UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DAVID WARNER,	:	
Plaintiff,	:	CIVIL ACTION NO.
v.	:	3-03-CV-1267 (JCH)
	:	
ASPLUNDH TREE EXPERT CO.,	:	
Defendant.	:	DECEMBER 10, 2003

RULING ON DEFENDANT'S MOTION TO DISMISS
[DKT. NO. 10]

David Warner alleges employment discrimination by Asplundh Tree Expert Co., ("Asplundh"). Warner alleges violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, and the Connecticut Fair Employment Practices Act ("CFEPA"), Conn. Gen. Stat. § 46a-60. Asplundh moves to dismiss the CFEPA claims as time-barred, and argues in the alternative that the CFEPA claim fails to state a cause of action; it also moves to dismiss the ADA claim for failure to state a claim. For the following reasons, the motion is denied.

I. BACKGROUND

The complaint alleges that Warner began working at Asplundh on July 15, 1985 as a Budget Operator. He began serving as Foreman in 1986, a position at which he continued until the events that give rise to this claim

On November 30, 2001, the plaintiff was laid off by the defendant's General Foreman, Steve Blevins. Blevins told Warner that the lay off was a result of the company's

lack of available work, and that he would be rehired in January 2002.

In January 2002, plaintiff unsuccessfully attempted to contact Blevins, who would not return his calls. The plaintiff further alleges that no one else from Asplundh would return his calls, either.

On June 10, 2002, Munck filed a claim with the Connecticut Commission on Human Rights and Opportunities ("CHRO") and Equal Employment Opportunity Commission ("EEOC"). On July 21, 2003, Warner received a release from the CCHRO. On July 17, 2003, Munck received a right to sue notice from the EEOC. Munck filed the complaint in this case on July 23, 2003. Count 1 alleges violations of CFEPA; Count 2 alleges violations of ADA.

II. DISCUSSION

A. Standard

A motion to dismiss filed pursuant to Rule 12(b)(6) can be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In considering such a motion, the court accepts the factual allegations alleged in the complaint as true and draws all inferences in the plaintiff's favor. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds, Davis v. Scherer, 468 U.S. 183 (1984). A Rule 12(b)(6) motion to dismiss cannot be granted simply because recovery appears remote or

unlikely on the face of a complaint. Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir. 1996). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Id. (quotation omitted).

"While the pleading standard is a liberal one, bald assertions and conclusions of law will not suffice." Leeds v. Meltz, 85 F.3d 51, 53 (2d Cir. 1996). Rule 8 of the Federal Rules of Civil Procedure provides that a complaint "shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

B. CFEPA Claims

Asplundph argues that Warner's CFEPA claims are time-barred by Conn. Gen. Stat. § 46a-82(e). Section 46a-82(e) establishes a 180 day statute of limitations for a CFEPA claim. The defendant argues that, because Warner was terminated on November 30, 2001 and did not file with the CHRO until June 10, 2002, the lapsed time was 192 days, and his claim is thus untimely. Warner counters that the defendant told him that he was laid off because of a shortage of work and would be rehired in January, so that the earliest date from which the statute of limitations could begin to run is January 1, 2002, resulting in a timely CHRO claim.

The filing deadline for a discrimination complaint is not jurisdictional and can be subject to equitable tolling. Zerilli-Edelglass v. New York City Transit Auth., 333 F.3d 74, 80 (2d Cir. 2003). "[O]rdinarily the applicable period starts to run on the employer's

commission of the unlawful act and is not tolled 'pending the employee's realization that the conduct was discriminatory,' a court might in some cases permit tolling 'as a matter of fairness.'" Cerbone v. Int'l Ladies Garment Workers' Union, 768 F.2d 45, 48 (2d Cir. 1985). "When determining whether equitable tolling is applicable, a district court must consider whether the person seeking application of the equitable tolling doctrine (1) has 'acted with reasonable diligence during the time period she seeks to have tolled,' and (2) has proved that the circumstances are so extraordinary that the doctrine should apply." Zerilli-Edelglass, 333 F.3d at 80 (citing Chapman v. ChoiceCare Long Island Term Disability Plan, 288 F.3d 506, 512 (2d Cir.2002)).

"The essence of the doctrine [of equitable tolling] is that a statute of limitations does not run against a plaintiff who is unaware of his cause of action." Dillman v. Combustion Eng'g, Inc.,784 F.2d 57, 60 (2d Cir. 1986) (citing Cerbone, 768 F.2d at 48). Warner alleges that, because of the defendant's false assurances that he would be rehired, he was not aware of his cause of action until at least January 1, if not later. If, as plaintiff alleges, he was not aware of the discrimination until January, he acted with reasonable dilligence, and the circumstances of his being allegedly misled are so unusual, that equitable tolling applies and plaintiff's claim is timely.

