No. 21-1517

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATURALAND TRUST; SOUTH CAROLINA TROUT UNLIMITED; UPSTATE FOREVER,

Plaintiffs – Appellants

v.

DAKOTA FINANCE, LLC d/b/a Arabella Farm; KEN SMITH, SHARON SMITH; WILLARD R. LAMNECK, JR.,
Defendants – Appellees

On Appeal from the United States District Court for the District of South Carolina, at Greenville. Joseph Dawson, III, District Judge. (6:20-cv-01299-JD)

APPELLEES' PETITION FOR REHEARING EN BANC

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RULE 35(b) STATEMENT

This case involves a question of exceptional importance: Does the South Carolina administrative enforcement process for alleged violations of the Clean Water Act "commence" when South Carolina says it does—with the issuance of a Notice of Alleged Violation—so that citizen suits alleging the same violations are precluded by the diligent prosecution bar of 33 U.S.C. § 1319(g)(6)(A)(ii)?

The answer to this question matters to numerous individuals and businesses who respond to Notices of Alleged Violation and ultimately enter consent orders with the South Carolina Department of Health and Environmental Control (DHEC). Unless the state enforcement action operates as a bar to citizen suits for the same violations, these individuals and businesses risk cumulative or inconsistent penalties through citizen suits by persons who are dissatisfied with the state's enforcement decisions.

The answer to this question also matters to the Clean Water Act enforcement program in South Carolina, which was delegated to DHEC by the U.S. Environmental Protection Agency based on EPA's findings that the state program is no less stringent than the federal program. South Carolina has been administering its own NPDES permit and enforcement program in lieu of the federal program since 1975. 40 Fed. Reg. 28130 (July 3, 1975) (delegating NPDES program); 57 Fed. Reg. 43733 (Sept. 22, 1992) (delegating general permit program). South Carolina has a

history of success in securing compliance through imposition of penalties and performance requirements in administrative orders, usually issued as consent orders. If facilities faced with the threat of a citizen suit cannot achieve finality by engaging in the state administrative process, their only alternative is to seek to enter a consent decree in court, which will preclude a citizen suit under 33 U.S.C. § 1365(b)(1)(B). This result would burden both the state agency and the court system.

As an issue of first impression in the Fourth Circuit, the answer to this question is also important to federal courts who must analyze state administrative schemes to determine whether a state has commenced administrative proceedings that may bar citizen suits. *See, e.g., Chesapeake Bay Found., Inc. v. Cnty. of Henrico*, No. 3:21-cv-752 (DJN), 2022 U.S. Dist. LEXIS 67080 (E.D. Va. Apr. 11, 2022).

STATEMENT OF THE CASE

In 2017, Arabella Farm began clearing land to create a working farm with an orchard and vineyard, and later an event barn for weddings and other celebrations. Op. 3. Believing its work fell within the agricultural exemption from Clean Water Act permitting requirements, Arabella Farm did not obtain a National Pollutant Discharge Elimination System (NPDES) permit for discharges of stormwater associated with construction activities.

Numerous inspections and interactions between Arabella Farm, Pickens County, and DHEC occurred over the next two years. On September 13, 2019, DHEC sent Arabella Farm a Notice of Alleged Violation/Notice of Enforcement Conference, which DHEC considered the first step in the administrative enforcement process. J.A. 54, 59. The NOAV set a conference date for September 25, 2019.

Two months after the NOAV and enforcement conference, on November 14, 2019, Trout Unlimited and Naturaland Trust sent Arabella Farm a "Notice of Intent to Sue" letter announcing their intention to file a lawsuit under the citizen suit provisions of the Clean Water Act. J.A. 61-76. On April 6, 2020, Appellants filed this lawsuit. J.A. 21-48.

Arabella Farm moved to dismiss the lawsuit on the ground, *inter alia*, that a citizen suit was barred by 33 U.S.C. §1319(g)(6), which provides that a citizen suit for civil penalties will not lie for any violation with respect to which a state has

commenced and is diligently prosecuting an action under a state law for administrative penalties. 33.U.S.C. § 1319(g)(6)(A)(ii).[1] The district court agreed and dismissed the lawsuit by opinion dated March 31, 2021. Appellants filed this appeal on April 30, 2021.

On July 20, 2022, a divided panel of the Fourth Circuit Court of Appeals held that DHEC's NOAV was not the "commencement" of a state administrative enforcement action comparable to one brought under federal law. Judge Quattlebaum dissented. Judge Quattlebaum determined that under either the definition of

[1] At the time the civil lawsuit was filed, DHEC had sent the NOV and held the enforcement conference with Arabella Farm. The enforcement case resulted in a Consent Order issued in May 2020 which imposed injunctive relief and civil penalties. Under the terms of the Consent Order, Arabella Farm was required to: (1) Complete the process of obtaining coverage under the NPDES General Permit for Stormwater Discharges from Construction Activities (SCR100000) with the Pickens County Office of Stormwater Management; (2) Submit to DHEC and Pickens County a revised stormwater management plan prepared by a Professional Engineer licensed to practice in the State of South Carolina in accordance with the stormwater detention requirements contained in the South Carolina Stormwater Management; (3) Submit to DHEC and Pickens County a plan prepared by a Professional Engineer to address the stabilization of the pasture areas of the Site; (4) Submit to DHEC a report signed by the Professional Engineer stating that the Site is in compliance with the approved SWPPP and associated permit; (5) Submit to DHEC and Pickens County a plan prepared by a stream assessment and restoration professional to assess impacts of sediment deposition originating from Arabella Farm to (a) the unnamed tributary west of the Site from the check dam to the confluence with the unnamed tributary to the west above Roy Jones Road; and (b) Clearwater Branch; (6) Submit to DHEC a report prepared by the stream assessment and restoration professional, with the report to include the findings of the assessment, recommendations, and a list of any remediation activities necessary to mitigate stream impacts from sediment originating at the Site; and (7) Pay a civil penalty to DHEC. J.A. 85.

"commencement" used by the majority or under the common definition of "commencement," DHEC's NOAV was the commencement of the state enforcement action. Op. 22, 25. Judge Quattlebaum further observed that by allowing the citizen suit to proceed despite the measures South Carolina had already taken, the majority's decision elevated citizen suits above their supplemental role. Op. 17.

ARGUMENT

The panel majority erroneously determined that a Notice of Alleged Violation issued by the South Carolina Department of Health and Environmental Control was not the "commencement" of an action under a state law that is comparable to a federal administrative enforcement proceeding.

The "diligent prosecution" bar of the Clean Water Act precludes a citizen suit for violation of an effluent standard or limitation if "a State has commenced and is diligently prosecuting an action" with respect to that same violation under a state law comparable to the administrative enforcement mechanism set forth in 33 U.S.C. § 1319 at the time the citizen files his complaint. 33 U.S.C. § 1319(g)(6)(A)(ii). This provision, added to the Clean Water Act in 1987, is similar to the earlier-enacted citizen suit bar in 33 U.S.C. § 1365(b)(1)(B), which provides that "[n]o action may be commenced. . .if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State."

1. Commencement of an action under state law should be determined by the state's own procedures.

The Clean Water Act does not define what it means to "commence" a court action under Section 1365 ("a civil or criminal action in a court") or an administrative action under Section 1319 ("an action under a State law comparable to this subsection"). Determining commencement of a federal civil court action is a simple matter: Fed. R. Civ. P. 3 says a civil action is commenced by filing a complaint in court.

"Commencement" of state enforcement is a different matter. The Clean Water Act's framework of cooperative federalism encourages states to develop different regulatory approaches. States have "the primary responsibilities and rights" to manage the nation's water resources. 33 U.S.C. § 1251(b). Citizen suits, by contrast, are to "supplement rather than to supplant" government action. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.,* 484 U.S. 49, 60 (1987); *see also Piney Run Pres. Assoc. v. Cnty Comm'rs of Carroll Cnty, Md.,* 523 F.3d 453, 456 (4th Cir. 2008). The purpose of the citizen suit is to act when the government fails to do so. *Gwaltney of Smithfield,* 484 U.S. at 60.

Allowing a citizen enforcement to supplant the role of the government would undermine the government's ability to reach voluntary settlements with defendants, as defendants would have little incentive to settle disputes with the government if they remained open to unlimited citizen suits despite settling. *See, e.g., United States v. Metro. Water Reclamation Dist. of Greater Chicago*, 792 F.3d 821, 824-25 (7th Cir. 2015).

State flexibility to determine when its administrative process starts is consistent with the Clean Water Act's deference to the state's primary role in enforcement. In *Arkansas Wildlife Federation v. ICI Americas, Inc.,* 29 F.3d 376 (8th Cir. 1994), the Eighth Circuit noted that states are afforded latitude in selecting the specific mechanism of their enforcement program. Thus, it held that the state agency

"commenced" an administrative action when it followed the procedures the agency set forth in accordance with state law. *Id.* at 380. *See also Sierra Club v. Colorado Ref. Co*., 852 F. Supp. 1476 (D. Colo. 1994) (looking to the relevant state's specific procedures for the institution of enforcement proceedings and finding that Notice of Significant Noncompliance issued under state procedures qualified as commencement).

Courts analyzing the term "commencement" for purposes of other federal statutes have also deferred to state procedures to determine when an action is commenced, even in statutes requiring commencement in court. In *Lassiter v. LabCorp Occupational Testing Servs*., 337 F. Supp. 2d 746 (M.D.N.C. 2004), the court noted that the North Carolina Rules of Civil Procedure allowed a plaintiff to commence an action by filing for an extension of time and securing a summons from the state court. Thus, the court ruled that the plaintiff had "commenced" a timely action for violation of Title VII of the Civil Rights Act of 1964 even though the plaintiff did not actually file a complaint within 90 days after receiving a final decision of the Equal Employment Opportunity Commission. *Id.* at 752. *Accord, Koures v. Pfizer, Inc.,* 2011 U.S. Dist. LEXIS 52323, at *15 (W.D.N.C. May 16, 2011); *Allen v. Federal Express Corp.,* 2009 U.S. Dist. LEXIS 91775, 2009 WL 3234699 (M.D.N.C. Sept. 30, 2009); *see also Vail v. Harleysville Group. Inc*., 2003 U.S. Dist. LEXIS 17405, 2002 WL 32172799 (E.D. Pa. Aug. 24, 2003) (finding that

plaintiff's compliance with Pennsylvania procedural requirements for commencing a lawsuit, despite failure to file a complaint within the ninety-day period, satisfied Title VII).

In this case, DHEC's own documents demonstrate that the NOAV is the start of the state administrative process. J.A. 59 (DHEC's "Overview of the Administrative Enforcement Process" describing the Notice of Alleged Violation/Notice of Enforcement Conference as the "first step" in the administrative enforcement process). Consistent with the Clean Water Act's cooperative federalism scheme, the Court should defer to the state's determination of when its enforcement action began.

Additionally, as the dissent pointed out, the ordinary meaning of the word "commence" is to "begin" or to "start." The panel majority's analysis placed undue emphasis on the term "action" rather than the term "commenced," then construed "action" to mean something more like a court action. This led to two errors: the conclusion that to preclude a citizen suit, a state enforcement action had to be initiated by a formal, public document, and the conflation of the analysis of "commencement" with the analysis of "comparability" of the state program with the federal program.[2]

[2] Because the panel majority determined that the state had not "commenced" an action, it did not reach the question of whether the state's administrative enforcement mechanism is comparable to federal enforcement. The dissent determined that the state had commenced an action and went on to analyze why the state's administrative procedure is comparable to the federal procedure.

States have broad latitude to determine what sort of "action" they will use to commence an administrative enforcement process under the Clean Water Act. Nothing in the law suggests that an administrative "action" must be analogous to an action in court. Nothing in the law suggests that the determination of "commencement" has anything to do with how the state administrative program compares to the federal program.

2. The panel majority's decision erroneously minimized the role and effect of a DHEC Notice of Alleged Violation.

The panel majority incorrectly characterized DHEC's Notice of Alleged Violation as a state agency's "notice of an alleged violation for failure to obtain a required permit, without more." In fact, DHEC NOAVs in general, and this one in particular, are much more robust than mere notices. The NOAV set forth a litany of communications between Pickens County and Arabella Farm, including Pickens County's own notices of violation and consent order; detailed observations from DHEC inspections and communications with Arabella Farm; and accused Arabella Farm of violating state statutes. J.A. 55-58. The letter accompanying the NOAV noted that the enforcement conference would be Arabella's opportunity to disprove the allegations and offer any extenuating information that might mitigate the gravity of the alleged violations. J.A. 54. The informational flyer included with the NOAV entitled "An Overview of the Administrative Enforcement Process" noted that if a

respondent didn't attend the enforcement conference to dispute the findings in the NOAV, an order would be issued, if appropriate, and sent to the respondent. J.A. 59.

A person receiving such a notice would not, in the words of the dissent, view the NOAV "as a casual offer to engage in a voluntary discussion." Op. 29. The careful recitation of DHEC's prior interactions with Arabella Farm, coupled with the accusations of violations of state law and the threat of civil penalties, distinguish the DHEC NOAV from situations in which an agency wrote warning letters or simply began an investigation. *See, e.g., Louisiana Envtl. Action Network v. Sun Drilling Products Corp.,* 716 F. Supp. 2d 476, 481 (E.D. La. 2010).

DHEC's Uniform Enforcement Policy prescribes that if a party fails to respond adequately to the Notice of Violation, DHEC may seek relief through the courts or pursue the matter administratively. J.A. 77-78. *See also* S.C. Code Ann. § 48-1-50 (powers of DHEC include making, revoking, or modifying orders requiring the discontinuance of a discharge and instituting legal proceedings in a court of competent jurisdiction).

A DHEC NOAV is a serious document, one that requires the person to whom it is sent to participate in the administrative enforcement process or risk having an order issued against it. It collects the history of the alleged violator's failures, recounts DHEC's earlier efforts to bring the facility into compliance, sets forth violations of the law that carry significant penalties, and warns the alleged violator

of the consequences of refusing to attend the enforcement conference and seeking a voluntary resolution of DHEC's allegations. It is a meaningful document that sets the formal administrative process in motion, and it should be regarded as the "commencement" of state administrative enforcement against persons allegedly in violation of the Clean Water Act.

