Plaintiff's action on this ground, the Clerk is **DIRECTED** to **SUBSTITUTE** the School Board of the City of Chesapeake as the named Defendant on the docket of this case.[2]

With the entity identification issue resolved, the Court will proceed with its analysis of Defendant's Motion to Dismiss. For the reasons set forth below, Defendant's Motion to Dismiss, ECF No. 7, is **GRANTED**.

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[2] Defendant argues that "[i]t would be futile to allow the Plaintiff to amend to include the School Board because Plaintiff never filed [Equal Employment Opportunity Commission ("EEOC")] charges against the School Board and thus failed to administratively exhaust her claims against the School Board, as required by Title VII and the ADA." Mem. in Supp. of Mot. to Dismiss at 5, ECF No. 8. However, the "exhaustion requirement was intended by Congress 'to serve the primary purposes of notice and conciliation.'" *Johnson v. Portfolio Recovery Assocs.*, LLC, 682 F. Supp. 2d 560, 569 (E.D. Va. 2009) (citing *Chacko v. Patuxent Inst.*, 429 F.3d 505, 510 (4th Cir. 2005)). Defendant does not argue that it was unaware of the EEOC Charge. As such, the Court refuses to dismiss the *pro se* Plaintiff's case on the basis of a technical error in her EEOC Charge. *See Smith v. Moore*, No. S-03-0672, 2005 U.S. Dist. LEXIS 31787, at *1-8 (E.D. Cal. Dec. 8, 2005) (recommending denial of a motion to dismiss based on the naming of the wrong entity in an EEOC Charge, when the defendant had sufficient notice of the plaintiff's claim); *see also Love v. Pullman Co.*, 404 U.S. 522, 527 (1972) (noting in a Title VII case that "technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process").

I. Factual and Procedural Background

Plaintiff was formerly employed by Defendant. Plaintiff alleges that she became ill with a diagnosis that "caused [Plaintiff] to be incapacitated and unable to work," and that she was "directed by her medical doctor of record . . . to apply for retirement disability." Compl. ¶ 2. On September 25, 2015, Plaintiff submitted a "Sick Leave Bank Request" form to Defendant, along with a request for leave pursuant to the Family and Medical Leave Act. *Id.* Plaintiff claims that on October 6, 2015, she received approval from Defendant for her absence "to be covered by the sick leave bank beginning November 9, 2015." *Id.* However, Plaintiff did not receive any salary payment on November 9, 2015, as expected. *Id.* Plaintiff contacted Defendant's Human Resource Department to discuss the issue and demand payment. *Id.* Plaintiff claims that, without providing any notification to Plaintiff, Defendant rescinded its prior authorization for Plaintiff to use paid sick leave during her absence. *Id.* Plaintiff further claims that such rescission was contrary to the policies of the school board. *Id.* Plaintiff asserts that she had a "right" to receive paid sick leave for her absence "due to the medical condition and inability to perform assigned work of any kind," and that Defendant's denial of this "right" constituted a violation of Title VII and the ADA. *Id.* Plaintiff claims that she filed a Charge of Discrimination based on "[r]etaliation and [d]isability" with the EEOC and was issued a Right to Sue Letter on May 16, 2016. *Id.* ¶ 3.

On August 16, 2016, Plaintiff filed a Motion to Proceed *in Forma Pauperis* ("IFP Motion"), along with a proposed Complaint. IFP Mot., ECF No. 1. The Court denied Plaintiff's IFP Motion on August 24, 2016, and directed Plaintiff to file the requisite filings fees within thirty days. Order at 2, ECF No. 2. Plaintiff paid her filing fees on September 16, 2016, prior to the

expiration of the Court's thirty-day deadline, and Plaintiff's Complaint was filed on the same day. Receipt, ECF No. 3; Compl., ECF No. 4.

Defendant filed a Motion to Dismiss on November 15, 2016, and provided Plaintiff with a proper *Roseboro* notice pursuant to Rule 7(K) of the Local Rules of the United States District Court for the Eastern District of Virginia. Mot. to Dismiss, ECF No. 7. Plaintiff did not file a brief in opposition to Defendant's Motion to Dismiss.

