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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

STEVEN J. COLMAR

Plaintiff,

v.

JACKSON BAND OF MIWUK INDIANS, DBA JACKSON RANCHERIA CASINO, HOTEL & CONFERENCE CENTER, and DOES 1 through 10, Inclusive,

Defendants.

CASE NO. CV-00742-JAM-DAD

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF REPLY TO OPPOSITION TO MOTION TO DISMISS PURSUANT TO FRCP 12(b)(1) OR, IN THE ALTERNATIVE, FRCP 12(b)(6)

Date: July 10, 2009
Time: 10:00 a.m.
Courtroom: 27
Judge: Magistrate Judge Dale A. Drozd

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I. INTRODUCTION

Plaintiff Steven J. Colmar ("Plaintiff" or "Colmar") opposes Defendant's Motion to Dismiss his First Cause of Action based on a personal declaration wherein Colmar declares that he filed a "charge" with the EEOC and in response the EEOC told him that it did not have jurisdiction over Indian tribes and that he should consult a lawyer.[1] A close examination of the facts and law establishes that no "charge" was filed with the EEOC and, therefore, Colmar cannot satisfy the statutory prerequisite to suit. Even assuming, arguendo, that a "charge" was filed with the EEOC, by his own admission, Colmar failed to timely file his claim. Under either scenario, the court should grant Defendant's Motion to Dismiss without leave to amend.

II. ARGUMENT

A. Colmar Cannot File a Valid Charge With the EEOC as a Matter of Law Which Precludes His Federal ADEA Claim.

The ADEA provides that "[n]o civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the [EEOC]." 29 USC § 626(d). Unlike Title VII, the ADEA statutory structure does not require that a plaintiff have a right to sue letter prior to initiating suit. Rather, Congress chose to make the initiation of a lawsuit under the ADEA contingent upon the filing of a valid charge with the EEOC. It is this filing that triggers the commencement of a civil action.

Colmar relies on the case of *Federal Express Corporation v. Holowecki,* (1008) 128 S.Ct. 1147 and argues that his only failing in this case is his inability to obtain a "right to sue" letter which he claims the EEOC has wrongfully withheld. As discussed above, there is no requirement under the ADEA that Colmar have a right to sue letter in order to file a lawsuit. In fact, a plaintiff who has filed a valid charge with the EEOC can file an ADEA claim in court while the EEOC is also investigating the claim. The employee need not wait for a Notice of Dismissal or Termination to be issued. 29 CFR § 1626.18(b).

What Colmar ignores in his Opposition is the fact that he has not filed a valid charge with

[1] It is entirely unclear why these allegations were not included in the original complaint filed by Colmar.

the EEOC which **is** the statutory requirement for commencing a civil action in court. Colmar states, "**Once a valid charge has been filed**, the EEOC's failure to fulfill its statutory duties in processing the charge does not preclude a claim." (See Opposition 2:20). Emph. Added. By Colmar's own admission, the EEOC's obligations and the fulfillment of the requirements of 29 USC § 626(d) are contingent upon the filing of a **valid charge.** Here, the EEOC determined that, based on the information Colmar provided in his Intake Questionnaire, no **valid** charge could be filed because the EEOC had no jurisdiction over the Tribe. (See Colmar Declaration at ¶ 7).

Colmar admits in his Complaint that no charge could be filed because the Tribe is a sovereign state. His statement that, "Plaintiff is unable to pursue administrative remedies under the Equal Employment Opportunity Commission," is an acknowledgement that no charge was filed. See Complaint at ¶ 19. Therefore, the prerequisite to Colmar filing suit under the ADEA is not and cannot be satisfied as a matter of law.

B. Colmar's Intake Questionnaire Is Not a Valid Charge.

While admitting in his Complaint that he has not filed a charge, Colmar contradicts himself in his Opposition by unilaterally labeled his Intake Questionnaire as a "charge." In doing so, Colmar (1) fails to acknowledge his prior admission that no charge was filed; and (2) ignores the fact that he cannot simply convert his Intake Questionnaire into a charge by labeling it such. His admission in his complaint that no charge was filed establishes as a matter of law that he cannot satisfy the statutory prerequisite to suit. Moreover, there are specific requirements that must be met before a charge will be deemed to be filed with the EEOC.