In a recent decision, the federal district court for the Eastern District of Virginia reached a conclusion consistent with the conclusion of the dissent and the district court in this case. In *Chesapeake Bay Found., Inc. v. Cnty. of Henrico*, No. 3:21-cv-752 (DJN), 2022 U.S. Dist. LEXIS 67080 (E.D. Va. Apr. 11, 2022), Judge Novak ruled that the Virginia Department of Environmental Quality had "commenced" an administrative enforcement action against Henrico County when it sent six Notices of Violation and held an enforcement conference with the County by telephone. Because the NOVs used conditional language describing possible future enforcement, and because DEQ issued serial NOVs over two years without pursuing resolution, the district court determined that the NOVs alone did not constitute "commencement" of administrative action. However, the court found that the enforcement conference supplemented the NOVs to create the "hallmarks of commencement that the NOVs lacked on their own."[3] *Id.* at *31. Since the sending

[3] The Court noted that under Virginia DEQ's enforcement policy, NOVS were merely referrals from DEQ's Compliance Division to DEQ's Enforcement Division. The Enforcement Conference represented DEQ's engagement with Henrico County

of the NOVs and the holding of the enforcement conference both occurred before plaintiffs sent their Notice of Intent to Sue, the court ruled that the diligent prosecution bar precluded plaintiffs' lawsuit.

In this case, the DHEC NOAV is not a conditional document, nor is it a document that occurred in a series of similar documents that might or might not culminate in an enforcement conference. However, even if the NOAV needed to be supplemented with an enforcement conference to constitute "commencement," both activities occurred in September 2020, two months before Appellants sent their notice of intent to sue in November 2020.

3. Cases cited by the panel majority do not support the conclusion that DHEC had not commenced an administrative action against Appellees.

The panel majority cites several cases from other jurisdictions as bolstering its determination that a statement administrative action had not "commenced" when Appellants filed their lawsuit. These cases, as the dissent points out, do not support the panel majority's conclusion. Rather, they address the comparability between the state administrative mechanism at issue and the federal administrative mechanism. Comparability of the state enforcement scheme to the federal enforcement scheme is a separate inquiry from whether the state enforcement scheme had commenced.

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to bring the facility into compliance and assess penalties. In the South Carolina scheme, the NOAV is combined with a Notice of Enforcement Conference and commences administrative enforcement.

McAbee v. City of Fort Payne, 318 F.3d 1248, 1251 (11th Cir. 2003), cited by the panel majority, explicitly declined to address commencement and warned against conflation of the commencement and comparability analyses. *Id.* at 1251.

Language about commencement in the comparability cases is at most dicta. For example, the panel majority cites *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.,* 382 F.3d 743, 760 (7th Cir. 2004), cert. denied, 544 U.S. 913 (2005), for the proposition that an administrative enforcement action commences at the point when notice and public participation protections become available to the public and interested parties. Op. 13. While this statement appears in the *Friends of Milwaukee's Rivers* opinion, the court had before it Wisconsin's very different enforcement scheme. Wisconsin's environmental agency could negotiate a corrective action plan, but it had no power to impose administrative penalties. The Wisconsin environmental agency was required to refer the matter to the Wisconsin Department of Justice, which then filed an action in court. Because Wisconsin law did not authorize administrative penalty proceedings or fines, there were no administrative enforcement provisions comparable to those of the Clean Water Act for which the court could consider the matter of "commencement." *Id.* at 756.

Other cases cited by the panel majority support Appellees' position that the courts should defer to the State's determination of when its administrative enforcement commences. In *Arkansas Wildlife Fed'n v. ICI Ams.*, 29 F.3d 376 (8th

Cir. 1994), the Eight Circuit emphasized that courts should respect the state's determination of when state enforcement commenced. *Id.* at 379-380. Plaintiffs in that case argued that the state's issuance of a consent order did not commence enforcement because the consent order did not contain sufficient public notice and participation rights. The Eighth Circuit rejected plaintiffs' argument, deferring to the state's definition of commencement rather than conducting its own analysis of the different public notice and participation features of the consent order and Plaintiff's preferred agency action.

CONCLUSION

Rehearing *en banc* is warranted because this case involves a question of exceptional importance. The panel's holding that South Carolina had not "commenced" administrative enforcement against Arabella Farm at the time Appellants filed this suit eviscerates the primary role of state regulators in Clean Water Act enforcement, impermissibly enlarges the "supplemental" role of citizen suits, and deprives South Carolina citizens of the federal statutory protections afforded to persons who in good faith resolve allegations of Clean Water Act violations through the state-sanctioned administrative process.

Appellees request that the Court grant the petition for rehearing en banc.

Respectfully submitted,

s/Elizabeth B. Partlow

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CERTIFICATE OF COMPLIANCE

This petition complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

[X] this petition contains 3,385 words

This petition complies with the typeface and type style requirements because:

[X] this petition has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Times New Roman style.

s/ Elizabeth B. Partlow
Elizabeth B. Partlow

Attorney for Appellees

August 3, 2022

CERTIFICATE OF SERVICE

I certify that on August 3, 2022, an electronic copy of Appellees' Petition for Rehearing En Banc was filed with the CM/ECF system of the United States Court of Appeals for the Fourth Circuit, which will cause an electronic notice of such filing to be sent to counsel of record for the Plaintiff-Appellants and Amici Curiae, who are registered to receive documents through the ECF system.

s/ Elizabeth B. Partlow
Elizabeth B. Partlow

Attorney for Appellees

ADDENDUM

(Cases not available in publicly accessible database)

Allen v. Fed. Express Corp.

United States District Court for the Middle District of North Carolina

September 30, 2009, Decided; September 30, 2009, Filed

1:09CV17

Reporter
2009 U.S. Dist. LEXIS 91775 *; 2009 WL 3234699

LEONIA ALLEN, Plaintiff, v. FEDERAL EXPRESS CORPORATION, Defendant.

Subsequent History: Summary judgment granted by, Judgment entered by *Allen v. Fed. Express Corp., 2011 U.S. Dist. LEXIS 34812 (M.D.N.C., Mar. 31, 2011)*

Core Terms

right-to-sue, alleges, plaintiff's claim, retaliation, wrongful termination, Exhibits, summons, negligent infliction of emotional distress, employment agreement, limitations period, retaliation claim, ninety days, Memorandum, argues

Counsel: **[*1]** For LEONIA ALLEN, Plaintiff: JAMES EDWARD HAIRSTON, JR., LEAD ATTORNEY, LAW OFFICES OF JAMES E. HAIRSTON, JR., RALEIGH, NC.

For FEDERAL EXPRESS CORPORATION, Defendant: JILL STRICKLIN COX, LEAD ATTORNEY, KILPATRICK STOCKTON LLP, WINSTON-SALEM, NC; RICHARD S. MCCONNELL, PRO HAC VICE, FEDERAL EXPRESS CORP., MEMPHIS, TN.

Judges: William L. Osteen, Jr., United States District Judge.

Opinion by: William L. Osteen, Jr.

Opinion

MEMORANDUM OPINION AND ORDER

OSTEEN, JR., District Judge.

Presently before the court is Defendant Federal Express Corporation's Motion to Dismiss Plaintiff Leonia Allen's claims under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. (Doc. 9.) Plaintiff filed a Memorandum of Law in Opposition of Defendant's Motion to Dismiss (Doc. 14), and Defendant filed a Reply Memorandum (Doc. 16). On September 3, 2009, the parties appeared in front of this court for a hearing. At the hearing, both parties agreed that the affidavit and exhibits (Doc. 10-2) submitted by Defendant in support of its Motion to Dismiss could be considered by this court without converting the motion into one for summary judgment.

For the reasons set forth below, Defendant's Motion to Dismiss will be granted in part and denied in part. **[*2]** Plaintiff's claims for Title VII discrimination, violation of the FMLA, wrongful termination, and negligent infliction of emotional distress will be dismissed, but Plaintiff's claim for Title VII retaliation will not be dismissed.

I. Background

The following facts are presented in the light most favorable to Plaintiff Leonia Allen. Plaintiff is an African American female with Grave's Disease. She applied for employment with Defendant Federal Express Corporation ("FedEx") on July 25, 1997, and, in conjunction with her employment application, signed a two-page Employment Agreement. (Decl. of F. Douglas (Doc. 10) Ex. A at 8-9.) Paragraph 15 of that agreement, located above the signature line, provides in part: "To the extent the law allows an employee to bring legal action against Federal Express Corporation, I agree to bring that complaint within the time prescribed by law or 6 months from the date of the event forming the basis of my lawsuit, whichever expires first." (*Id.* at 9.)

Plaintiff was hired as a courier by FedEx in August 1997. (Compl. (Doc. 1-5) P 5.) She later worked as a dispatcher in the Research Triangle Park office, where she experienced some friction with a fellow dispatcher, **[*3]** John Carr. According to her complaint, Mr. Carr "sabotage[d] Mrs. Allen's work as a dispatcher including but not limited to phone calls, courier decisions, assigning pick-ups, and deliveries." (*Id.* P 20.) Plaintiff alleges that she complained to several managers about Mr. Carr's behavior, but contends that nothing was done

to correct Mr. Carr's actions. (*Id.* PP 21-32.) Even after complaining to a new manager in 2004, Plaintiff "would cry on her way to work and not want to go to work. She was also having anxiety attacks with heart palpitations and nervousness." (*Id.* P 39.) Although Plaintiff continued to complain about a hostile and stressful work environment, she alleges that she "did not see any differences in her work environment." (*Id.* PP 42-48.)

Eventually, Plaintiff left work under the Family Medical Leave Act (FMLA) "due to the stress of her work environment exacerbating the condition of her Grave's Disease." (*Id.* P 49.) Upon her return, Plaintiff was given "all the late shifts with no rotation and her hours were cut." (*Id.* P 53.) In April 2006, Plaintiff "suffered an assault from Mr. Carr because she went to human resources and filed a complaint against him." (*Id.* P 56.) Plaintiff **[*4]** alleges that FedEx did nothing to correct the situation and even that FedEx discouraged two witnesses to the assault from coming forward. Plaintiff filed her first discrimination charge with the Equal Employment Opportunity Commission ("EEOC") on July 19, 2006, alleging discrimination based on race and disability from February 1, 2006 until the time of the EEOC charge filing. (Def.'s Mem. in Support of Mot. to Dismiss (Doc. 10) Ex. B.)

On April 3, 2007, FedEx terminated Plaintiff for making threatening gestures, although Plaintiff alleges that she merely "held her hand up to her head and put her finder [sic] to her temple in a vertical motion showing [a coworker] that Ms. Wojick was driving her crazy." (Compl. (Doc. 1-5) P 59-61.) Plaintiff filed a second EEOC charge on May 7, 2007, alleging that she was discharged in retaliation for filing a previous charge of employment discrimination against FedEx. (Def.'s Mem. in Support of Mot. to Dismiss (Doc. 10) Ex. D.)

On September 25, 2008, Plaintiff filed this lawsuit in the General Court of Justice, Superior Court Division, Durham County. Defendant subsequently removed the case to the United States District Court for the Middle District of **[*5]** North Carolina. Plaintiff's Complaint alleges Title VII race discrimination and retaliation, wrongful termination, negligent infliction of emotional distress, and violation of the FMLA. Defendant now seeks dismissal of Plaintiff's claims. [1]

[1] Defendant's actual motion to dismiss (Doc. 9) "requests that the Court dismiss four out of five claims, including Title VII race discrimination, FMLA, wrongful termination in violation of public policy, and negligent infliction of emotional distress." (Def.'s Mot. to Dismiss 2.) However, in its memorandum (Doc. 10), Defendant argues that Plaintiff's Title VII retaliation claim should also be dismissed. (Def.'s Mem. in Support of Mot. to Dismiss 8-9.) Likewise, in its reply memorandum (Doc. 16), "FedEx requests that the court dismiss all Plaintiff's claims *in their entirety*." (Reply Mem. 5 (emphasis added).) As this court will not dismiss Plaintiff's retaliation claim, it is unnecessary to further discuss Defendant's intention.

II. Legal Standard

Defendant moves to dismiss Plaintiff's claims pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. Attached to its Motion to Dismiss, Defendant has submitted six exhibits as well as an affidavit authenticating **[*6]** the exhibits. (Decl. of F. Douglas and Exhibits 1-6 (Doc. 10-2).) Specifically, Exhibit A is a copy of the Application for Employment completed and signed by Plaintiff in July 1997. Exhibits B and D are copies of Plaintiff's Charges of Discrimination to the EEOC, and Exhibits C and E are copies of the Notices of Right to Sue issued by the EEOC. Exhibit F is a copy of Plaintiff's Application and Order Extending Time to File Complaint. At the September 3, 2009 hearing, both parties agreed that all of these documents could be considered by this court without converting the motion into one for summary judgment, and this court agrees.

When analyzing a *Rule 12(b)(6)* motion, the pleading setting forth the claim must be "liberally construed" in the light most favorable to the nonmoving party, and allegations made therein are taken as true. *Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S. Ct. 1843, 23 L. Ed. 2d 404 (1969)*. A court should not grant the motion if the plaintiff can show "any set of facts consistent with the allegations in the complaint." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 563, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (citation omitted).

A plaintiff need not plead detailed evidentiary facts, and a complaint is sufficient if it will give a defendant **[*7]** fair notice of what the plaintiff's claim is and the grounds upon which it rests. *See Bolding v. Holshouser, 575 F.2d 461, 464 (4th Cir. 1978)*. A "plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555* (citation omitted). "Nonetheless, the requirement of liberal construction does not mean that the court can ignore a clear failure in the pleadings to allege any facts [that] set forth a claim." *Estate of Williams-Moore v. Alliance One Receivables Mgmt., Inc., 335 F. Supp. 2d 636, 646 (M.D.N.C. 2004)*.

III. Analysis

Defendant seeks dismissal of Plaintiff's Title VII claim of race discrimination because Plaintiff failed to file a civil action within ninety days after a right-to-sue letter on the race claim was issued. In its memorandum, Defendant also suggests that Plaintiff's Title VII retaliation claim should be dismissed because the lawsuit was also not filed within ninety days of receipt of a right-to-sue letter, even though Plaintiff secured an extension under Rule 3 of the North Carolina Rules of Civil Procedure. **[*8]** Defendant further argues that Plaintiff's FMLA, wrongful termination, and negligent infliction of emotional distress claims are barred by the six-month contractual limitations period contained in Plaintiff's employment agreement with FedEx.

