

No. 23-1763

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PHYLLIS WEAVER,
Plaintiff-Appellant,

v.

WALGREEN COMPANY,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of North Carolina

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION AS AMICUS CURIAE IN SUPPORT OF
APPELLANT AND IN FAVOR OF REVERSAL

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STATEMENT OF INTEREST

Congress charged the Equal Employment Opportunity Commission with interpreting, administering, and enforcing Title I of the Americans with Disabilities Act, as amended (ADA), 42 U.S.C. §§ 12101 *et seq.*, as well as administering and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Under Title VII and the ADA, plaintiffs may file a lawsuit within ninety days of receiving a notice-of-right-to-sue letter (NRTS). 42 U.S.C. § 2000e-5(f)(1) (describing procedures for issuing notice); 42 U.S.C. § 12117(a) (adopting Title VII procedures for ADA). The district court held that Phyllis Weaver had not filed her lawsuit within ninety days of receiving a NRTS and dismissed this case under Rule 12(b)(1) for lack of subject matter jurisdiction. That ninety-day filing requirement, however, is a claims-processing rule, not an element of the court's jurisdiction.

Because the EEOC has a strong interest in the enforcement of these statutes, the agency offers its views. Fed. R. App. P. 29(a)(2).

STATEMENT OF THE ISSUES¹

1. Did the district court err in holding that Title VII's and the ADA's ninety-day filing requirement is an element of the court's subject matter jurisdiction?
2. Did the district court err in resolving the defendant's motion to dismiss based on Rule 12(b)(1)?
3. Did the district court err in dismissing the plaintiff's § 1981 claim, apparently based on the ninety-day filing requirement for Title VII and ADA claims?

STATEMENT OF THE CASE

A. Statement of the Facts

Phyllis Weaver is an African-American woman who worked for the Walgreen Company (Walgreens) as a pharmacist. JA 6-7 ¶¶ 4, 7. She alleged she had several disabilities, including lupus, migraines, and post-traumatic stress disorder. JA 7 ¶ 8. According to her complaint, Weaver was robbed at gunpoint while working for Walgreens in August 2017 and “had a gun held to her head for 15 minutes.” JA 7 ¶ 10. That traumatic incident “exacerbated Ms. Weaver’s pre-existing medical conditions and

¹ The EEOC takes no position on any other issue in the case.

resulted in further disabilities.” JA 7 ¶ 10. As a result, she was on short-term disability leave until December 2017. JA 7 ¶ 11.

Weaver alleged that, when she returned, she endured harassment and discrimination based on her race and her disabilities. JA 7 ¶ 12. She provided information about her disabilities to Walgreens and suggested accommodations such as “moving her to a different location (rather than making her continue to work in the store in which she was robbed).” JA 8 ¶ 15. Weaver’s manager told her that “he did not care what her medical issues might be, that she was not performing the duties of her position, and that he intended to terminate her employment.” JA 8 ¶ 13. Walgreens terminated her several months later. JA 8 ¶ 17.

According to her complaint, Weaver then filed a charge of discrimination with the EEOC and received a notice-of-right-to-sue letter (NRTS) from the agency. JA 6 ¶ 3. She filed suit in the Eastern District of Pennsylvania on December 27, 2019, alleging that she had done so “within 90 days of receipt of the NRTS.” JA 6 & JA 6 ¶ 3. Her complaint alleged claims under Title VII, the ADA, and 42 U.S.C. § 1981. JA 6 ¶ 1.