II. Analysis

A. Standard of Review

Defendant seeks to dismiss Plaintiff's Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief may be granted. A motion to dismiss under Rule 12(b)(6) should be granted if a complaint fails to "allege facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A Rule 12(b)(6) motion "tests the sufficiency of a complaint and 'does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.'" *Johnson v. Portfolio Recovery Assocs., LLC*, 682 F. Supp. 2d 560, 567 (E.D. Va. 2009) (quoting *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992)). As such, the district court must accept all factual allegations contained in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Johnson,* 682 F. Supp. 2d at 567.

An employment discrimination plaintiff need not plead specific facts in a complaint establishing a *prima facie* case of discrimination, but must comply with Federal Rule of Civil Procedure 8(a)(2) that requires only a "short and plain statement of the claim showing that the pleader is entitled to relief" in order to provide the defendant fair notice of the plaintiff's claims and the grounds upon which they rest. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 515

(2002). However, a plaintiff is still required to allege facts sufficient to state all of the elements of his or her claim. *Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003).

Further, when analyzing the pleadings of a *pro se* plaintiff, courts are required to construe such pleadings liberally, especially in a civil rights case. *See Brown v. N.C. Dep't of Corr.* 612 F.3d 720, 722 (4th Cir. 2010); *Conyers v. Va. Hous. Dev. Auth.*, No. 3:12cv458, 2012 U.S. Dist. LEXIS 134908, at *7-8 (E.D. Va. Sept. 19, 2012).

B. Discussion

i. Timeliness of Plaintiff's Lawsuit

Defendant argues that Plaintiff's Complaint should be dismissed as untimely because it was not filed within ninety days of receiving her Right to Sue Letter from the EEOC. Mem. in Supp. of Mot. to Dismiss at 6-10, ECF No. 8. This Court disagrees.

Civil actions under Title VII and the ADA must be filed within ninety days of receiving a Right to Sue Letter from the EEOC. *See* 42 U.S.C. § 2000e-5(f)(1); 42 U.S.C. § 12117(a). Although courts "strictly adhere to the 90-day filing deadline, . . . exceptions exist for equitable tolling, waiver and estoppel." *Wyatt v. Steidel*, No. 3:14cv64, 2014 U.S. Dist. LEXIS 111585, *4 (E.D. Va. Aug. 12, 2014). As this Court recognizes, "[*p*]*ro se* status and the filing of a petition to proceed *in forma pauperis* have been widely recognized as reasons to allow equitable tolling." *Wyatt*, 2014 U.S. Dist. LEXIS 111585 at *4 (applying equitable tolling when the court's denial of a timely filed IFP Motion caused the plaintiff to file an acceptable complaint outside of the ninety-day filing deadline); *see also Martin v. Richmond City Police Dep't*, No. 3:08cv849, 2009 U.S. Dist. LEXIS 62294, *34-35, (E.D. Va. June 24, 2009) (stating that "when a complaint is attached to a *pro se* motion to proceed *in forma pauperis*, and is timely filed, the complaint shall be deemed filed on the date of the Plaintiff's motion"); *Druitt v. College of*

William & Mary, No. 4:04cv128, 2005 U.S. Dist. LEXIS 26709, *16-17 (E.D. Va. Feb. 23, 2005) (finding equitable tolling appropriate when a complaint was filed outside of the 90-day window due, in part, to an unsuccessful attempt to file a motion to proceed *in forma pauperis*).