A. Title VII Claims

Defendant first argues that Plaintiff failed to bring a civil action under Title VII within ninety days of when her right-to-sue letters were issued. As mentioned above, Plaintiff filed her first EEOC complaint on July 19, 2006, alleging discrimination based on race and disability. (Def.'s Mem. in Support of Mot. to Dismiss (Doc. 10) Ex. B.) Plaintiff was mailed a right-to-sue letter on August 28, 2007. (*Id.* at Ex. C.) Plaintiff filed a second EEOC charge on May 7, 2007, alleging retaliation. (*Id.* at Ex. D.) She was issued her second right-to-sue letter on June 9, 2008. (*Id.* at Ex. E.) On September 5, 2008, Plaintiff filed an application and order, under Rule 3 of the North Carolina Rules of Civil Procedure, extending by twenty days the time she had to file her complaint. Plaintiff filed this lawsuit on September 25, 2008.

It is undisputed that Plaintiff did not file suit within ninety days of receipt of her first right-to-sue letter. **[*9]** Plaintiff's memorandum does not cite any legal authority for its assertion that the discrimination claim should not be dismissed. [2] (Pl.'s Mem. in Opp'n of Def.'s Mot. to Dismiss (Doc. 14) at 3.) An EEOC charge defines the scope of a plaintiff's right to institute a civil suit. Even assuming that Plaintiff's second EEOC charge was properly filed, it does not include any allegations of discrimination. Only retaliation is alleged, and therefore Plaintiff can only litigate her retaliation claim. *See* *Chacko v. Patuxent Inst., 429 F.3d 505, 509 (4th Cir. 2005)* ("[t]he factual allegations made in formal litigation must correspond to those set forth in the administrative charge."); *Bryant v. Bell Atl. Md., Inc., 288 F.3d 124, 132-33 (4th Cir. 2002)* (Title VII retaliation claims barred when EEOC charge only alleged discrimination based on race). For these reasons, the claim of Title VII discrimination alleged in Plaintiff's first EEOC charge should be dismissed.

Defendant further argues that Plaintiff's Complaint was also filed more than ninety days after issuance **[*10]** of her second right-to-sue letter, and thus her retaliation claim should also be dismissed. As discussed above, Plaintiff was issued her second right-to-sue letter on June 9, 2008. On September 5, 2008, Plaintiff filed an application and order extending by twenty days her time to file her complaint under Rule 3 of the North Carolina Rules of Civil Procedure. Plaintiff claims that she then had until September 25, 2008 to file her complaint, and on that date she properly filed her complaint. Defendant recognizes the existence of Rule 3, but argues that "no explanation of justification for failing to file within 90-days was provided" and suggests that Plaintiff "failed to issue a summons before the expiration of the 90-day period" as is required by Rule 3. (Def.'s Mem. in Support of Mot. to Dismiss (Doc. 10) 8.)

Rule 3 of the North Carolina Rules of Civil Procedure provides that an action may be commenced by the issuance of a summons when "[a] person makes an application to the court stating the nature and purpose of his action and requesting permission to file his complaint within 20 days" and "[t]he court makes an order stating the nature and purpose of the action and granting the requested **[*11]** permission." N.C. R. Civ. P. 3(a). "Merely filing an application for extension of time is insufficient; a plaintiff must have a summons issued within the relevant statutory period to sustain his claims." *Lassiter v. LabCorp Occupational Testing Servs., Inc., 337 F. Supp. 2d 746, 751-52 (M.D.N.C. 2004)*; *see also* *Beall v. Beall, 156 N.C. App. 542, 547, 577 S.E. 2d 356, 360 (2003)* (affirming dismissal of claims because even though plaintiff filed a Rule 3 extension, summons was not issued until after the relevant statute of limitations expired).

A review of the record reveals that a "Civil Summons to be Served with Order Extending Time to File Complaint" was issued in the General Court of Justice, Superior Court Division, Durham County, on September 5, 2008, within the ninety-day period after Plaintiff's second right-to-sue letter was issued. (Notice of Removal (Doc. 1) Ex. A.) Therefore, Plaintiff's retaliation claim will not be

[2] Plaintiff's counsel essentially conceded these points at the September 3, 2009 hearing and did not object to dismissal of this claim.

dismissed, since the extension order was granted and a summons was issued within the ninety-day period after Plaintiff's second right-to-sue letter was issued.

Defendant further contends that Plaintiff should not be given the benefit of Rule 3, as it "is contrary **[*12]** to the clear language and intent of Title VII." (Def.'s Mem. in Supp. of Mot. to Dismiss (Doc. 10) 8.) However, a court in this district has previously held that a plaintiff may initiate a Title VII action in a North Carolina state court utilizing either means set forth in Rule 3 of the North Carolina Rules of Civil Procedure, as *42 U.S.C. § 2000e-5(f)(1)* does not specify that the filing of a complaint is necessary to commence an action. *Lassiter, 337 F. Supp. 2d at 752 (M.D.N.C. 2004)*. *See also Sheaffer v. County of Chatham, 337 F. Supp. 2d 709, 725 (M.D.N.C. 2004)* (Rule 3 procedure can properly be used in North Carolina state courts to extend the time in which to file claims under the ADA). This court finds these cases persuasive and concludes that Plaintiff brought the current Title VII retaliation action in a timely manner, and this claim will not be dismissed.

B. FMLA, Wrongful Termination, and Emotional Distress Claims

Defendant next argues that Plaintiff's FMLA, wrongful termination, and negligent infliction of emotional distress claims are barred by the six-month contractual limitations period contained in the Employment Agreement signed by Plaintiff on July 25, 1997. Defendant **[*13]** points to *Badgett v. Federal Express Corp., 378 F. Supp. 2d 613 (M.D.N.C. 2005)*, where another court in this district upheld the six-month contractual statute of limitation contained in the same FedEx employment agreement. Indeed, in *Badgett,* the court held that "the federal law and North Carolina law allow the parties to contractually agree to shorter limitations periods than those provided by statute." *Badgett, 378 F. Supp. 2d at 623*. Furthermore, the court held that the limitations clause did not violate North Carolina or federal law and was reasonable under the circumstances present in that case. *Id. at 626*.

This court finds the reasoning set forth in *Badgett* to also be persuasive on the facts of this case. This court further finds unpersuasive Plaintiff's argument that the court should set aside the limitations period by applying the doctrine of equitable tolling or equitable estoppel. (Pl.'s Mem. in Opp'n to Def.'s Mot. to Dismiss (Doc. 14) 6.) Plaintiff's Complaint does not sufficiently allege facts that, even if proven true, would cause this court to not apply the limitations period under either theory. Finally, at the September 3, 2009 hearing, Plaintiff's counsel essentially **[*14]** conceded that *Badgett* is persuasive on these facts and did not object to dismissal of the FMLA and state law claims. For these reasons, this court will enforce the six month limitations clause in the Employment Agreement. Accordingly, Plaintiff's FMLA, emotional distress, and wrongful termination claims will be dismissed as untimely.

IV. Conclusion

For the reasons set forth above, it is hereby ORDERED that Defendant's Motion to Dismiss (Doc. 9) will be GRANTED in part and DENIED in part. Plaintiff's claims of Title VII discrimination, violation of the FMLA, negligent infliction of emotional distress, and wrongful termination are DISMISSED. The motion is DENIED as to Plaintiff's claim for retaliation under Title VII.

This the 30th day of September 2009.

/s/ William L. Osteen, Jr.

United States District Judge

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Chesapeake Bay Found., Inc. v. Cnty. of Henrico

United States District Court for the Eastern District of Virginia, Richmond Division

April 11, 2022, Decided; April 11, 2022, Filed

Civil No. 3:21cv752 (DJN)

Reporter
2022 U.S. Dist. LEXIS 67080 *; 2022 WL 1084998

CHESAPEAKE BAY FOUNDATION, INC., et al., Plaintiffs, v. COUNTY OF HENRICO, Defendant.

Core Terms

consent order, violations, compliance, civil penalty, effluent, commencement, Plaintiffs', enforcement action, diligence, notice, diligent prosecution, citizen suit, limits, notice of violation, sewage, load, Pollution, concentration, projects, Counts, bypass, administrative enforcement, injunctive relief, motion to dismiss, effluent limitation, corrective action, plain language, prosecuting, asserts, lack of subject matter jurisdiction

Counsel: **[*1]** For Chesapeake Bay Foundation Inc., Plaintiff: Jon Mueller, LEAD ATTORNEY, Chesapeake Bay Foundation, Annapolis, MD; Taylor Lilley, PRO HAC VICE, Chesapeake Bay Foundation (MD-NA), Annapolis, MD.

For James River Association, Plaintiff: Jon Mueller, LEAD ATTORNEY, Chesapeake Bay Foundation, Annapolis, MD; Jennifer Duggan, PRO HAC VICE, Environmental Integrity Project, Washington, DC.

For County Of Henrico, Defendant: Christopher Donald Pomeroy, LEAD ATTORNEY, AquaLaw PLC, Richmond, VA; Denise Mary Letendre, Henrico County Attorney's Office, Henrico, VA; Joseph Thomas Tokarz, II, Henrico County Attorney's Office, Richmond, VA; Justin W. Curtis, AquaLaw PLC, Richmond, VA.

Judges: David J. Novak, United States District Judge.

Opinion by: David J. Novak

Opinion

MEMORANDUM OPINION

Plaintiffs Chesapeake Bay Foundation, Inc., and James River Association bring this citizen suit against Defendant County of Henrico, alleging violations of the *Clean Water Act, 33 U.S.C. § 1251 et seq.*, at the Henrico County Water Reclamation Facility. This matter now comes before the Court on the Motion to Dismiss (ECF No. 12) filed by the County of Henrico.

For the reasons set forth below, the Court will GRANT IN PART and DENY IN PART Defendant's Motion.

I. BACKGROUND

A motion made pursuant **[*2]** to *Federal Rule of Civil Procedure 12(b)(1)* challenges the court's jurisdiction over the subject matter of the complaint. A defendant moving for dismissal for lack of subject matter jurisdiction may either attack the complaint on its face, asserting that the complaint "fails to allege facts upon which subject matter jurisdiction can be based," or, may attack "the existence of subject matter jurisdiction in fact, quite apart from any pleadings." *White v. CMA Coast. Co., 947 F. Supp. 231, 233 (E.D. Va. 1996)* (internal citations omitted). When deciding a *Rule 12(b)(1)* motion to dismiss, a federal court may resolve factual questions to determine whether it has subject matter jurisdiction. *Thigpen v. United States, 800 F.2d 393, 396 (4th Cir. 1986)*, *overruled on other grounds, Sheridan v. United States, 487 U.S. 392, 108 S. Ct. 2449, 101 L. Ed. 2d 352 (1988)*. In resolving a motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, the Court will accept Plaintiff's well-pleaded factual allegations as true, though the Court need not accept Plaintiffs legal conclusions. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. Based on these standards, the Court accepts the following facts.

A. Factual Background

Plaintiffs Chesapeake Bay Foundation, Inc. and James River Association bring this citizen suit against Defendant County of Henrico, alleging significant and ongoing violations of the *Clean Water Act, 33 U.S.C. §*

1251 et seq., (the "CWA" or "Act") at the Henrico County Water Reclamation Facility (the "Facility"), including disregard for the terms of its Permit **[*3]** issued under the Virginia Pollution Discharge Elimination System ("VPDES").[1] (Compl. ¶¶ 1-2 (ECF No. 1).) Henrico's violation of its Permit has harmed the ecological integrity of the James River and its tributaries, and resulted in the Commonwealth of Virginia's imposition of four separate consent orders in the last twenty-eight years. (Compl. ¶¶ 5, 9-10.) In light of violations in the previous four years, and frustrated that the state's enforcement efforts have not resolved Henrico's violations, Plaintiffs bring this citizen suit seeking Henrico's compliance with the Clean Water Act.

1. Henrico's History of Non-compliance at the Facility

The Facility began operating in 1989, and receives untreated wastewater through its sewage collection system from the greater Richmond area. (Compl. ¶¶ 2-3.) Henrico received VPDES Permit No. VA0063690 (the "Permit") pursuant to the CWA, § 1342, authorizing the Facility to discharge treated sewage and wastewater into the James River with certain limitations. (Compl. ¶ 4.) Specifically, the Permit establishes effluent load and concentration limits for, among other things, Total Suspended Solids ("TSS")[2] and Carbonaceous Biological Oxygen Demand ("CBOD")[3] and proscribes sanitary **[*4]** sewer overflows ("SSOs").[4] (Compl. ¶ 4.)

Between August 3, 1989, and January 8, 1993, the Facility received twenty-three Notices of Violation ("NOVs") that led to the development of a voluntary administrative consent order (the "1993 Consent Order"), issued by the Commonwealth of Virginia State Water Control Board, and approved by the Virginia Department of Environmental Quality ("DEQ") on June 1, 1993. (Compl. ¶ 70; Exhibit D: 1993 Consent Order (ECF No. 1-5).) That order directed Henrico to implement a schedule of compliance addressing effluent limitations for fecal coliform and ammonia nitrogen through effluent filtration, ozone disinfection, and inflow and infiltration projects, but did not assess any penalty. (Compl. ¶¶ 70-71; Exhibit D: 1993 Consent Order at 1-3, App. A.)

In the period between February 5, 1993, and August 4, 1994, the Facility received thirteen NOVs. (Compl. ¶ 72; Exhibit E, at 1 (ECF No. 1-6).) During that time, the Facility failed to meet its Permit limits for TSS and CBOD and interim effluent limits set by the 1993 Consent Order for fecal coliform. (Compl. ¶ 72; Exhibit E: 1994 Consent Order Amendment at 1, App. A.) As a result, in September 1994, the State Water **[*5]** Control Board approved an amendment to the 1993 Consent Order, attributing these violations to a failure of the Facility's effluent filtration system and issuing an updated schedule of compliance. (Compl. ¶ 72.)

On February 19, 1998, DEQ issued an administrative consent order to Henrico to address SSO violations from Henrico's sewage collection system, requiring rehabilitation of nine sewer collection subsystems. (Compl. ¶ 73; Exhibit F: 2003 Consent Order, Section C ¶ 2 (ECF No. 1-7).) Henrico failed to meet the schedule identified in this order, resulting in DEQ's issuance of another NOV on November 23, 1999. (Compl. ¶ 73.)