The question of whether an Intake Questionnaire constitutes a charge was recently addressed by the U.S. Supreme Court recently in *Holowecki, supra*. While the Supreme Court held that the Intake Questionnaire in *Holowecki* did constitute a charge, the underlying facts upon which the decision was reached are readily distinguishable from the current situation.[2] In

[2] The circumstances surrounding the filing of the "charge" in *Holowecki,* were as follows: the plaintiff filed an EEOC Intake Questionnaire form and accompanying affidavit on December 3, 2001, and subsequently an EEOC charge form on May 30, 2002. The complaint was filed by the plaintiff on April 30, 2002. If the date for filing the charge was deemed to be May 30, 2002, it would have been untimely since it was not filed 60 days prior to the complaint. The EEOC in *Holowecki* did file a formal charge and the only question was of timing. In other words, the issue in *Holowecki* was whether the questionnaire was sufficient as a charge to make the filing of the lawsuit timely.

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Holowecki, the documents that were filed were different than that filed by Colmar, the EEOC had jurisdiction over the claims filed by the employee, the EEOC itself considered the documents taken together (an Intake Questionnaire and an extensive affidavit) to constitute a charge and, finally, the EEOC filed a charge. None of these facts are present here.

In *Holowecki,* the Court first examined the EEOC's rule that a filing is deemed a charge, "if the document can be construed to request agency action and appropriate relief on the employee's behalf." The Court held that the agency acted within its authority in formulating this rule. The Supreme Court then evaluated whether it was in agreement with the EEOC's determination that the Intake Questionnaire and affidavit taken together and considered by the Court satisfied this rule. *Id.* at 1159. In agreeing with the EEOC's determination the Court stated, "The agency says it does, and we agree. The Agency's determination is a reasonable exercise of its authority to apply its own regulations and procedures in the course of the routine administration of the statute it enforces." *Id.*

In contrast, Colmar's Intake Questionnaire does not satisfy the EEOC's standard for a charge due to several failings as well as the fundamental lack of EEOC jurisdiction over the claims.

1. Colmar's Intake Questionnaire Did Not Request Agency Action.

Recognizing that the facts in *Holowecki* were unique, the Court stated, "the agency is not required to treat every completed Intake Questionnaire as a charge." *Id.* at 1159. The Intake Questionnaire in *Holowecki* was found to be deficient because it contained no request for the agency to act since the design of the Intake Questionnaire did not give rise to an inference that the employee was requesting action against the employer. This deficiency was remedied only by the fact that the employee had also filed a six-page affidavit in which the employee asked the agency to take action. Unlike *Holowecki,* there was no affidavit filed in conjunction with Colmar's Intake Questionnaire that requested that the EEOC take specific action with regards to the alleged conduct.

Colmar's Intake Questionnaire is similar to the Intake Questionnaire in the *Holowecki* case which the court found deficient. This is significant because the Court in *Holowecki* stated,

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"Were the Intake Questionnaire the only document before us we might agree its handwritten statements do not request action." *Id.* at 1159. In finding that the Intake Questionnaire standing alone was deficient as a charge, the Court pointed to the fact that the Intake Questionnaire was not labeled a charge of discrimination, and it stated the form's purpose was to facilitate "pre-charge filing counseling and to enable the agency to determine whether it has jurisdiction over potential charges." There is analogous language in footnote 4 to the Colmar Intake Questionnaire.

Colmar's Intake Questionnaire indicated that it was "to be reviewed to determine EEOC coverage." The introductory paragraph also states that a charge of discrimination must be filed within 180 days or in some places 300 days of the alleged discrimination. It does not state anywhere in the document that the employee has filed a charge by completing the form. Nor is there any request within Colmar's Intake Questionnaire that the agency take action, as required under the standards for a charge.

The contents of the Intake Questionnaire before the Court in *Holowecki* were distinguished by the Court from the contents of a form later developed by the EEOC. A later form which is entitled "Charge Questionnaire,"[3] is referenced in the both the majority decision and dissent in *Holowecki*. *Id.* at 1159 and 1165-1167. The Court indicated that in contrast to the Intake Questionnaire it was considering, the Charge Questionnaire included several indications that when it was filed, the employee had completed a charge.