Here, Plaintiff filed an IFP Motion and a proposed Complaint on August 16, 2016, prior to the expiration of her ninety-day deadline to file suit. IFP Mot., ECF No. 1. The Court denied Plaintiff's IFP Motion on August 24, 2016, and directed Plaintiff to pay the requisite filing fees within thirty days. Order at 2, ECF No. 2. Plaintiff paid the requisite filings fees on September 16, 2016, within the thirty-day deadline imposed by the Court, and Plaintiff's Complaint was filed on the same day. Compl., ECF No. 4. Under these facts, the Court finds that equitable tolling applies and Plaintiff's Complaint will be deemed to be timely filed.[3]

ii. Title VII Discrimination Claim

In her Complaint, Plaintiff claims that Defendant's rescission of its prior authorization for Plaintiff to use paid sick leave to cover her absence constituted a violation of Title VII. Compl. ¶ 2. Defendant argues that Plaintiff has insufficiently alleged a *prima facie* case of discrimination under Title VII. Mem. in Supp. of Mot. to Dismiss at 10-12, ECF No. 8. This Court agrees.

Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his or her compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). To state a *prima facie* claim of discrimination under Title VII, Plaintiff must show: (i) membership in a protected class; (ii) satisfactory job performance; (iii) an adverse employment action; and (iv) more favorable

[3] Defendant argues that equitable tolling should only be applied when a plaintiff files his or her IFP Motion within the ninety-day deadline and is subsequently *granted* IFP status. Mem. in Supp. of Mot. to Dismiss at 8-10, ECF No. 8. Defendant's argument is unpersuasive.

treatment of someone outside the protected class with comparable qualifications. *Coleman v. Md. Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010).

Here, there is no reference in the Complaint to Plaintiff's race, color, religion, sex, or national origin, and no suggestion that Defendant's actions were based on any such factor. Further, Plaintiff has not alleged that she was able to satisfactorily perform her job duties. In fact, Plaintiff has alleged the opposite – that she was unable to perform any job duties. Compl. ¶ 2 (alleging that "[a]fter a valiant attempt to continue to work, the plaintiff could not," and referencing an "inability to perform assigned work of any kind"). Plaintiff has not alleged that similarly situated individuals outside of her protected class received more favorable treatment from Defendant. Under these circumstances, Plaintiff has not stated a claim of Title VII discrimination upon which relief may be granted. Accordingly, Defendant's Motion to Dismiss, ECF No. 7, is **GRANTED** as to Plaintiff's Title VII discrimination claim.

iii. ADA Discrimination Claim

In her Complaint, Plaintiff also claims that Defendant's rescission of its prior authorization for Plaintiff to use paid sick leave to cover her absence constituted a violation of the ADA. Compl. ¶ 2. Defendant argues that Plaintiff has insufficiently alleged a *prima facie* case of discrimination under the ADA. Mem. in Supp. of Mot. to Dismiss at 12-14, ECF No. 8. This Court agrees.

The ADA provides that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). To state a *prima facie* claim of disability discrimination under the ADA, Plaintiff must show that: (i) she was a qualified

individual with a disability under the ADA; (ii) she suffered an adverse employment action; (iii) her performance at the time met the legitimate expectations of her employer; and (iv) the adverse employment action occurred under circumstances that raise a reasonable inference of unlawful discrimination. *Pickering v. Va. State Police*, 59 F. Supp. 3d 742, 748 (E.D. Va. 2014). A "qualified individual" under the ADA is a person "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds." 42 U.S.C. § 12111(8). Notably, "[t]he ADA does not require as an accommodation that an employer wait indefinitely until an employee is well enough to work again." *McIntyre-Handy v. APAC Customer Servs., Inc.*, No. 4:04cv83, 2005 U.S. Dist. LEXIS 41752, at *16 (E.D. Va. May 13, 2005) (finding that a plaintiff was not a "qualified individual" under the ADA, in part, because an indeterminate amount of leave is not a reasonable accommodation under the ADA); *see also Gladden v. Winston Salem State Univ.*, 495 F. Supp. 2d 517, 522 (M.D. N.C. May 9, 2007) (noting that a "reasonable accommodation" under the ADA "does not require an employer to wait indefinitely for an employee's medical condition to be corrected").