On January 7, 2003, DEQ and Henrico entered into another administrative consent order (the "2003 Consent Order") to address consistent TSS, CBOD, total phosphorus, ammonia nitrogen, and chlorine effluent violations, as well as continued SSOs

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[1] The Chesapeake Bay Foundation and James River Associations are 501(c)(3) non-profit organizations oriented towards ecological restoration, education and advocacy. Their members reside in the Commonwealth of Virginia along the James River basin downstream of the Facility and claim harm by the Facilities' violations. Thus, they would have standing to sue in their own right. (Compl. ¶¶ 20-22, 26, 28, 33.)

[2] TSS refers to the amount of insoluble particles floating in suspension in wastewater. (Compl. ¶ 6.) TSS pollution significantly threatens waterways, and the aquatic organisms that inhabit them, by inhibiting the growth of aquatic organisms by smothering them or blocking sunlight. (Compl. ¶ 6.) Suspended solids can also carry bacteria and other toxic substances threatening the health of impacted waterways and humans using those rivers, creeks and streams. (Compl. ¶ 6.)

[3] Elevated levels of TSS often translate to an increase in CBOD. (Compl. ¶ 7.) CBOD refers to the consumption of dissolved oxygen by microorganisms when they convert organic material into carbon dioxide via respiration. (Compl. ¶ 7.) Increased levels of CBOD correspond to a decrease in the available oxygen in an affected waterbody, effectively suffocating the aquatic organisms within it. (Compl. ¶ 7.)

[4] Illegal SSOs from the Facility also result in the discharge of raw sewage into the James River and its tributaries. (Compl. ¶ 8.) Raw sewage risks exposure to an array of viruses, bacteria and parasites. (Compl. ¶ 8.) The concentration of contaminants and the unpredictability of the make-up of each SSO event presents a significant health risk to humans and impairs waterways. (Compl. ¶ 8.)

containing raw sewage that had occurred in the previous two years. (Compl. ¶ 75; Exhibit F: 2003 Consent Order, Section C ¶¶ 3-7.) On November 2, 2001, DEQ had issued an NOV to Henrico for violations of TSS and CBOD reported by Henrico during the March through August 2001 monitoring periods. (Compl. ¶ 74.) DEQ issued an additional **[*6]** NOV on April 16, 2002, for TSS, total phosphorous and ammonia violations during the December 2001 through February 2002 monitoring periods. (Compl. ¶ 72.) The April NOV also cited Henrico for nineteen SSOs that occurred between September 1, 2001 and April 6, 2002. (Compl. ¶ 72.) Despite these NOVs, several additional sewage overflows followed. (Compl. ¶ 72; Exhibit F: 2003 Consent Order, Section ¶¶ 3-4.) The 2003 Consent Order assessed a civil charge of $25,500 and required Henrico to develop and implement a formal operation and maintenance manual to address effluent limitation violations and submit a schedule of completion for several inflow and infiltration projects to be completed by January 15, 2007, to address the SSOs. (Compl. ¶ 76; Exhibit F: 2003 Consent Order, Section D, App. A.)

Henrico and DEQ amended the 2003 Consent Order in February 2005 to incorporate an additional inflow and infiltration project. (Compl. ¶ 77; Exhibit G: 2005 Consent Order Amendment, Section B ¶ 4 (ECF No. 1-8).) In September 2007, Henrico and DEQ again amended the 2003 Consent Order to confirm Henrico's completion of all of the corrective actions required to address the effluent violations identified **[*7]** and extend the schedule to complete the inflow and infiltration projects necessary to resolve the SSO violations. (Compl. ¶ 78; Exhibit H: 2007 Consent Order Amendment (ECF No. 1-9).)

Following a renewed series of SSO discharges and effluent limit violations by the Facility, DEQ and Henrico entered into yet another administrative consent order on December 17, 2010 (the "2010 Consent Order"). (Compl. ¶ 79.) The 2010 Consent Order limited its scope by dismissing the effluent violations and, instead, addressed twenty-six unauthorized SSOs occurring from June 20, 2009 through December 3, 2009, and fifty additional SSOs occurring from December 3, 2009 to June 11, 2010. (Compl. ¶ 79; Exhibit I: 2010 Consent Order ¶¶ C.2-7, 9, 10, 13-15 (ECF No. 1-10).) The 2010 Consent Order required Henrico to complete several inflow and infiltration projects designed to eliminate ongoing illicit SSOs and instituted a Schedule of Compliance ending on June 15, 2018. (Compl. ¶ 80.) The 2010 Consent Order also required Henrico to submit to DEQ for approval, and then implement, standard operating procedures for the most optimal plant configuration and process modes for a given set of flow, temperature, and influent **[*8]** loading conditions. (Compl. ¶ 80.) Other than this requirement, the order did not include any other projects to remedy TSS and CBOD effluent violations from the Facility, as it claimed that the Facility had lost the necessary nitrification capability due to influent flow beyond its capacity. (Compl. ¶ 80.) The 2010 Consent Order required Henrico to pay a civil administrative penalty of $29,500 and did not include any stipulated penalty provisions for future violations. (Compl. ¶ 81.) However, as of February 22, 2021, public documents show no evidence of civil or administrative penalties assessed or paid since Henrico and DEQ's execution of the 2010 Consent Order. (Compl. ¶ 81.)

Henrico complied with its schedule and completed all of the projects listed in the 2010 Consent Order by April 2018. (Compl. ¶ 82; Def.'s Mem. Att. A: DEQ Enforcement Order 12/15/2021 ("2021 Consent Order") ¶ C.6 (ECF No. 13-1).) However, the projects failed to curb Henrico's frequent and recurring SSO events: since 2016, Henrico discharged over sixty-six million gallons of sewage into the James River and its tributary creeks and streams, with over fifty-six million gallons released after Henrico completed the **[*9]** projects required under the 2010 Consent Order. (Compl. ¶ 82; Exhibit J: Compilation of Henrico County, Unauthorized Discharge and Overflow Reports (Sept. 28, 2016 - Oct. 7, 2021) ("Henrico SSO Reports") (ECF No. 1-11).) Furthermore, Henrico again began to violate effluent limits in 2019. (Compl. ¶ 82.)

2. Recent Violations and Enforcement Actions

On May 31, 2017, DEQ renewed the Facility's VPDES Permit (Permit No. VA0063690). (Compl. ¶ 83.) Although effective June 1, 2017, to May 31, 2020, DEQ administratively continued it. (Compl. ¶ 83.) The Permit acknowledges that the Facility has a design flow of seventy-five million gallons per day and, like the previous version, sets limitations for, among other things, TSS[5] and CBOD,[6] prohibits unanticipated

[5] The Permit limits TSS discharge as follows: monthly average concentration 8.0 milligrams per liter ("mg/L"), monthly average load 2,300 kilograms per day ("kg/day"), weekly average concentration 12.0 mg/L, weekly average load 3,400 kg/day. (Compl. ¶ 84.)

[6] The Permit limits CBOD discharge as follows: June 1 - October 31, monthly average concentration 5.0 mg/L, monthly

bypass of wastewater,[7] requires "proper operation and maintenance of all facilities and systems of treatment and control" and imposes prompt reporting requirements to DEQ. (Compl. ¶¶ 84, 86 (cleaned up).)

After renewal of the Permit in 2017, Henrico again received numerous NOVs and Warning Letters for effluent concentration and load limitation exceedances. (Compl. ¶ 87.) On May 7, 2019, DEQ issued a Warning Letter detailing exceedances for TSS **[*10]** concentration and load limits. (Compl. ¶ 88; Exhibit K: DEQ, Henrico County Warning Letter (May 7, 2019) (ECF No. 1-12).) On April 3, 2020, DEQ sent Henrico an NOV reiterating previously identified violations that occurred in February 2020 relating to the TSS concentration and load limits. (Compl. ¶ 89; Exhibit L: DEQ, Henrico County Notice of Violation (Apr. 3, 2020) ("April 3, 2020 NOV") (ECF No. 1-13).) On June 3, 2020, Henrico received an NOV from DEQ detailing March 2020 and April 2020 violations, again pertaining to TSS concentration and load limits, as well as CBOD concentrations and load limits. (Compl. ¶ 90; Exhibit M: DEQ, Henrico County Notice of Violation (June 3, 2020) (ECF No. 1-14).) On August 11, 2020, DEQ issued another NOV for May 2020 and June 2020 effluent violations for TSS concentration and load limit exceedances. (Compl. ¶ 91; Exhibit N: DEQ, Henrico County Notice of Violation (Aug. 11, 2020) (ECF No. 1-15).)

Henrico has also reported several recent SSOs at the Facility. Following a July 18, 2018 SSO event lasting 585 minutes and releasing 144,495 gallons of sewage into Almond Creek, a James River tributary, a DEQ site inspector "observed evidence of long-term **[*11]** overflow of sewage at the location based on excessive bacterial growth on the stream bottom as well as the existence of aged sewage solids." (Compl. ¶ 92; Exhibit 0: DEQ, Henrico County Notice of Violation (Sept. 18, 2018) ("Sept. 18, 2018 NOV") at 2 (ECF No. 1-16).) On September 18, 2018, DEQ issued an NOV for fifty-nine individual SSO events that occurred between September 28, 2016, and August 18, 2018. (Compl. ¶ 93; Sept. 18, 2018 NOV at 1-3; *see also* Table 10, Compl. at 34-40.) On February 21, 2019, DEQ issued another NOV for twenty-nine additional unpermitted SSOs from the Facility's collection system, occurring between September 17, 2018, and January 15, 2019. (Compl. ¶ 94; Exhibit P: DEQ, Henrico County Notice of Violation (Feb. 21, 2019) (ECF No. 1-17); *see also* Table 10.) On April 18, 2019, DEQ again issued an NOV for thirteen additional unpermitted SSOs occurring between January 17, 2019, and April 15, 2019. (Compl. ¶ 95; Exhibit Q: DEQ, Henrico County Notice of Violation (Apr. 18, 2019) (ECF No. 1-19); *see also* Table 10.) On August 15, 2019, DEQ issued an NOV for five unpermitted SSOs occurring between April 19, 2019, and July 8, 2019. (Compl. ¶ 96; Exhibit R: DEQ, Henrico **[*12]** County Notice of Violation (Aug. 15, 2019); *see also* Table 10.) Since September 2019, Henrico has reported several additional SSO events which account for millions of gallons of illicit sewage discharged. (Compl. ¶ 97; Exhibit J: Henrico SSO Reports; *see also* Table 10.)

In addition to violations noticed by DEQ, Henrico, in compliance with reporting requirements of its Permit, has also identified and reported recurring unanticipated filter bypass events. (Compl. ¶ 98.) The Permit prohibits bypasses unless unavoidable to prevent loss of life, injury, or severe property loss and there existed no feasible alternatives to the bypass. (Compl. ¶ 100.) Henrico's written reports notifying DEQ of these bypasses provide no indication that these conditions were satisfied, instead variously attributing unanticipated partial bypass events to out-of-service filter cells,[8] a combination of increased pollutant loads and the failure of three primary clarifiers[9] and equipment failure.[10] (Compl. ¶¶ 100-03)[11]

3. 2021 Proposed Administrative Consent Order

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average load 1,361 kg/day, weekly average concentration 7.0 mg/L, weekly average load 2,044 kg/day; November 1 - May 31, monthly average concentration 8.0 mg/L, monthly average load 2,157 kg/day, weekly average concentration 11.0 mg/L, weekly average load 3,236 kg/day. (Compl. ¶ 84.)

[7] The 2017 Permit defines a "bypass" as the "intentional diversion of water streams from any portion of a treatment facility." (Compl. ¶ 99.)

[8] Ten individual SSO events occurred during the period of time spanning February 11-28, 2021. (Compl. ¶ 101; Exhibit S: Compilation of 2021 Partial Filter Bypass Notifications and Written Reports (Feb. 11, 2021-Mar. 6, 2021) ("Bypass Reports") (ECF No. 1-20).)

[9] Three individual SSO events occurred during the period of time spanning March 1-6, 2021. (Compl. ¶ 102; Bypass Reports.)

[10] Sixteen individual SSO events occurred during the period of time spanning March 24 to June 15, 2021. (Compl. ¶ 103; Bypass Reports.)

[11] Three additional unapproved bypass events occurred on September 16, October 3 and 7, 2021. (Compl. ¶ 104.)

In response to Henrico's recent NOVs, DEQ required that Henrico attend an enforcement conference on June 24, 2020 to discuss the violations. (2021 Consent Order **[*13]** ¶ C.20.) On August 26, 2020, DEQ sent Henrico a draft administrative consent order imposing a civil charge of $65,835 and requiring Henrico to submit a proposed Corrective Action Plan and implementation schedule for review and approval by DEQ. (Decl. of Bentley P. Chan, P.E.[12] ("Chan Decl.") ¶¶ 13-14 (ECF No. 13-3).) DEQ gave Henrico until September 8, 2020 to provide comments on the draft order. (Chan Decl. ¶ 14.) After a year of negotiating the terms, Henrico signed the 2021 Consent Order on August 25, 2021. (Compl. ¶¶ 105-06; 2021 Consent Order at 13.) The 2021 Consent Order assessed an administrative penalty of $207,680, requiring Henrico to pay $51,920 in administrative penalties and allowing Henrico to conduct a Supplemental Environmental Project to satisfy the rest of the $155,750 assessed, and does not propose any stipulated penalties for future violations. (Compl. ¶ 106.) It aims to resolve effluent limit exceedances and partial filter bypass event violations from the Facility by requiring replacement of existing equipment. (Compl. ¶ 106.) On September 16, 2021, DEQ published the Proposed Administrative Consent Order for notice and comment as required by *Virginia Code § 62.1-44.15(8f)*. (Compl. ¶ 105.) Plaintiffs **[*14]** took the opportunity to raise their concerns during notice and comment. (Enforcement Summary at 3-10; DEQ Hr'g Tr. (Dec. 14, 2021) ("Hr'g Tr.") at 113-20 (ECF No. 16-1).) The DEQ board considered those comments, responded to them in full in a published statement, provided additional response during its December 14, 2021 board meeting and ultimately executed the 2021 Consent Order without incorporating any comments. (Enforcement Summary at 3-10; Hr'g Tr. at 113-25.)