Additionally, contrary to what the defendant suggests in its briefs, Cerbone supports plaintiff's argument for tolling. The Cerbone court noted that in cases "where an employee

alleged that he had delayed filing a discrimination charge because, subsequent to his discharge, demotion, or forced retirement, his employer had promised to reinstate him in his former position or in a comparable alternative position," courts have "held that it was improper to grant summary judgment to the employer on the ground that the action was timebarred." Id. at 49 (citing cases). The court found that these cases could be interpreted either as "applications of the doctrine that a limitations period is tolled because the employer concealed from the employee the existence of the cause of action" or "fashioning a doctrine that the employer is estopped from asserting the limitations bar because he represented, in effect, that he would settle the ADEA claim, and the employee delayed in filing his EEOC charge in reliance on that promise." Id. It found that those holdings did not aid Cerbone, because the "case present[ed] no facts on which a reasonable jury could find that the Union misled Cerbone with respect to the existence of his ADEA claim," id., nor did the "undisputed facts of this . . . permit a jury to conclude that the Union's representations constituted an offer of settlement of an ADEA claim." Id. at 50. Based upon the allegations of the complaint, that is not the case here.

B. CFEPA Claim

Both parties agree that termination because of a "perceived" disability is not protected by the CFEPA. See Beason v. United Tech. Corp., 337 F.3d 271, 279 (2d Cir. 2003). In his brief, the plaintiff contends that he does not allege a "regarded as" claim under

CFEPA, but rather that he has a physical disability as defined by Conn. Gen . Stat. § 46a-51(15). Pl.'s Mem. In Opp. at 8. The defendant's reply does not address this issue. The complaint alleges, "The defendant discriminated against the plaintiff with respect to the terms and conditions of his employment because of his 'physical disability,' in violation of Conn. Gen. Stat. 46a-60(a)(1)." Compl. at ¶ 23. As a result, the court agrees with the plaintiff that he has stated a cognizable CFEPA claim.

C. ADA Claim

Lastly, the defendant argues that the plaintiff's ADA claim fails because he must allege not only that he was fired on the basis of a "perceived" disability, but also that his employer thought his obesity was caused by a physiological impairment, not overeating. See Francis v. City of Meriden, 129 F.3d 281, 286 (2d Cir. 1997) ("Francis's claim fails because obesity, except in special cases where the obesity relates to a physiological disorder, is not a 'physical impairment' within the meaning of the statutes.")[1]; see also Giordano v. City of New York, 274 F.3d 740 (2d Cir. 2001) ("Under 42 U.S.C. § 12102(2)(C)

---

[1]However, as the court in Connor v. McDonald's Rest., 2003 WL 1343259 (D. Conn. March 19, 2003) (Underhill, J.), noted, Francis further states that a "cause of action may lie against an employer who discriminates against an employee on the basis of the perception that the employee is morbidly obese, or suffers from a weight condition that is the symptom of a physiological disorder." Francis, 129 F.3d at 286 (emphasis added). "Thus, Francis can potentially be interpreted as requiring obesity to be linked to a physiological impairment, yet not requiring morbid obesity to be linked to such an impairment." Connor, 2003 WL 1343259 at *3, n. 4.

('regarded as disabled'), the decisive issue is the employer's perception of his or her employee's alleged impairment.").

Even if the defendant is correct in its interpretation of Francis, so that Warner must eventually prove that his morbid obesity is linked to a physiological disorder in order to recover under the ADA, Warner does not have to comply with the heightened pleading standard that Asplundh urges on the court. As the Supreme Court explained in Swierkiewicz v. Sorema N. A., 122 S.Ct. 992, 998 (2002), a "heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2), which provides that a complaint must include only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" A defendant's pleading must "simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" Id. (internal quotations omitted). This applies to cases under the ADA. See Gorski v. New Hampshire Dept. of Corr., 290 F.3d 466 (1st Cir. 2002) ("The Supreme Court has recently confirmed that complaints alleging employment discrimination need only satisfy "the simple requirements of Rule 8(a)."); Briggs v. New York State Dept. of Transp., 233 F. Supp. 2d 367, 372 (N.D.N.Y. 2002).

Warner's complaint pleads, inter alia, that he has "morbid obesity," Compl. at ¶ 10; that the defendant regarded him as "'an individual with a disability,' within the meaning of the Act," Compl. at ¶ 11; that Blevins told Warner's former co-worker that the plaintiff was

laid off because he was "overweight" and was "going to die on [his] job site," Compl. at ¶ 19; and that the plaintiff's perceived disability was a "substantive factor" in the defendant's decision to terminate and not rehire him, Compl. at ¶ 21. This, and the accompanying facts, are more than sufficient to state a claim for relief under Rule 8.

IV. CONCLUSION

For the foregoing reasons, Asplundh's Motion to Dismiss [Dkt. No. 10] is DENIED.

SO ORDERED.

Dated at Bridgeport, Connecticut this 10th day of December, 2003.

/s/ Janet C. Hall
Janet C. Hall
United States District Judge