Walgreens moved to dismiss. JA 16. It argued, among other things, that the Eastern District of Pennsylvania lacked personal jurisdiction over

Walgreens, Weaver failed to state a claim under Title VII and § 1981, and Weaver's Title VII and ADA claims were untimely because Weaver filed her lawsuit more than ninety days after receiving the NRTS. JA 24-28, JA 30-34. The motion attached several documents, including a copy of the NRTS. *See* JA 53. The EEOC addressed the NRTS to Weaver, and it listed Weaver's attorney and Walgreens's representative on the "cc" line. JA 53. The NRTS also had a field for "Date Mailed," which was filled in with "9/20/19."² JA 53. Walgreens's Legal Coordinator Christina Woodworth added a handwritten notation on the NRTS when she entered it into Walgreens's records; the note reads "cw entered 10/3/19." JA 103-04 n.4; *see* JA 53. Weaver responded to the motion to dismiss, attaching a declaration from her attorney that he did not receive the NRTS until October 2019, *see generally* JA 59-70; JA 72, which appears consistent with the notation on the NRTS indicating Walgreens did not enter the NRTS into its records until 10/3/19. *See* JA 103-04 n.4.

² The NRTS to Weaver came with a cover letter from an EEOC investigator, which was dated September 9, 2019. JA 54. The record does not reflect why the cover letter date differs from the "Date Mailed" on the NRTS.

The Eastern District of Pennsylvania ordered the case transferred to the Eastern District of North Carolina and denied the rest of the motion without prejudice. JA 107-111. Two years later, without any explanation for the delay, the case was transferred. JA 3. Walgreens again moved to dismiss, this time arguing only that Weaver’s ADA and Title VII claims were untimely and that Weaver had not stated a claim under Title VII and § 1981. *See generally* JA 113-126.

B. District Court’s Decision

The district court granted the motion to dismiss. JA 180. It stated that “the ninety-day filing requirement is a jurisdictional prerequisite for filing a complaint under the ADA and Title VII.” JA 178. It then reasoned that the ninety days begins to run when a plaintiff receives actual or constructive notice of the NRTS. JA 178. Observing here that “[t]he exact date that plaintiff received the notice is unknown,” the court found that “the Acting District Director of the EEOC[] certified that the notice was mailed on September 20, 2019.”³ JA 179. Adding days for mailing, the court held that

³ Although the district court found that the EEOC’s Acting District Director for the Charlotte District Office had certified the precise date of mailing, *see* JA 179, we note that the NRTS does not include a certification, under oath

Weaver “presumably received the notice on September 24, 2019” and “[t]he ninety-day filing period ended on December 23, 2019.” JA 179.

Because Weaver filed her complaint on December 27, 2019, the court held that Weaver’s complaint was untimely. JA 179. The court concluded that “Defendant’s motion [DE 20] to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) is GRANTED,” and it denied the rest of the motion as moot. JA 180. It did not address the § 1981 claim but ordered the clerk to close the case. JA 177-180.

ARGUMENT

I. The ninety-day filing requirement for Title VII and ADA claims is not jurisdictional.

The district court held that it lacked jurisdiction because Weaver had not filed suit within ninety days of receiving the NRTS. The ninety-day filing limit in 42 U.S.C. § 2000e-5(f)(1), however, does not affect a court’s jurisdiction.

Title VII and the ADA both expressly confer subject matter jurisdiction on federal district courts. 42 U.S.C. § 2000e-5(f)(3); 42 U.S.C.

or otherwise, that confirmed the EEOC actually mailed the NRTS on September 20, 2019. JA 53. Instead, the NRTS is a standard form the EEOC may issue at the end of an investigation. *See* 29 C.F.R. § 1601.28.

§ 12117(a) (adopting the “powers, remedies, and procedures” set out in 42 U.S.C. § 2000e-5). Separately, Congress provided an administrative process for claims under Title VII and the ADA that generally begins when an individual files a charge of discrimination. *See Mach Mining, LLC v. EEOC*, 575 U.S. 480, 483 (2015). And both Title VII and the ADA require that an individual file any such charge within either 180 or 300 days of the discrimination alleged. 42 U.S.C. § 2000e-5(e)(1); 42 U.S.C. § 12117(a). If that individual decides to file a lawsuit, he or she must do so within ninety days of the EEOC providing a NRTS. 42 U.S.C. § 2000e-5(f)(1); 42 U.S.C. § 12117(a).