Just two weeks before Henrico's execution of the 2021 Consent Order, on August 11, 2021, Plaintiffs transmitted to Defendant their Notice of Intent to Sue (the "NOI") as required by *33 U.S.C. § 1365(b)(1)(A)*. (Compl. ¶ 12; NOI Letter (ECF No. 1-3).) On December 6, 2021, before DEQ finalized the 2021 Consent Order, Plaintiffs filed this suit. (Compl. ¶ 105.) After a hearing on December 14, 2021, DEQ executed the final 2021 Consent Order on December 15, 2021. (2021 Consent Order at 12-13.)

[12] Mr. Chan, a licensed Professional Engineer, serves as Director of Henrico County Department of Public Utilities ("DPU"). (Chan Decl. ¶¶ 2-3.)

B. Plaintiffs' Complaint

On December 6, 2021, Plaintiffs filed their Complaint against Defendant, raising five counts for relief based on the above allegations. Plaintiffs raise each of the counts for a distinct manner in which Henrico contravened the terms of its **[*15]** VPDES Permit, in violation of *sections 301(a)* and *402* of the *Clean Water Act*, *33 U.S.C. §§ 1311(a)*, *1342*. Count One asserts a claim for violations of effluent load limitations of the Permit, alleging that Henrico exceeded its weekly and monthly average effluent load limit for TSS and CBOD on several occasions in the past three years. (Compl. ¶¶ 109-19.) Count Two asserts a claim for violations of effluent concentration limitations of the Permit, alleging that Henrico also exceeded its weekly and monthly average effluent concentration limit for TSS and CBOD on several occasions in the past three years. (Compl. ¶¶ 120-26.) Count Three asserts a claim for violations of the prohibition on unanticipated filter bypasses under the Permit, alleging thirty violations since the beginning of 2021. (Compl. ¶¶ 127-30.) Count Four asserts a claim for unpermitted SSO events under the Permit, alleging that Henrico has discharged 65,881,966 gallons of raw, untreated sewage into the James River and its tributaries since September 2016. (Compl. ¶¶ 131-40.) Count Five asserts a claim for failure to properly operate and maintain the Facility and systems under the Permit, founded on the Permit violations described in Counts One through Four. (Compl. ¶¶ 141-48.) **[*16]** Based on these claims, Plaintiffs seek declaratory and injunctive relief ordering Henrico to cease violating its Permit and the Clean Water Act, as well as to assess and remediate the harm caused, as overseen by the Court. (Compl. at 41-42.) Plaintiffs also seek the imposition of civil penalties and the award of reasonable attorney's fees and costs. (Compl. at 41-42.)

C. Defendant's Motion

In response to Plaintiffs' Complaint, on January 6, 2022, Defendant filed a Motion to Dismiss (ECF No. 12), moving to dismiss Plaintiffs' claims against it for lack of subject matter jurisdiction and failure to state a claim under *Federal Rules of Civil Procedure 12(b)(1)* and *12(b)(6)*. In support of its Motion, Henrico argues that *33 U.S.C. § 1319(g)(6)* bars this citizen suit in its entirety, because DEQ has already commenced and was diligently prosecuting its enforcement action against Henrico at the time that Plaintiffs filed their Complaint. (Mem. in Supp. of its Mot. to Dismiss for Lack of Subject

Matter Jurisdiction and for Failure to State a Claim Upon Which Relief can be Granted ("Def.'s Mem.") at 5-14 (ECF No. 13).) Additionally, Henrico argues that Counts One and Two fail to state a claim, and the Court lacks subject matter jurisdiction over them, because they **[*17]** rely on wholly past violations that Henrico has already remedied. (Def.'s Mem. at 14-16.)

On January 20, 2022, Plaintiffs filed their response in opposition (Pls.' Br. in Opp'n to Def.'s Mot. to Dismiss ("Pls.' Resp.") (ECF No. 16)), to which Henrico replied on January 26, 2022 (Reply Br. in Supp. of its Mot. to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim Upon Which Relief can be Granted ("Def.'s Reply") (ECF No. 17)), rendering the Motion now ripe for review.

II. STANDARD OF REVIEW

A motion made pursuant to *Federal Rule of Civil Procedure 12(b)(1)* challenges the court's jurisdiction over the subject matter of the complaint. A defendant moving for dismissal for lack of subject matter jurisdiction may either attack the complaint on its face, asserting that the complaint "fails to allege facts upon which subject matter jurisdiction can be based," or may attack "the existence of subject matter jurisdiction in fact, quite apart from any pleadings." *White, 947 F. Supp. at 233* (internal citations omitted). In either case, the plaintiff bears the burden of proof to establish jurisdiction. *Richmond, Fredericksburg & Potomac R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991)*. The Court must dismiss an action if it determines that it lacks subject matter jurisdiction. *Fed. R. Civ. P. 12(h)(3)*.[13]

A motion to dismiss pursuant to **[*18]** *Rule 12(b)(6)* tests the sufficiency of a complaint or counterclaim; it does not serve as the means by which a court will resolve contests surrounding the facts, determine the merits of a claim or address potential defenses. *Republican Party of N. Carolina v. Martin, 980 F.2d 943, 952 (4th Cir. 1992)*. In considering a motion to dismiss, the Court will accept a plaintiff's well-pleaded allegations as true and view the facts in a light most favorable to the plaintiff. *Mylan Lab'ys, Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993)*. However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal, 556 U.S. at 678*.

Under the Federal Rules of Civil Procedure, a complaint or counterclaim must state facts sufficient to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests[.]'" *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (quoting *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*). As the Supreme Court opined in *Twombly*, a complaint or counterclaim must state "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action," though the law does not require "detailed factual allegations." *Id.* (citations omitted). Ultimately, the "[f]actual allegations must be enough to raise a right to relief above the speculative level," rendering the right "plausible on its face" rather than merely "conceivable." *Id. at 555, 570*. Thus, a **[*19]** complaint must assert more facts than those "merely consistent with" the other party's liability. *Id. at 557*. And the facts alleged must suffice to "state all the elements of [any] claim[s]." *Bass v. E.I. DuPont de Nemours & Co., 324 F.3d 761, 765 (4th Cir. 2003)* (citing *Dickson v. Microsoft Corp., 309 F.3d 193, 213 (4th Cir. 2002)* and *Iodice v. United States, 289 F.3d 270, 281 (4th Cir. 2002)*).

III. DISCUSSION

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[13] Henrico attaches to its Memorandum in Support of its Motion to Dismiss the fully executed 2021 Consent Order, the Enforcement Summary and the Chan Declaration. When a defendant makes a facial challenge to subject matter jurisdiction under *Rule 12(b)(1)*, a court will treat the motion similar to one made for failure to state a claim under *Rule 12(b)(6)* and take only the facts alleged in the complaint as true. *Kerns v. United States, 585 F.3d 187, 192 (4th Cir. 2009)*. But when a defendant challenges the factual allegations that a Plaintiffs makes in support of subject matter jurisdiction, a court can resolve factual disputes to decide whether it has subject matter jurisdiction. *Thigpen, 800 F.2d at 396*. By that token, a court "may consider affidavits, depositions, or live testimony without converting [a *Rule 12(b)(1)* Motion] into one for summary judgment." *Lewis v. UPS Freight, 2010 U.S. Dist. LEXIS 39796, 2010 WL 1640270, at *1 (E.D. Va. Apr. 22, 2010)* (citing *Williams v. United States, 50 F.3d 299, 304 (4th Cir. 1995)*); *Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982)*. It appears that Henrico raises a factual dispute regarding the full extent of DEQ's enforcement actions. (Def.'s Mem. *passim*.) For that reason, the Court will take into consideration the attachments to the Memorandum to the extent that they go to the factual dispute.

A. The Diligent Prosecution Bar to Citizen Suits Under the Clean Water Act

Henrico first moves to dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction due to the diligent prosecution bar of 33 U.S.C. § 1319(g)(6). "Congress enacted the [Clean Water Act] 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" The Piney Run Pres. Ass'n v. The Cty. Comm'rs Of Carroll Cty., MD, 523 F.3d 453, 455 (4th Cir. 2008) (quoting 33 U.S.C. § 1251). "To serve those ends, the Act prohibits 'the discharge of any pollutant by any person' unless done in compliance with some provision of the Act." S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 102, 124 S. Ct. 1537, 158 L. Ed. 2d 264 (2004) (quoting 33 U.S.C. § 1311(a)). Section 402 of the Act, codified at 33 U.S.C. § 1342, "established a National Pollution Discharge Elimination System (NPDES) that is designed to prevent harmful discharges into the Nation's waters." Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 650, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007). "Generally speaking, the NPDES requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters." Miccosukee Tribe, 541 U.S. at 102. An NPDES permit "defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations under **[*20]** the [Act]." Env't Prot. Agency v. California ex rel. State Water Res. Control Bd., 426 U.S. 200, 205, 96 S. Ct. 2022, 48 L. Ed. 2d 578 (1976). "The Environmental Protection Agency (EPA) initially administers the NPDES permitting system for each State, but a State may apply for a transfer of permitting authority to state officials. . . . albeit with continuing EPA oversight." Nat'l Ass'n of Home Builders, 551 U.S. at 650 (cleaned up). In 1975, the EPA delegated Clean Water Act enforcement to the Commonwealth of Virginia, which administers its Virginia Pollution Discharge Elimination System ("VPDES") through its Department of Environmental Quality. Historic Green Springs, Inc. v. U.S. E. P.A., 742 F. Supp. 2d 837, 842 (W.D. Va. 2010); *9 Va. Admin. Code § 25-31-10 et seq.*

"Although the primary responsibility for enforcement rests with the state and federal governments, private citizens provide a second level of enforcement and can serve as a check to ensure the state and federal governments are diligent in prosecuting Clean Water Act violations." Sierra Club v. Hamilton Cty. Bd. of Cty. Comm'rs, 504 F.3d 634, 637 (6th Cir. 2007). Specifically, section 505(a) of the Act, 33 U.S.C. § 1365(a), authorizes citizens "to bring suit against any NPDES permit holder who has allegedly violated its permit." Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 152 (4th Cir. 2000) (en bane). The Fourth Circuit has recognized that this citizen suit provision is "critical to the enforcement of the Clean Water Act," *id*, as it allows citizens "to abate pollution when the government cannot or will not command compliance," Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 62, 108 S. Ct. 376, 98 L. Ed. 2d 306 (1987).

However, citizen suits are meant "to supplement rather than to supplant governmental action," id. at 60, and, **[*21]** as relevant here, the Act expressly bars such suits where the State has issued a "final order not subject to further judicial review" or has at least "commenced and is diligently prosecuting" an administrative enforcement action[14] against the defendant under State law comparable to the Act's administrative enforcement scheme.[15] 33 U.S.C. § 1319(g)(6)(A)(ii)-(iii). The Clean Water Act creates an exception for citizen suits in which the Plaintiffs either (i) filed a civil action prior to the State commencing its enforcement action, or (ii) provided notice of its intent to sue prior to the State commencing its enforcement action and actually filed suit within 120 days of that notice. § 1319(g)(6)(B)(i)-(ii).

Here, the parties agree to the underlying timeline of events, but dispute (1) the scope of the diligent prosecution bar, (2) which of those events constitute the commencement of DEQ's prosecution, and (3) whether DEQ diligently prosecuted its enforcement action. Between September 18, 2018 and June 3, 2020, DEQ issued six NOVs citing Henrico for various violations of its VPDES permit. (2021 Consent Order ¶¶ C.9-18.) As described in DEQ's Civil Enforcement Manual, an NOV "is considered the referral from [the] compliance

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[14] The Act also includes a separate diligent prosecution bar that applies when the State has pursued enforcement in a court instead of administratively. 33 U.S.C. § 1365(b) ("No action may be commenced . . . if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.").

[15] Here, Plaintiffs do not dispute Defendant's assertion of comparability of the enforcement authorities and procedures of the State Water Control Law, Va. Code § 62.1-44.2 et seq. to those of the Clean Water Act. (Mot. at 2; Def.'s Mem. at 6.)

[Division] to [the Division] of Enforcement." **[*22]** (*DEQ Civil Enforcement Manual, Chapter 2 - General Enforcement Procedures*, VA. DEP'T OF ENV'T QUALITY 4 (Dec. 31, 2021)[16].) On June 24, 2020, acting upon the referrals, "[DEQ] held an enforcement conference [with Henrico] on the phone to discuss the violations. During the meeting, Henrico stated that they have recognized the need for final filter rehabilitation at the treatment plant and have initiated both an interim and a long term corrective action plan." (2021 Consent Order ¶ C.20.)

On August 26, 2020, DEQ sent Henrico a draft enforcement order imposing a civil charge of $65,835 and requiring Henrico to submit a proposed Corrective Action Plan and implementation schedule for review and approval by DEQ. (Chan Decl. ¶¶ 13-14.) DEQ gave Henrico until September 8, 2020, to provide comments on the draft order. (Chan Decl. ¶ 14.) "Over the ensuing 12 months, DEQ's enforcement staff engaged [Henrico] in its prosecution of this enforcement action including working to significantly expand the enforcement action's scope and requirements." (Chan Decl. ¶ 15.) On August 25, 2021, Henrico signed the proposed consent order, rendering it ripe for public comment as required by *Virginia Code § 62.1-44.15*(80. (2021 Consent Order **[*23]** at 13; DEQ Enforcement Item Summary, State Water Control Board Meeting Dec. 14, 2021 ("Enforcement Summary") at 2 (ECF No. 13-2).) Public comment on the proposed Consent Order proceeded from September 13, 2021 to October 13, 2021. (Enforcement Summary at 2.) After a hearing on December 14, 2021, DEQ executed the final Consent Order on December 15, 2021. (2021 Consent Order at 11-12.)

On August 11, 2021, two weeks before Henrico's execution of the Consent Order, Plaintiffs transmitted to Henrico their Notice of Intent to Sue as required by *33 U.S.C. § 1365(b)(1)(A)*. (Compl. ¶ 12.) On December 6, 2021, Plaintiffs filed this suit.

1. Scope of Preclusion

First, the parties contest whether the diligent prosecution bar operates to preclude only civil penalty actions, or also bars actions seeking injunctive or declaratory relief. By its terms, *§ 1319(g)(6)(A)* states, in relevant part, that "any violation . . . with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection . . . shall not be the subject of a *civil penalty action* under *subsection (d)* of this section or *section 1321(b)* of this title or *section 1365* [the citizen suit provision] of this title." In light of the plain language of this provision, **[*24]** the Court preliminarily concludes that, should the diligent prosecution bar apply here, it would only preclude Plaintiffs' claims for civil penalties. As Plaintiffs seek injunctive relief as well, those claims may proceed unimpeded by *§ 1319(g)(6)(A)*.