However, Colmar did not complete a Charge Questionnaire. In fact there are a number of marked differences in the Intake Questionnaire filed by Colmar, and the Charge Questionnaire cited in the majority decision and dissent in *Holowecki*. For example, the Charge Questionnaire that was discussed in *Holowecki* includes a space for a charge number, requires the complainant

[3] In a subsequent decision in the District of Columbia (*Beckham v. National Railroad Passenger Corporation*, 590 F.Supp.2d 82 (D.D.C. 2008)) the court held that a "Charge Questionnaire" did constitute a sufficient charge. In so ruling, however, the court focused on the fact that the Charge Questionnaire did "activate the agency's machinery and remedial processes citing to a determination letter received from the EEOC in that case which stated that "the timeliness and all other jurisdictional requirements for coverage have been met." Here, in contrast, Colmar's Intake Questionnaire by itself did not trigger the agency's machinery because the agency found that it did not have jurisdiction over the claim.

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to sign and attest that the information is correct, includes an attestation that the complainant intends to initiate the agency's procedures; includes language that "the purpose of the charge, whether recorded initially on this form or in some other way reduced to writing and later recorded on this form is to invoke the jurisdiction of the Commission;" in addition to other language that indicates that the Charge Questionnaire is intended to be a charge; and lists "Charging Party" at the bottom of the space for the signature. *Id.* at 1165-1166. In contrast, Colmar's Intake Questionnaire lacks all of these attributes which the Court indicated would transform an Intake Questionnaire into a charge.

Colmar no doubt would have the court focus on a footnote on the fourth page of Colmar's Intake Questionnaire that states:

> The purpose of this questionnaire is to solicit information in an acceptable form consistent with statutory requirements to enable the Commission to act on matters within its jurisdiction. When this form constitutes the only timely written statements of allegations of employment discrimination, the Commission will, consistent with....29 CFR 1626.8(b), consider it to be a sufficient charge of discrimination under the relevant statutes. ...Information provided on this form will be used by Commission employees to determine the existence of facts relevant to a decision as to whether the commission has jurisdiction over allegations of employment discrimination and to provide such charge filing counseling as is appropriate.

In Colmar's circumstances, the EEOC used the information in the Intake Questionnaire to determine it did not have jurisdiction under the relevant statutes to process his claim and, thereby provided him with counseling which indicated that it would not be filing a charge of discrimination and no subsequent charge was ever filed. The footnote itself states that in order to constitute a charge, it would need to be consistent with the EEOC's regulations governing such charges. Here, the Commission itself did not consider Colmar's charge to fall within its regulations. Moreover, the footnote states that the Commission will consider it a sufficient charge "under the relevant statutes." The Commission in Colmar's case determined that the relevant statutes did not come into play due to the fact that the EEOC had no jurisdiction over the Tribe. It is clear that the EEOC did not consider Colmar's Intake Questionnaire a charge, which is a significant factual difference from the *Holowecki* decision (and which Colmar himself

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admits in his Complaint at ¶19).

If the EEOC had considered Colmar's Intake Questionnaire a **valid** charge it would have provided notice of it to the respondent, engaged in conciliation efforts, and could have exercised its right to investigate. (See 29 CFR § 1626 et.seq.). To construe this footnote to mean that Colmar's Intake Questionnaire suffices as a charge is completely inconsistent with the clear language on the form which indicates that the form is to be used to determine whether the claims were within the EEOC's jurisdiction. The Intake Questionnaire did not pass this initial jurisdictional hurdle which would have moved it forward in the process toward becoming an actual charge.[4]

2. Colmar's Intake Questionnaire Did Not Request Appropriate Relief.

Even assuming, arguendo, that Colmar's Intake Questionnaire did request agency action, the Questionnaire did not satisfy the second component of the EEOC's "charge rule," namely that it request appropriate relief. In contrast to *Holowecki*, because of the EEOC's lack of jurisdiction over the allegations set forth in Colmar's Intake Questionnaire, the Intake Questionnaire could not satisfy the EEOC's "charge rule." Colmar's Intake Questionnaire did not request "appropriate relief" since (1) Colmar did not ask for any relief; and (2) the EEOC itself determined it had no authority to provide any relief or to even accept Colmar's accusations as a charge.[5] Applying the standards set forth in *Holowecki*, Colmar's Intake Questionnaire did not constitute a charge and he, therefore, did not satisfy the requirement for filing suit.