In her Complaint, Plaintiff provides only vague allegations of a "medical condition" and an illness that "caused [her] to be incapacitated and unable to work." Compl. ¶¶ 1-2. Plaintiff does not provide any specific allegations that would allow the Court to properly analyze whether her condition meets the definition of a "disability" under the ADA. Even assuming Plaintiff did properly allege that her condition constituted a "disability" under the ADA, Plaintiff has not sufficiently alleged that she is a "qualified individual" under the ADA. A "qualified individual," as noted above, must be able to perform the essential functions of his or her job with or without reasonable accommodations. Plaintiff alleges, however, that she is unable "to perform assigned

work of any kind," and seems to suggest that no amount of leave will enable her to recover and return to work. *Id.* ¶¶ 2-3. Under these circumstances, the Court determines that Plaintiff has insufficiently plead the first, third, or fourth required elements of a *prima facie* case of disability discrimination under the ADA. Accordingly, Defendant's Motion to Dismiss, ECF No. 7, is **GRANTED** as to Plaintiff's disability discrimination claim under the ADA.

iv. Retaliation Claim Under Title VII and the ADA

Plaintiff's Complaint contains one vague reference to retaliation. Compl. ¶ 3 (referencing a "Charge of Discrimination based on Retaliation and Disability"). To the extent that Plaintiff intended to bring a retaliation claim against Defendant under Title VII or the ADA, such a claim cannot withstand Defendant's dismissal challenge under Federal Rule 12(b)(6).

To establish a *prima facie* case of retaliation under Title VII or the ADA, Plaintiff must show that: (i) she engaged in protected activity, (ii) she was subjected to an adverse employment action by Defendant, and (iii) there was a causal connection between the protected activity and the adverse employment action. *Reynolds v. Am. Nat'l Red Cross*, 701 F.3d 143, 154 (4th Cir. 2012); *King v. Rumsfeld*, 328 F.3d 145, 150-51 (4th Cir. 2003); *Evans v. Larchmont Baptist Church Infant Care Ctr., Inc.*, 956 F. Supp. 2d 695, 704 (E.D. Va. 2013). The protected activity necessary to establish a Title VII retaliation claim may be based on:

> the "opposition clause," which makes it "an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter," and the "participation clause," which makes it an unlawful employment practice for the employer to discriminate because the employee "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

Johnson v. Portfolio Recovery Assocs., LLC, 682 F. Supp. 2d 560, 568-59 (E.D. Va. 2009). Similarly, the ADA prohibits retaliation against an employee "because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act." 42 U.S.C. § 12203(a); *see also Evans*, 956 F. Supp. 2d at 704.

Here, Plaintiff has insufficiently alleged that she engaged in any protected activity, as defined by Title VII or the ADA, prior to suffering any adverse employment action. Although Plaintiff alleges that she filed a Charge of Discrimination with the EEOC in May of 2016, the filing of such Charge occurred long after Defendant's alleged rescission of its prior authorization to allow Plaintiff to use paid sick leave for her absence, and does not appear to serve as the impetus for any other alleged adverse employment action. Compl. ¶ 3. Without sufficient allegations of protected activity that was causally connected to an adverse employment action, Plaintiff cannot state a claim for retaliation under Title VII or the ADA. Accordingly, Defendant's Motion to Dismiss, ECF No. 7, is **GRANTED** as to Plaintiff's retaliation claims under Title VII and the ADA.

III. Conclusion

The Clerk is **DIRECTED** to **SUBSTITUTE** the School Board of the City of Chesapeake as the named Defendant in this matter. Further, for the reasons set forth above, Defendant's Motion to Dismiss, ECF No. 7, is **GRANTED**.

Plaintiff may appeal from this Dismissal Order by forwarding a written notice of appeal to the Clerk of the United States District Court, Norfolk Division, 600 Granby Street, Norfolk, Virginia 23510. The written notice must be received by the Clerk within thirty days from the date of the entry of this Dismissal Order.

The Clerk is **DIRECTED** to send a copy of this Dismissal Order to Plaintiff and counsel for Defendant.

IT IS SO **ORDERED**.

/s/
Arenda L. Wright Allen
United States District Judge

Norfolk, Virginia
March 15th, 2017