While the Fourth Circuit has not yet ruled on the scope of the diligent prosecution bar, Defendant cites to cases from the First and Eighth Circuit Court of Appeals that have found the bar to encompass both legal and equitable relief. In *N. & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate*, the First Circuit reasoned that, in spite of the plain language of the statute, "it is inconceivable" and not only "undesirable" but "absurd" that the *§ 1319(g)(6)* bar would apply to civil penalty actions but not declaratory and injunctive relief. *949 F.2d 552, 557-58 (1st Cir. 1991)*. The Eighth Circuit similarly disregarded the statute's plain language in *Arkansas Wildlife Fed'n v. ICI Americas, Inc.*, concluding that "such a result would undermine . . . the goals of the [*Clean Water Act*], and . . . the intent of Congress." *29 F.3d 376, 383 (8th Cir. 1994)*. Both cases relied on the Supreme Court's reasoning in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found, Inc.*, that *§ 1365(a)* "does not authorize civil penalties separately from injunctive relief; rather, **[*25]** the two forms of relief are referred to in the same subsection, even in the same sentence." *484 U.S. 49, 58, 108 S. Ct. 376, 98 L. Ed. 2d 306 (1987)*.

In contrast, the Tenth Circuit, in *Paper, Allied-Indus., Chem. And Energy Workers Intl Union v. Cont'l Carbon Co.*, has more recently applied the plain language of the statue and allowed claims for equitable relief to proceed where the diligent prosecution bar precluded claims for legal relief. *428 F.3d 1285, 1300 (10th Cir. 2005)*. There, the Tenth Circuit distinguished *Gwaltney*, noting that the Supreme Court faced the question of whether a citizen suit could seek civil penalties for wholly past violations of the Act and held "that a civil penalty may only be sought when the citizen is also seeking injunctive relief." *Id at 1299*. Like in *Paper*, "[t]he issue before us is instead the mirror image of the Supreme Court's holding: whether a suit seeking injunctive relief can be maintained when the Plaintiffs cannot seek civil penalties." *Id.*

[16] Available at https://townhall.virginia.gov/L/GetFile.cfm?File=CATownHall\docroot\GuidanceDocs\440\GDoc_DEQ_4432_v7.pdf .

Persuaded by the Tenth Circuit's reasoning, the Court finds that no basis exists to depart from the plain language of the diligent prosecution bar.[17] Principally, the Court notes that, in contrast to broadly authorizing "civil action" citizen suits in § 1365, Congress chose to use the narrower term "civil penalty action" **[*26]** in § 1319 describing those actions preluded by the state's diligent prosecution. This Court must "give effect to Congress' choice" to include the narrower term in § 1319. *See* Univ. of Texas Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 354, 133 S. Ct. 2517, 186 L. Ed. 2d 503 (2013); United States v. Menasche, 348 U.S. 528, 538-39, 75 S. Ct. 513, 99 L. Ed. 615 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section.") (cleaned up). Further, the language of § 1365 maintains a distinction between legal and equitable relief, allowing for "enforcement" of effluent standards or limitations separately from "apply[ing] any appropriate civil penalties."

Additionally, alongside the diligent prosecution bar, the statute includes a separate jurisdiction-stripping provision for claims for injunctive relief in § 1365(b)(1)(B), which applies when the state initiates judicial proceedings against a polluter. Resultantly, Congress has created a "two-tiered claim preclusion scheme:" a private citizen may not sue at all if the state diligently prosecutes a court action to enforce the standard, but if the state diligently prosecutes administrative enforcement, a private citizen may still seek injunctive relief. Paper, 428 F.3d at 1298. Beyond the plain language of the statute, Congress' intent for § 1319 to only preclude civil penalty actions finds support in the legislative **[*27]** history. Id. at 1299-1300 (quoting H.R. Conf. Rep. No. 1004, 99th Cong., 2d Sess. at 133 (1986) (the § 1319 diligent prosecution bar "would not apply to: 1) an action seeking relief other than civil penalties (e.g., an injunction or declaratory judgment) . . .")) Finally, as "[t]he governing principle behind § 1319(g) is to avoid duplicative monetary penalties for the same violation," allowing claims for equitable remedies to proceed does not amount to an absurd result as "the court can manage the actions to ensure that the state action will predominate." Id at 1300.

Because allowing Plaintiffs' claims for equitable relief to proceed does not contravene Congressional intent or lead to an absurd result, the Court declines to follow the reasoning of the First and Eighth Circuits in setting aside the plain language of the statute.[18] Accordingly, the Court concludes that the diligent prosecution bar of § 1319(g)(6) applies, if at all, only to Plaintiffs' claims for civil penalties. The Court's holding on scope finds support with district courts in this circuit and beyond. *See* United States v. Smithfield Foods, Inc., 965 F. Supp. 769, 791 (E.D. Va. 1997), *aff'd in part, rev'd in part*, 191 F.3d 516 (4th Cir. 1999) ("Since Section 309(g)(6)(A) only applies to civil penalty actions, the court finds that the United States' claim for injunctive relief is not barred by this **[*28]** section."); *Coal. for a Liveable W. Side, Inc. v. New York City Dep't of Env't Prot., 830 F. Supp. 194, 197 (S.D.N.Y. 1993)* ("The express words of § 1319(g)(6)'s bar provision appear to have been chosen with care. I can find no reason to abrogate them."); *Sierra Club v. Hyundai Am., Inc., 23 F. Supp. 2d 1177, 1180 (D. Or. 1997)* ("It would require a significant departure from the plain meaning of the statute to find plaintiffs' case for injunctive or declaratory relief barred by section 1319(g)(6)(A)."). *But see* Naturaland Tr. v. Dakota Fin., LLC, 531 F. Supp. 3d 953, 964 n.12 (D.S.C. 2021) ("This Court agrees with the First circuit [sic] and concludes 1319 [sic] applies to all civil actions."). Accordingly, to the extent that the diligent prosecution bar applies at all, it would only apply to bar Plaintiffs' claims for civil penalties.

2. Commencement of an Enforcement Action

To avoid the jurisdictional bar of 33 U.S.C. § 1319(g)(6)(A), the statute requires, *inter alia*, that

[17] In matters of statutory interpretation, the Fourth Circuit has adopted the judicial canon of the "plain meaning rule:" without some ambiguity present in the statute's language, "a court's analysis must end with the statute's plain language." Hillman v. I.R.S., 263 F.3d 338, 342 (4th Cir. 2001) (citation omitted). Rare exceptions to the rule exist where its application would produce an outcome that either "is demonstrably at odds with clearly expressed congressional intent to the contrary" or "results in an outcome that can truly be characterized as absurd . . . shock[ing to] the general moral or common sense." *Id* (citation omitted).

[18] Additionally, the Court notes that the First Circuit appears to presently be reconsidering its interpretation of the scope of the diligent prosecution bar. Thirty years after deciding *Scituate*, the court has granted rehearing *en banc* in *Blackstone Headwaters Coal., Inc. v. Gallo Builders, Inc.*, "as to the issue of whether to overrule the holding in [*Scituate*] that citizen suits seeking equitable relief under 33 U.S.C. § 1319 are not permitted when a state has commenced and is diligently prosecuting an action under a state law comparable to § 1319(g)." ***15 F.4th 1179 (1st Cir. 2021)***.

Plaintiffs establish that they gave their August 11, 2021 Notice of Intent to Sue "prior to commencement" of DEQ's enforcement action. Henrico moves to dismiss Plaintiffs' suit, arguing that DEQ had commenced its prosecution of the enforcement action "at least as of June [24,] 2020," when it conducted an enforcement conference with Henrico. (Def.'s Mem. at 6-8.) Because that date precedes Plaintiffs' August 11, 2021 NOI by over one year, deeming enforcement **[*29]** to have commenced then would bar this citizen suit's claims for civil penalties under 33 U.S.C. § 1319(g)(6)(B)(ii). Plaintiffs contend that commencement did not occur until September 13, 2021, when DEQ released the proposed 2021 Consent Order for notice and comment. (Pls.' Resp. at 12-13). Should the Court find commencement to have occurred then, the suit could go forward in its entirety, because Plaintiffs sent their NOI one month before public comment began. The Fourth Circuit has not addressed when a Clean Water Act administrative enforcement action commences. District courts that have addressed the issue do not coalesce around any specific administrative action, but make their determination based upon the facts of the case.

Here, the Court finds that DEQ commenced its administrative enforcement action before Plaintiffs sent their NOI. It appears to the Court that, in these circumstances, DEQ's NOVs issued to Henrico between September 2018 and June 2020 did not constitute commencement. In some regards, these letters resemble commencement of administrative enforcement, because they recite specific factual bases supporting the violation, provide citation to the relevant code sections contravened and those sections providing **[*30]** authority for DEQ enforcement, notify Henrico of maximum potential penalties and describe follow-on procedures for resolution of the violation. *See* Public Interest Research Group, Inc. v. Elf Atochem N. Am., Inc., 817 F. Supp. 1164, 1173 (D.N.J. 1993) (finding notice commenced proceeding where it provided due process protections such as specification of amount of penalty to be imposed or advice of right to hearing); *cf.* Public Interest Research Group v. New Jersey Expressway Auth., 822 F. Supp. 174, 184 n.13 (D.N.J. 1992) (finding no commencement of proceeding where agency correspondence with defendant did not provide due process protections such as specification of amount of penalty to be imposed or advice of right to hearing).

However, in spite of these hallmarks of commencing an enforcement action, the fact that the NOVs used conditional language describing possible future enforcement actions and that DEQ issued six NOVs serially over a period of almost two years — without pursuing resolution through a consent order or adversarial action — persuade the Court that the NOVs alone did not amount to commencement. *See* Elf Atochem N. Am., Inc., 817 F. Supp. at 1173 (finding inspection reports did not commence proceeding where they were "simply one in a series of periodic reports . . . which served to warn defendant than an enforcement action might be initiated in the future"); *cf.* Sierra Club v. Colorado Ref Co., 852 F. Supp. 1476, 1485 (D. Colo. 1994) (finding notice of violation commenced proceeding where **[*31]** it was "not one of a periodic series" and, rather than describe future enforcement conditionally, "demanded submission of a specific correction plan 'before we pursue *further* action"). Because the conditional language in the NOVs regarding enforcement outweigh the due process protections, the Court finds that the NOVs did not commence enforcement. *(See, e.g.*, April 3, 2020 NOV at 4-5 ("In order to avoid adversarial enforcement proceedings, Henrico County *may* be asked to enter into a Consent Order with the Department . . .") (emphasis added).)

In contrast, the Court finds that the June 24, 2020 Enforcement Conference supplements the NOVs to create the hallmarks of commencement that the NOVs lacked on their own. While the NOVs served as referrals from DEQ's Compliance Division to DEQ's Enforcement Division, the Enforcement Conference represented DEQ's engagement with Henrico to bring the Facility into compliance and assess appropriate civil penalties. *Cf* Naturaland Tr. v. Dakota Fin., LLC, 531 F. Supp. 3d 953, 958, 961 (D.S.C. 2021) (finding notice of alleged violation commenced enforcement where it included notice of enforcement conference). During the Enforcement Conference, having already informed Henrico of its due process protections in its most recent NOV **[*32]** three weeks before, DEQ obtained Henrico's admission of needed corrective actions and determined that the most appropriate course of action would be an expedited resolution through Consent Order. Elf Atochem N. Am., Inc., 817 F. Supp. at 1173 (finding provision of due process protections critical to commencement). In follow-up, on August 26, 2020, DEQ delivered a draft consent enforcement order to Henrico, which assessed a civil penalty of $65,835. *See* Molokai Chamber of Corn. v. Kukui (Molokai), Inc., 891 F. Supp. 1389, 1405 (D. Haw. 1995) ("[T]he State must seek penalties and not merely compliance in order for its action to have a preclusive effect."). DEQ also required Henrico to respond by September 8, 2020, and

submit a proposed Corrective Action Plan and implementation schedule. *See* Colorado Ref Co., 852 F. Supp. at 1485 (finding notice of violation commenced proceeding where it demanded submission of a specific correction plan); *cf* Gulf Restoration Network v. Hancock Cty. Dev., LLC, 2009 WL 3841728, at *5 (S.D. Miss. Nov. 16, 2009) (finding notice of violation did not commence enforcement where it merely requested information in furtherance of resolving the violation). The following year saw the negotiation of the terms of the Consent Order, including the increase of the civil penalty to $207,680 by the time that Henrico executed it on August 25, 2021. Accordingly, DEQ's enforcement action commenced with its June 2020 Enforcement Conference, over **[*33]** one year before Plaintiffs noticed their intent to sue.

Plaintiffs cite to Ohio Valley Env't Coal., Inc. v. Hobet Min., LLC, 723 F. Supp. 2d 886, 906 (S.D.W. Va. 2010) in support of their argument that DEQ's action did not commence until September 2021, when DEQ published the Consent Order for notice and comment. While that decision relied in part on the centrality of public participation to administrative enforcement, it also came to that conclusion, because only then, at issuance for notice and comment, did the state first cite Defendant's NPDES permit. Id at 906 n.8. Indeed, the court explained that, had the state incorporated the permit earlier, it would have constituted commencement. *Id* Here, by contrast, DEQ's NOVs themselves cite Henrico's VPDES Permit. *(See, e.g.*, April 3, 2020 NOV at 2.) Without minimizing the importance of public participation to administrative enforcement, the Court finds, as described above, that DEQ's actions bore sufficient indicia of commencing enforcement long before it issued the proposed Consent Order for notice and comment.