In *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 349 n. 3 (1983), the Supreme Court held that the ninety-day filing requirement is not jurisdictional. While *Crown, Cork & Seal* primarily turned on the effect the filing of a class action had on individual claims under Title VII, the petitioner also argued that Title VII’s ninety-day filing requirement was jurisdictional. *Id.* at 349 n.3, 353. The Supreme Court summarily rejected that jurisdictional argument. *Id.* at 349 n.3.

Crown, Cork & Seal was not an outlier. A year earlier, the Supreme Court decided *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982),

which involved the requirement that a charge be timely filed. *Zipes* held that the timely-charge-filing requirement “is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.” *Id.*

The Supreme Court continues to reject arguments that the claim-processing rules in Title VII and the ADA are jurisdictional. In *Fort Bend County v. Davis*, 139 S. Ct. 1843, 1852 (2019), the Court held that the requirement that an individual file a charge before filing suit is not jurisdictional. It emphasized that Title VII has its “own jurisdictional provision, 42 U.S.C. § 2000e-5(f)(3).” *Id.* at 1850. Sections 2000e-5(e)(1) and (f)(1), meanwhile, are “[s]eparate provisions” that do not speak to jurisdiction. *Id.* at 1850-51. The charge-filing requirements in these sections set out “a processing rule, albeit a mandatory one, not a jurisdictional prescription delineating the adjudicatory authority of courts.” *Id.* at 1851.

Consistent with this Supreme Court precedent, this Court does not treat the ninety-day filing requirement as jurisdictional. Instead, it is a “non-jurisdictional requirement of initiating a lawsuit within the limitations period.” *Allen v. Atlas Box & Crating Co.*, 59 F.4th 145, 148 (4th Cir. 2023); *see also Laber v. Harvey*, 438 F.3d 404, 429 n.25 (4th Cir. 2006)

(relying on *Zipes*, 455 U.S. at 393, to hold that the substantively similar time limit for federal employees under Title VII is “not jurisdictional, but [is] rather in the nature of a statute-of-limitations defense”).

The district court did not cite *Crown, Cork & Seal, Zipes, Fort Bend*, or this Court’s precedent. See JA 178-180. It instead relied on an unpublished district court decision adopting a magistrate’s recommendation. JA 178 (citing *Robinson v. N.C. Emp. Sec. Comm’n*, No. 3:09-cv-00088-W, 2009 WL 3526495 (W.D.N.C. Oct. 23, 2009)). That magistrate’s recommendation stated, without further reasoning, that “[o]ne of the jurisdictional prerequisites for filing a Complaint under the ADEA and Title VII is the filing of a lawsuit . . . within ninety (90) days from the date of receipt of the EEOC right to sue letter.” *Robinson*, 2009 WL 3526495, at *3-4; see also JA 178. For the reasons set out above, that was error.

II. Rule 12(b)(1) does not provide the appropriate framework for resolving issues involving the ninety-day filing requirement.

The district court resolved Walgreen’s motion under Rule 12(b)(1), but that rule does not apply when subject matter jurisdiction is not at issue. See Fed. R. Civ. P. 12(b)(1). And considering the ninety-day filing requirement under Rule 12(b)(1), as the district court did here, carries

inappropriately harsh consequences. Faced with a Rule 12(b)(1) motion, the plaintiff “bears the burden of proving that subject-matter jurisdiction exists.” *Piney Run Pres. Ass’n v. Cnty. Comm’rs*, 523 F.3d 453, 459 (4th Cir. 2008). When the defendant “challenges the factual predicate of subject matter jurisdiction,” then “the presumption of truthfulness normally accorded a complaint’s allegations does not apply, and the district court is entitled to decide disputed issues of fact with respect to subject matter jurisdiction.” *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009).

