

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

STEPHANIE DICKENS,

Plaintiff,

v.

Case No. 19-cv-02529

Dispositive Motion

PEPPERIDGE FARM INCORPORATED,

Defendant.

**DEFENDANT'S PARTIAL MOTION TO DISMISS COUNTS II AND III OF
PLAINTIFF'S THIRD AMENDED COMPLAINT AND INCORPORATED
MEMORANDUM OF LAW**

Defendant, Pepperidge Farm Incorporated ("Defendant"), by and through its undersigned counsel and pursuant to F.R.C.P. 12(b), hereby moves to dismiss Counts II and III of the Third Amended Complaint filed by Plaintiff, Stephanie Dickens ("Plaintiff") on March 8, 2021 [Dkt. 89]. In support, Defendant submits the following memorandum of law and states:

I. BACKGROUND AND PROCEDURAL HISTORY

A. The Original Complaint.

On July 29, 2019, Plaintiff filed a five-count Complaint (the "Original Complaint") [Dkt. 1] against Defendant alleging retaliation under the Florida Private Whistleblower's Act ("FPWA") as well as gender discrimination and retaliation under Title VII of the Civil Rights Act of 1964, as amended ("Title VII")

and the Florida Civil Rights Act (“FCRA”). Specifically, Count I of the Original Complaint alleged retaliation under the FPWA. Count II alleged gender discrimination under Title VII. Count III alleged retaliation under Title VII. Count IV alleged gender discrimination under the FCRA. Count V alleged retaliation under the FCRA.

In response to the Original Complaint, Defendant filed a Motion to Dismiss (the “First Motion to Dismiss”) on November 4, 2019, asserting that, among other deficiencies, the Plaintiff failed to exhaust her administrative remedies prior to filing Plaintiff’s Title VII and FCRA Claims, rendering the claims time-barred. [Dkt. 7]

On December 6, 2019, Plaintiff moved to amend her Original Complaint (the “Motion to Amend”), which amendment was nearly indistinguishable from the Original Complaint. [Dkts. 17; 17-1] Accordingly, Defendant opposed the amendment as futile. [Dkt. 20]

On January 16, 2020, the Court held a hearing on the Motion to Amend. At the hearing, Plaintiff represented that she had one or more documents potentially proving that she had filed a timely charge of discrimination with the EEOC. [Tr. of Mot. Hr’g 7:3–18; 10:4–25, January 16, 2020] The Court granted Plaintiff leave to amend her Complaint but directed her to attach the alleged document(s) as an exhibit to the amended complaint. [Tr. of Mot. Hr’g 13:9–14:1, 15:1–3, 22–23,

January 16, 2020]

B. The First Amended Complaint and the Order of Dismissal.

Plaintiff filed her First Amended Complaint on February 18, 2020 (the last day of the 33-day deadline), with no exhibits attached or filed with such pleading, contrary to this Court's prior ruling. [Dkt. 28] Instead, the First Amended Complaint alleged, without documentary support, that an October 2018 EEOC intake questionnaire constituted Plaintiff's timely charge of discrimination. [Dkt. 28 ¶ 21]

On March 3, 2020, Defendant moved to dismiss the First Amended Complaint (the "Second Motion to Dismiss"), asserting, among other things, that the Plaintiff's Title VII and FCRA claims were still time-barred. [Dkt. 31] After a hearing on June 24, 2020, on July 23, 2020, the Court entered an order granting the Second Motion to Dismiss without prejudice as to Plaintiff's gender discrimination and retaliation claims and denying the Second Motion to Dismiss with respect to Plaintiff's FPWA claim. [Dkt. 40]

C. The Second and Third Amended Complaints.

On November 18, 2020, Plaintiff filed her Second Amended Complaint.¹ [Dkt. 64] Like the Original Complaint and First Amended Complaint, the Second

¹ On February 12, 2021, the Court denied Defendant's motion to strike the Second Amended Complaint and granted Plaintiff's oral motion to file the Second Amended Complaint on grounds unrelated to the instant motion. [Dkt. 84]

Amended Complaint alleged retaliation under the FPWA (Count I), gender discrimination under the FCRA (Count II), and retaliation under the FCRA (Count III).

Plaintiff filed her Third Amended Complaint on March 8, 2021 in response to this Court's Order dated February 17, 2021. [Dkt. 85] As stipulated, the Third Amended Complaint is identical to the Second Amended Complaint in all substantive respects, but for its allegations to support the existence of diversity jurisdiction. The Third Amended Complaint alleges retaliation under the FPWA (Count I), gender discrimination under the FCRA (Count II), and retaliation under the FCRA (Count III).

Counts II and III of the Third Amended Complaint (Plaintiff's FCRA claims) are still fatally flawed. Again, these claims are still time-barred as Plaintiff failed to demonstrate that she exhausted her administrative remedies on these claims prior to filing suit. Specifically, Plaintiff filed her Charge of Discrimination well after the applicable deadline expired, and, even if the Charge of Discrimination was timely (which it is not) the Charge of Discrimination failed to state any alleged facts to support a retaliation claim altogether. Additionally, Counts II and III of the Third Amended Complaint fail to plead facts sufficient to state a claim for discrimination or retaliation under the FCRA. As such, Counts II and III of the Third Amended Complaint should be dismissed with prejudice.

II. MEMORANDUM OF LAW

A. Legal Standard for Motion to Dismiss.

Pursuant to Federal Rule of Civil Procedure 8(a)(2), a complaint must contain a short and plain statement of the claim showing the plaintiff is entitled to relief to “give the defendant fair notice of what the...claim is and the grounds upon which it rests.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554–55, (2007) (internal quotation omitted). A complaint that offers “labels and conclusions” or a “formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. While the pleading standard set forth in Rule 8 does not require detailed factual allegations, it does demand “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Accordingly, a complaint containing “naked assertion[s]” without “further factual enhancement” is insufficient. *Id.* Moreover, “conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal.” *Moseley v. McKesson Medical-Surgical, Inc.*, 2013 WL 3639686 (M.D. Fla. July 11, 2013).

B. Counts II and III Should Be Dismissed with Prejudice Because Plaintiff Failed to Exhaust Her Administrative Remedies.

Plaintiff’s amended FCRA claims should be dismissed with prejudice, as Plaintiff failed to file a timely charge of discrimination prior to bringing suit. Further, in addition to being time-barred, Plaintiff’s retaliation claim (Count III) is

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