3. Diligent Prosecution of the Action

Plaintiffs may yet avoid the jurisdictional bar of 33 U.S.C. § 1319(g)(6)(A) if they can establish that DEQ did not diligently prosecute its enforcement action. "A CWA enforcement prosecution will ordinarily be considered **[*34]** 'diligent' if the judicial action 'is capable of requiring compliance with the Act and is in good faith calculated to do so." The Piney Run Pres. Ass'n v. The Cty. Comm'rs Of Carroll Cty., MD, 523 F.3d 453, 459 (4th Cir. 2008) (citing Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist., 382 F.3d 743, 760 (7th Cir. 2004)). "Citizen-Plaintiffs must meet a high standard to demonstrate that a government agency has failed to prosecute a violation diligently." *Id.* (cleaned up) (quoting Karr v. Hefner, 475 F.3d 1192, 1198 (10th Cir. 2007)). Indeed, "diligence is presumed." *Id* "This presumption is due not only to the intended role of the government as the primary enforcer of the CWA, but also to the fact that courts are not in the business of designing, constructing or maintaining sewage treatment systems." *Id.* (cleaned up). Because the diligent prosecution bar "is an exception to the jurisdiction granted in subsection (a) of § 1365, [diligence] is normally determined as of the time of the filing of a complaint." Chesapeake Bay Found. v. Am. Recovery Co., 769 F.2d 207, 208 (4th Cir. 1985).

Plaintiffs argue that DEQ did not diligently prosecute its action against Henrico, because (1) DEQ had not executed the 2021 Consent Order at the time that Plaintiffs filed their citizen suit, (2) the 2021 Consent Order will not bring Henrico into compliance with its Permit, because it does not include a deadline for compliance, and appears similar to previous consent orders that have proven ineffective and (3) the 2021 Consent Order **[*35]** does not address the concerns reflected in Plaintiffs' Complaint. (Pls.' Resp. at 13-17.) These arguments prove unavailing.

The Court finds that Plaintiffs have failed to overcome the presumption of diligence. First, Plaintiffs incorrectly contend that courts measure diligent prosecution by reference to whether a state has filed or executed a final enforcement action. The statutory provision does state that a final order operates as a bar to a citizen suit, but that provision functions disjunctively from the diligent prosecution provision. 33 U.S.C. § 1319(g)(6)(A) (citizen suit barred for "any violation . . . (ii) with respect to which a State has commenced and *is diligently prosecuting* an action under a State law comparable to this subsection, *or* (iii) for which the Administrator, the Secretary, or the State has issued a final order") (emphasis added). The plain language of the statute uses the present participle phrase "is diligently prosecuting" to indicate that bar may occur while an enforcement action actively proceeds, contravening Plaintiffs' argument that prosecution must have completed.

Second, Plaintiffs fail to persuade the Court that the 2021 Consent Order could not bring Henrico into compliance **[*36]** with the Act. Plaintiffs wrongly contend that the 2021 Consent Order does not impose a schedule for compliance. Rather, the agreement incorporates three Schedules of Compliance which impose individual completion deadlines for each of the projects and require semi-annual progress reports as

well as prompt notification to DEQ of completion of each project. (2021 Consent Order 18-24.) However, even if the 2021 Consent Order did not include a deadline for compliance, that alone would not cause sufficient concern for the Court to cast aside its required deference to the Commonwealth regarding how to ensure compliance with the Act. *See* Piney Run, 523 F.3d at 460 ("[T]he fact that the Consent Judgment does not establish a final deadline for compliance. . . . simply do[es] not establish a lack of diligence on [the state's] part.").

Additionally, as in *Piney Run*, "it cannot seriously be said that the [DEQ] enforcement action is incapable of requiring compliance with the Act." *Id.* Here, the Consent Order documents Henrico's individual TSS, CBOD, SSO, and filter bypass incidents of Permit violations from 2016 to 2021. It concludes that Henrico violated its Permit on those accounts. It declares its purpose "for Henrico **[*37]** to return to compliance," and describes an intricate and multi-layered plan over the coming years to achieve that result. The plan requires no less than twenty new sewer system upgrades, ten Facility projects subject to a forthcoming Corrective Action Plan and a fine of $207,680 - $155,760 of which DEQ will assess through completion of a Supplemental Environmental Project to expand water treatment services to un-served properties. These aspects of the Consent Order demonstrate that DEQ identified the problems of noncompliance and acted expediently to resolve them. Nothing that Plaintiffs argue suggests to the Court that the 2021 Consent Order cannot achieve its purposes of bringing Henrico into compliance with the Act. Plaintiffs argue that Henrico has a history of continuing to violate its Permit in spite of past efforts to bring the Facility into compliance through consent orders. However, those past occurrences do not demonstrate that DEQ has prosecuted Henrico with a lack of diligence in this instance.

Finally, the Consent Order does address the concerns raised in Plaintiffs' Complaint. Again, the Consent Order purposes to bring Henrico into compliance following its Permit violations **[*38]** for TSS, CBOD, SSOs and filter bypasses — the very claims raised in Plaintiffs' Complaint. Additionally, Plaintiffs took the opportunity to raise their concerns during notice and comment. (Enforcement Summary at 3-10; Hr'g Tr. at 113-20.) The DEQ board considered those comments, responded to them in full in a published statement, provided additional response during its December 14, 2021 board meeting and ultimately executed the 2021 Consent Order without incorporating any comments. (Enforcement Summary at 3-10; Hr'g Tr. at 11325.)

"A citizen-plaintiff cannot overcome the presumption of diligence merely by showing that the agency's prosecution strategy is less aggressive than he would like or that it did not produce a completely satisfactory result." Piney Run, 523 F.3d at 459. This follows, because "Section 1365(b)(1)(B) does not require government prosecution to be far-reaching or zealous. It requires only diligence." *Id* "Indeed, when presented with a consent decree we must be particularly deferential to the agency's expertise, and we should not interpret § 1365 in a manner that would undermine the government's ability to reach voluntary settlements with defendants." *Id.* (cleaned up). For the reasons stated, and mindful of the strong **[*39]** presumption of diligence, the Court finds that DEQ diligently prosecuted its enforcement action for purposes of § 1319(g)(6).

Because DEQ commenced and diligently prosecuted its administrative enforcement action against Henrico before Plaintiffs gave their NOI, § 1319(g)(6) bars Plaintiffs' claims for civil penalties.

B. Wholly Past Violations

Finally, Henrico moves to dismiss Counts One and Two for lack of subject matter jurisdiction and failure to state a viable claim, arguing that those counts concern wholly past violations. (Def.'s Mem. at 14-16.) In authorizing citizen suits, the Clean Water Act provides that "any citizen may commence a civil action on his own behalf against any person . . . who is *alleged to be in violation of*" the standards of the Act. 33 U.S.C. § 1365(a) & (1) (emphasis added). While § 1365 "does not permit citizen suits for wholly past violations," it allows suits to proceed where "citizen-Plaintiffs allege a state of either continuous or intermittent violation — that is, a reasonable likelihood that a past polluter will continue to pollute in the future." Gwaltney, 484 U.S. at 57, 64. A plaintiff may do so "by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations. **[*40]** Intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition." Am. Canoe Ass'n v. Murphy Farms, 412 F.3d 536, 539 (4th Cir. 2005).

Here, Counts One and Two address Henrico's February 2019 to March 2021 frequent violations of the maximum mass load and concentration effluent limitations for two non-toxic pollutant parameters, TSS and CBOD.

Henrico argues that, at the time of the filing of Plaintiffs' suit, Henrico had maintained compliance with the Permit for ten consecutive months. (Def.'s Mem. at 16-17.) Henrico contrasts that clean record to the preceding period of time, in which it had violated the Permit in ten of fourteen months, to show that the violations have no real likelihood of repetition. (Def.'s Reply at 14.) Plaintiffs counters that ten months of compliance cannot overcome Henrico's twenty-eight-year history of serial non-compliance with its Permit's TSS and CBOD effluent limitations despite operating under various consent orders in that time period. (Pls.' Resp. at 21-23.)

The Court finds that Plaintiffs have sufficiently alleged a state of intermittent violation at the Henrico Water Reclamation Facility. The Complaint details Henrico's serial violations of the TSS and CBOD **[*41]** effluent limitations over a period of almost three decades. As a result of receiving twenty-three NOVs since opening in 1989, DEQ executed its first consent order with Henrico in 1993, requiring a schedule of compliance addressing effluent limitations. (Compl. ¶ 70.) In September 1994, DEQ had to amend its 1993 Consent Order, because "the facility has been unable to meet Permit limits for [TSS and CBOD] . . . . [as] evidenced by thirteen (13) Notices of Violation (NOVs) issued between February 5, 1993, and August 4, 1994." (Compl. Ex. E: Am. to 1993 Consent Order; Compl. ¶ 72.) DEQ issued a second consent order to Henrico in 1998. (Compl. ¶ 73.) However, Henrico again received NOVs in November 2001 and 2002 for TSS and CBOD violations. (Compl. ¶ 74.) Henrico's third consent order issued in 2003 sought "to address consistent TSS, CBOD, total phosphorus, ammonia nitrogen, and chlorine effluent violations." (Compl. 1175.) Completion of the corrective actions addressing the effluent violations took until September 2007, as reflected in the 2007 Amendment to the 2003 Consent Order. (Compl. ¶ 78.) In 2010, DEQ and Henrico entered into a fourth consent order following a renewed series of **[*42]** effluent limit violations and SSOs. (Compl. ¶ 79.) Despite the narrower scope of that consent order, which dismissed the effluent limit violations, it required eight years for completion of the remedial measures. (Compl. ¶¶ 79, 82.)

In addition to a history of serial noncompliance, Henrico and DEQ themselves appear to express doubt that the effluent limit violations remain wholly in the past. Like the 2010 Consent Order, the 2021 Consent Order requires several years to complete the necessary remedial measures "for Henrico to *return* to compliance." (2021 Consent Order ¶ C.33.) Additionally, Henrico acknowledges that the TSS and CBOD violations coincide with "wet weather conditions" (2021 Consent Order ¶ 23), while also asserting that "[t]his challenge is compounded by the recent effects of climate change, including more frequent severe weather events and increased amounts of precipitation." (Def.'s Mem. at 2.) Such trends suggest to the Court that Henrico may yet violate its effluent limitation limits in the intervening years before it has completed the 2021 Consent Order's upgrades required to account for increased precipitation.

As the district court found on remand in *Gwaltney*, such reasonable **[*43]** doubts as to future compliance — in spite of then-present compliance — suffice for the Court to find that Henrico's TSS and CBOD violations are not wholly past. *See Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd, 688 F. Supp. 1078, 1079 (ED. Va. 1988)* ("Despite Gwaltney's improved wastewater treatment facilities, there was no degree of certainty in June 1984 that the risk of continued violations had been eradicated. Rather, the evidence at trial demonstrated that at the time plaintiffs filed suit, there existed a very real danger and likelihood of further violation."). The Court finds that Plaintiffs have adequately alleged a continuing likelihood of a recurrence in intermittent or sporadic effluent limitation violations. Because Plaintiffs sufficiently allege that Henrico remains in violation of the standards of the Act, the Court denies Defendant's Motion to Dismiss Counts One and Two.

IV. CONCLUSION

For the reasons set forth above, the Court will GRANT IN PART and DENY IN PART Defendant's Motion to Dismiss. Specifically, the Court will GRANT the Motion with regard to the claims for civil penalties and DENY the Motion with regard to Plaintiffs' claims for equitable relief, including as sought in Counts One and Two.

An appropriate Order shall issue.

Let the Clerk file **[*44]** a copy of this Memorandum Opinion electronically and notify all counsel of record.

It is so ORDERED.

/s/ David J. Novak

David J. Novak

United States District Judge

Richmond, Virginia

Date: April 11, 2022

ORDER

Plaintiffs Chesapeake Bay Foundation, Inc., and James River Association bring this citizen suit against Defendant County of Henrico, alleging violations of the *Clean Water Act, 33 U.S.C. § 1251 et seq.*, at the Henrico County Water Reclamation Facility. This matter now comes before the Court on the Motion to Dismiss (ECF No. 12) filed by Henrico.

For the reasons set forth in the Memorandum Opinion accompanying this Order, the Court hereby GRANTS IN PART and DENIES IN PART Defendant's Motion. Specifically, the Court GRANTS the Motion with regard to the claims for civil penalties and DENIES the Motion with regard to Plaintiffs' claims for equitable relief, including as sought in Counts One and Two.

Let the Clerk file a copy of this Order electronically and notify all counsel of record.

It is so ORDERED.

/s/ David J. Novak

David J. Novak

United States District Judge

Richmond, Virginia

Date: April 11, 2022

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Koures v. Pfizer, Inc.

United States District Court for the Western District of North Carolina, Charlotte Division

May 16, 2011, Decided; May 16, 2011, Filed

3:10-cv-00499

Reporter
2011 U.S. Dist. LEXIS 52323 *; 2011 WL 1869970

PETER G. KOURES, Plaintiff, Vs. PFIZER, INC., Defendant.

Subsequent History: Motion denied by *Koures v. Pfizer, Inc., 2016 U.S. Dist. LEXIS 4252 (W.D.N.C., Jan. 13, 2016)*

Core Terms

summons, state court, motion to dismiss, public policy, extension of time, federal court, survive, filing of the complaint, district court, civil action, pleadings, commencement of the action, right-to-sue, initiate, issuance, lawsuit

Counsel: **[*1]** For Peter G. Koures, Plaintiff: J. Elliott Field, Charlotte, NC.

For Pfizer, Inc., Defendant: Stephanie E. Lewis, Julia M. Ebert, Jackson Lewis LLP, Greenville, SC.

Judges: Max O. Cogburn, Jr., United States District Judge.

Opinion by: Max O. Cogburn, Jr.

Opinion

ORDER

THIS MATTER is before the court on defendant's Motion to Dismiss (#3). Having considered such motion, reviewed the pleadings, and heard oral arguments, the court enters the following findings, conclusions, and Order.

FINDINGS AND CONCLUSIONS

I. Background

On February 11, 2009, plaintiff filed an EEOC charge alleging that he was unlawfully discharged based on age and sex. A right to sue letter issued on April 27, 2010. Plaintiff alleged that he received such letter on May 1, 2010. On July 29, 2010, plaintiff, through counsel, filed an "Application and Order Extending Time to File Complaint" in the North Carolina General Court of Justice, Mecklenburg County, Superior Court Division. The state court's Order, issued July 29, 2010, allowed plaintiff until August 18, 2010, to file a Complaint against defendant. At the time the Application was filed and the Order issued, a summons was issued by the state court, all of which occurred July 29, 2010.

On August 18, **[*2]** 2010, plaintiff filed his Complaint in state court. On September 9, 2010, defendant was served with the summons and Complaint. While both Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII") and the Age Discrimination in Employment Act (hereinafter ADEA") provide for bringing such actions in state or federal courts, defendant timely and properly removed this action on October 7, 2010.