Those procedures should not apply to the ninety-day filing requirement because it is an affirmative defense – not an element of jurisdiction. *Payan v. Aramark Mgmt. Servs. Ltd. P’ship*, 495 F.3d 1119, 1121-23 (9th Cir. 2007) (collecting cases); *see also Laber*, 438 F.3d at 429 n.25 (describing a similar ninety-day filing requirement in 42 U.S.C. § 2000e-16(c) as “in the nature of a statute of limitations defense”). As such, the defendant – not the plaintiff – must raise it. *Compare* Fed. R. Civ. P. 8(a) *with* Fed. R. Civ. P. 8(c); *see also Bd. of Trustees, Sheet Metal Workers’ Nat’l Pension Fund v. Four-C-Aire, Inc.*, 929 F.3d 135, 152 (4th Cir. 2019) (“Plaintiffs are not ordinarily required to plead allegations relevant to

potential affirmative defenses to an asserted claim.”); *Richards v. Mitcheff*, 696 F.3d 635, 637 (7th Cir. 2012) (“Complaints need not anticipate defenses and attempt to defeat them.”).

Defendants may thus raise the ninety-day filing requirement in a responsive pleading and challenge timeliness through an appropriate motion or at trial. If assessing that defense “requires factual development,” however, a defendant may not use a motion under Fed. R. Civ. P. 12(b)(6) to challenge timeliness. *See Bd. of Trustees*, 929 F.3d at 152; *Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007) (en banc) (court should not assess affirmative defense under 12(b)(6) except “in the relatively rare circumstances where facts sufficient to rule on an affirmative defense are alleged in the complaint”). As a result, if either party seeks to introduce extrinsic evidence not referenced in the complaint, the question of timeliness should be resolved at summary judgment or at trial. *See, e.g., Gordon v. Nat’l Youth Work All.*, 675 F.2d 356, 360-61 (D.C. Cir. 1982) (reversing district court for granting motion to dismiss based on ninety-day filing requirement after considering “matters outside the pleadings”).

Regardless of the posture, the burden remains on the defendant to “prov[e] every element of that defense, including the date that the

limitations period commenced.” *Vazquez v. Caesar’s Paradise Stream Resort*, 524 F. App’x 831, 834 (3d Cir. 2013) (holding that district court erred in bench trial by placing the burden to prove timeliness on the plaintiff after the plaintiff rebutted the presumption the NRTS had been delivered within three days of mailing). If a defendant carries that burden and establishes the plaintiff did not file the complaint within ninety days of receiving the NRTS, the plaintiff must then show that an equitable doctrine, such as equitable tolling, excuses the untimeliness. *Battle v. Ledford*, 912 F.3d 708, 718 (4th Cir. 2019); *Coleman v. Talbot Cnty. Det. Ctr.*, 242 F. App’x 72, 73-74 (4th Cir. 2007) (assessing plaintiff’s arguments for equitable tolling of ninety-day filing requirement).

III. The ninety-day filing requirement does not apply to claims under § 1981.

The district court did not separately consider Weaver’s § 1981 claim. *See* JA 176-180. Instead, in an apparent oversight, it ordered the case closed based on its holding that Weaver had not met the ninety-day filing requirement that applies to Title VII and ADA claims.⁴ JA 180. But Title VII

⁴ Walgreens’s motion did not seek the dismissal of Weaver’s § 1981 claim based on untimeliness. *See* JA 113-126.

and § 1981 are “independen[t] . . . avenues of relief.” See *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 460 (1975). And a charge “is not a prerequisite to filing a Section 1981 suit.” *Aleman v. Chugach Support Servs., Inc.*, 485 F.3d 206, 213 (4th Cir. 2007).

CONCLUSION

For all these reasons, the judgment of the district court should be vacated, and the case remanded for further proceedings.

Respectfully submitted,

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February 8, 2024

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 2,537 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I certify that on this 8th day of February, 2024 I electronically filed the foregoing brief in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that all counsel of record are registered CM/ECF users, and service will be accomplished via the appellate CM/ECF system.

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