C. Alternatively, if the Court Rules That Colmar's Intake Questionnaire Constitutes a Valid Charge Under *Holowecki*, Then Colmar was Obligated to File His Suit Within 90 Days of Learning That the EEOC had Terminated its Proceedings, Which He Failed to Do.

In the alternative, if the Court does determine that the Intake Questionnaire is a "charge"

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[4] Colmar also cites *B.K.B. v. Maui Police Dept.*, 276 F.3d 1091 (9th Cir. 2002) in support of his claim that he has filed a charge. However, this case is inapposite. The issue in *B.K.B.* was whether the allegations in the charge were sufficient to allow an employee to pursue a claim for sexual harassment. There was no issue as to whether a charge had been filed in that case, nor was there any question of jurisdiction as is present in this case.

[5] The dissent acknowledges that the concept of charge is common in administrative law and implicit in this commonality is that the charge is a request to investigate a matter "within the jurisdiction of the agency." *Holowecki, supra* at 1162. Emph. Added.

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as required under 29 USC Section 626(d), then Colmar failed to timely file his complaint within 90 days of being informed that the EEOC was not taking any further action with regards to his claim. When Colmar was informed that the EEOC was not exercising jurisdiction and terminating its procedures (which he admits occurred the first week of June 2008), then the language of Section 626(e) was implicated. Under that section, when the EEOC terminates its proceedings, the employee must file a complaint in court within 90 days of such notice. Here, Colmar waited until March, 2009, which is nine months after he learned the EEOC was terminating its process.

Colmar may argue that he is not compelled to follow the requirements of Section 626(d) because he did not receive a formal written right to sue letter. However, there is no such requirement in the statute or in the regulations. While the EEOC indicates that it will send notice of such termination within its regulations, nothing in the regulations states that the obligation to file within 90 days of the termination is only triggered once the written notice is received. (See CFR § 1626.17). Moreover, the regulations do not preclude notification by other means (such as a verbal notification as occurred here).

In other cases in which a plaintiff received actual notice of the EEOC's dismissal or termination of its proceedings through means other than a right to sue, courts have held that actual notice suffices. See, *Hunter-Reed v. City of Houston*, 244 F.Supp.2d 733 (S.D. Tex. 2003); *Kerr v. McDonald's Corporation*, 427 F.3d 947 (11th Cir. 2007); *Cook v. Providence*, 820 F.2d 176 (6th Cir. 1987); *Ebbert v. Daimlerchrylser Corp.*, 319 F.3d 103 (3rd Cir. 2003); *Ball v. Abbott Advertising, Inc.*, 864 F.2d 419 (6th Cir. 1988). This makes sense in light of the clear statutory language and the absence of any requirement in the ADEA itself or in the EEOC's regulations that a written notice is required to trigger the 90 day period.

Moreover, there is no indication in anything submitted by Colmar that he asked for a right to sue letter and was denied same. All that Colmar states is that he asked if he would receive any further correspondence from the EEOC indicating that the EEOC did not have jurisdiction, he never requested a right to sue letter. In response, he reports that the EEOC directed him to consult a lawyer. Nine months later, this action ensued, which makes Colmar's

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claim untimely.

If the Court does not hold Colmar to this 90 day period, then Colmar would arguably be able to file suit indefinitely (even 5 or 10 years from now) since (as stated above) there is no statute of limitations within the ADEA, but the limits on filing said claim is set by the date that the individual learns of the EEOC's termination of its proceedings. Such an absurd result is clearly not intended under the ADEA nor mandated by any EEOC regulations.

III. CONCLUSION

Here, Colmar admits that he has not fulfilled the obligations of 29 USC § 626(d). [Colmar "is unable to exhaust his administrative remedies…..Colmar has no means of exhausting his administrative remedies." (See Opposition at 2: 17, 3: 4).] He also acknowledges in his Complaint that he could not pursue his administrative remedies (Complaint at ¶ 19). The Court must look past Colmar's simplification of the issue before the Court. This is not a matter of Colmar being wrongfully denied a right to sue letter, no such letter is necessary. The issue is that, by his own repeated admission, Colmar has not and cannot timely file a valid charge with the EEOC which is necessary for him to be able to file this action. Alternatively, if the Court determines that Colmar did file a charge, then he failed to timely file this lawsuit by waiting nine months after learning that the EEOC was terminating its process. Under either scenario, Defendant's Motion to Dismiss should be granted without leave to amend.

Dated: July 2, 2009

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