After removal, defendant moved to dismiss this action, contending that plaintiff failed to file the action within 90 days of receipt of the right to sue letter. Defendant has moved to dismiss under "Rule 12," which the court deems to be a *Rule 12(b)(1)* motion inasmuch as defendant appears to argue that failure to file this action within 90 days is jurisdictional. As will be seen, the concurrent jurisdiction of state and federal courts mentioned above will play a pivotal role in the outcome of defendant's jurisdictional motion. Defendant has also asserted a motion to dismiss plaintiff's claim for "discrimination" under the North Carolina Equal Employment Practices Act (hereinafter "NCEEPA"), which the court deems to be a *Rule 12(b)(6)* motion.

II. Applicable Standards

A. *Rule 12(b)(1)* [*3] Standard

Rule 12(b)(1) provides for dismissal where the court lacks jurisdiction over the subject matter of the lawsuit. Lack of subject-matter jurisdiction may be raised at any time either by a litigant or the court. Mansfield, C. & L.M.R. Co. v. Swan, 111 U.S. 379, 382, 4 S. Ct. 510, 28 L. Ed. 462 (1884). The ability of the court to independently address subject-matter jurisdiction is important to finality inasmuch as a litigant, even one who remains silent on the issue of jurisdiction, may wait until they receive an adverse judgment from a district court and raise the issue of subject-matter jurisdiction for the first time on appeal, thereby voiding the judgment. Capron v. Van Noorden, 6 U.S. 126, 2 Cranch 126, 127, 2 L.Ed. 229 (1804). The Federal Rules of Civil Procedure anticipate this issue and provide that "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed.R.Civ.P. 12(h)(3).

When a court considers its subject-matter jurisdiction, the burden of proof is on the plaintiff. Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982). In Richmond, Fredricksburg & Potomac R.R. Co. V. United States, 945 F.2d 765 (4th Cir. 1991) **[*4]** (Ervin, C.J.), the Court of Appeals for the Fourth Circuit held, as follows

> In determining whether jurisdiction exists, the district court is to regard the pleadings' allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment. Id.; *Trentacosta v. Frontier Pacific Aircraft Indus., 813 F.2d 1553, 1558 (9th Cir.1987)*. The district court should apply the standard applicable to a motion for summary judgment, under which the nonmoving party must set forth specific facts beyond the pleadings to show that a genuine issue of material fact exists. *Trentacosta, supra, 813 F.2d at 1559* (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986)). The moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law. *Trentacosta, supra, 813 F.2d at 1558*. A district court order dismissing a case on the grounds that the undisputed facts establish a lack of subject matter jurisdiction is a legal determination subject to de novo appellate review. Revene v. Charles County Comm'rs, 882 F.2d 870, 872 (4th Cir.1989); **[*5]** Shultz v. Dept. of the Army, 886 F.2d 1157, 1159 (9th Cir.1989).

Id., at 768-69. Where jurisdictional facts are intertwined with facts central to the substance of a case, a court must find that jurisdiction exists and consider and resolve the jurisdictional objection as a direct attack on the merits of the case. United States v. North Carolina, 180 F.3d 574, 580 (4th Cir. 1999).

B. *Rule 12(b)(6)* Standard

Until recently, a complaint could not be dismissed under Rule 12(b)(6) unless it appeared certain that plaintiff could prove no set of facts which would support its claim and entitle it to relief. Neitzke v. Williams, 490 U.S. 319, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989); Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). This "no set of facts" standard has been specifically abrogated by the Supreme Court in recent decisions.

First, in Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), the Court held that the "no set of facts" standard first espoused in Conley, supra, only describes the "breadth of opportunity to prove what an adequate complaint claims, not the minimum adequate pleading to govern a complaint's survival." Id., at 563. The Court specifically rejected use of the "no set of facts" standard because such standard would **[*6]** improperly allow a "wholly conclusory statement of claim" to "survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." Id., at 561 (alteration in original).

Post Twombly, to survive a Rule 12(b)(6) motion to dismiss, a plaintiff must allege facts in their complaint that "raise a right to relief above the speculative level." Id., at 555.

> [A] plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . .

Id. (second alteration in original; citation omitted). Further, a complaint will not survive Rule 12(b)(6) review where it contains "naked assertion[s] devoid of further factual enhancement." Id., at 557. Instead, a plaintiff must now plead sufficient facts to state a claim for relief that is "*plausible* on its face." Id., at 570 (emphasis added).

While the Court was clear in Twombly that Conley was

no longer controlling, see *Twombly, 550 U.S. at 563*, and *Felman Production Inc. v. Bannai, 2007 U.S. Dist. LEXIS 81365, 2007 WL 3244638, at *4 (S.D.W.Va. 2007)*, it again **[*7]** visited the *Rule 12(b)(6)* pleading standard in *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 173 L. Ed. 2d 868 (May 18, 2009)*. In Iqbal, the Court determined that Rule 8 "demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Id., S.Ct., at 1949*. The Court explained that, "to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is *plausible* on its face.'" Id. (citing *Twombly, supra*; emphasis added). What is plausible is defined by the Court:

> [a] claim has facial plausibility when the plaintiff pleads sufficient factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Id. This "plausibility standard" requires "more than a sheer possibility that a defendant has acted unlawfully." Id. Thus, a complaint falls short of the plausibility standard where a plaintiff pleads "facts that are 'merely consistent with' a defendant's liability . . . ." Id. While the court accepts plausible factual allegations made in a complaint as true and considers those facts in the light most favorable to plaintiff in ruling on a motion to dismiss, a court **[*8]** "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Eastern Shore Mkt.'s Inc. v. J.D. Assoc.'s, LLP, 213 F. 3d 175, 180 (4th Cir. 2000)*.

In sum, when ruling on a *Rule 12(b)(6)* motion, "a judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)* (*per curiam*) (citations omitted). A complaint "need only give the defendant fair notice of what the claim is and the grounds upon which it rests." *Id., at 93* (alteration and internal quotation marks omitted). However, to survive a motion to dismiss, the complaint must "state[ ] a plausible claim for relief" that "permit[s] the court to infer more than the mere possibility of misconduct" based upon "its judicial experience and common sense." *Iqbal, 129 S. Ct. at 1950*. While a plaintiff is not required to plead facts that constitute a *prima facie* case in order to survive a motion to dismiss, see *Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510-15, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)*, "[f]actual allegations must be enough to raise a right to relief above the speculative level," *Twombly, 550 U.S. at 555*.

III. Discussion

A. Improper Service

Defendant first moves to dismiss contending **[*9]** that under North Carolina law, plaintiff was required to serve it with a summons ***within five days*** of filing the Complaint in state court. Defendant has misread North Carolina law.

First, defendant has read into Rule 3, North Carolina Rules of Civil Procedure (which was utilized by plaintiff in seeking the extension, discussed infra) a requirement that Rule 4*(a)* of the North Carolina Rules of Civil Procedure be followed after seeking an extension. (Emphasis added). This is *not* what Rule 3 provides. Instead, North Carolina Rule 3 provides as follows:

> (a) A civil action is commenced by filing a complaint with the court. The clerk shall enter the date of filing on the original complaint, and such entry shall be prima facie evidence of the date of filing. A civil action may also be commenced by the issuance of a summons when
>
> (1) A person makes application to the court stating the nature and purpose of his action and requesting permission to file his complaint within 20 days and
>
> (2) The court makes an order stating the nature and purpose of the action and granting the requested permission.
>
> The summons and the court's order shall be served in accordance with the provisions of Rule 4. **When the [*10] complaint is filed it shall be served in accordance with the provisions of Rule 4** or by registered mail if the plaintiff so elects. If the complaint is not filed within the period specified in the clerk's order, the action shall abate.

N.C. Rules Civ. Proc., G.S. § 1A-1, Rule 3 (emphasis added). Despite defendant's argument to the contrary, the Rule makes no reference to *Rule 4(a)*. What defendant appears to be conflating is North Carolina's rule that if the summons does not *issue* within five days of filing the Complaint in such circumstances, the action abates. *Roshelli v. Sperry, 57 N.C. App. 305, 291 S.E.2d 355, 357 (N.C. App. 1982)*. The terms "issuance" and "service" have distinct meanings, and are not interchangeable: "a) Summons—Issuance; who may serve.—Upon the filing of the complaint, summons shall be issued forthwith, and in any event within five days." N.C. Rules Civ. Proc., G.S. § 1A-1, Rule 4(a).

Defendant has misread North Carolina law and such a reading cannot form a basis for dismissal. This motion will be denied.

B. Failure to Commence the Action Within 90 days

Defendant next contends that the Title VII and ADEA claims are time barred. They argue that plaintiff cannot enlarge the 90 day **[*11]** deadline for filing a federal Title VII action by seeking an extension of time from a state court under North Carolina Rule 3(a). Defendant cites *Cannon v. Kroger Co., 832 F.2d 303 (4th Cir. 1987)*, for the proposition that Rule 3 of the North Carolina Rules of Civil Procedure cannot be used to extend the six month statute of limitations applied to "hybrid" *§ 301*/fair representation claims under the National Labor Relations Act. While Canon does stand for that proposition, defendants fail to recognize that:

> [t]he reasoning of Cannon, however, makes clear that the rationale for barring the operation of Rule 3 was motivated by a desire for uniformity in "hybrid" cases that had been expressed by the Supreme Court.

Sheaffer v. County of Chatham, 337 F.Supp.2d 709, 725 (M.D.N.C. 2004) (Osteen, Sr., J.). The district court in Sheaffer went on to hold that:

> the Rule 3 procedure can properly be used in North Carolina state courts to extend the time in which to file claims under the ADA. Because Plaintiff sought the extension of time, had summonses issued before the 90-day period expired, and filed her complaint within the 20-day extension, her ADA claims were timely filed.

Id.

Defendant notes but **[*12]** dismisses as wrongly decided two other Middle District decisions which are inapposite to defendant's position, but which are directly on point. In *Lassiter v. Labcorp Occupational Testing Services, Inc., 337 F.Supp.2d 746 (M.D.N.C. 2004)*, Honorable Frank W. Bullock, Jr., United States District Judge, held as follows:

> A plaintiff may file suit alleging a violation of Title VII in either state or federal court. *See, e.g., Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 823, 110 S.Ct. 1566, 108 L.Ed.2d 834 (1990)* ("To give federal courts exclusive jurisdiction over a federal cause of action, Congress must, in an exercise of its powers under the *supremacy clause*, affirmatively divest state courts of their presumptively concurrent jurisdiction."). Generally, a plaintiff must file a complaint to initiate a Title VII action in federal district court. *See Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 149-50, 104 S.Ct. 1723, 80 L.Ed.2d 196 (1984)* (stating that the Federal Rules of Civil Procedure dictate the filing of a complaint commences an action in federal court). *But see Page v. Arkansas Dep't Corr., 222 F.3d 453, 454 (8th Cir.2000)* (concluding that litigant commenced a Title **[*13]** VII proceeding despite her failure to file a complaint when she submitted to the court a letter requesting assistance in filing a lawsuit and attaching a copy of the EEOC's right-to-sue letter and initial charge). A plaintiff may have alternate means for initiating a Title VII action in state court, however, depending on the state's statutory methods for commencing lawsuits. *See, e.g., Vail v. Harleysville Group, Inc., No. CIV.A.2002-CV-02933, 2003 U.S. Dist. LEXIS 17405, 2002 WL 32172799 (E.D.Pa.2003)* (finding that plaintiff's compliance with Pennsylvania procedural requirements for commencing a lawsuit, despite failure to file a complaint within the ninety-day period, satisfied Title VII); *Krouse v. Am. Sterilizer Co., 872 F.Supp. 203, 205 (W.D.Pa.1994)* (observing that *Section 2000e-5(f)(1)* "contains no reference at all to [filing] a 'complaint,'" and finding that "the statute requires only that a civil action be brought within the 90-day limitations period, but it does not specify the manner of commencing the 'civil action.'")

The North Carolina Rules of Civil Procedure do not limit the commencement of a lawsuit to the filing of a complaint. See N.C. R. Civ. P. 3(a). A plaintiff may, alternatively, commence **[*14]** an action by filing for an extension of time and by securing a summons from the state court. Id. Merely filing an application for an extension of time is insufficient; a plaintiff must have a summons issued within the relevant statutory period to sustain his claims. *See, e.g., Sink v. Easter, 284 N.C. 555, 558, 202 S.E.2d 138, 140 (1974)* (concluding that plaintiff's state law suit was properly initiated under "the procedure which permits an action to be commenced by the issuance of a summons"); *Beall v. Beall, 156 N.C.App. 542, 577 S.E.2d 356 (2003)* (affirming dismissal of plaintiff's claims because, prior to the expiration of the statute of limitations, plaintiff did not have a Rule 3 summons issued along with her application for a time extension); *Telesca v. SAS Inst., Inc., 133 N.C.App. 653, 516 S.E.2d 397*

(1999) (affirming dismissal of plaintiff's claims based on failure to have a Rule 3 summons issued before the limitations period ran); Collins v. Edwards, 54 N.C.App. 180, 282 S.E.2d 559 (1981) (affirming dismissal on statute of limitations grounds because plaintiff failed to have a Rule 3 summons issued).

In the instant case neither party contests that Plaintiff filed for an extension **[*15]** of time and that the Durham County Superior Court issued a summons within the ninety-day period following Plaintiff's receipt of her right-to-sue letter from the EEOC. Instead, the parties contest whether the utilization of the Rule 3 extension of time of the North Carolina Rules of Civil Procedure constitutes bringing an action for the purposes of 42 U.S.C. § 2000e-5(f)(1). Unlike some other federal statutory schemes involving concurrent jurisdiction of state and federal courts, Section 2000e-5(f)(1) does not specify that the filing of a complaint is necessary to commence an action. Accordingly, a plaintiff may initiate a Title VII action in a North Carolina state court utilizing either means set forth in Rule 3 of the North Carolina Rules of Civil Procedure.

Id., 337 F.Supp.2d at 751-52.

Likewise, Honorable William Lindsay Osteen, Jr. held in Allen v. Federal Express Corp., 2009 U.S. Dist. LEXIS 91775, 2009 WL 3234699 (M.D.N.C. Sept. 30, 2009) as follows:

Defendant further argues that Plaintiff's Complaint was also filed more than ninety days after issuance of her second right to-sue letter, and thus her retaliation claim should also be dismissed. As discussed above, Plaintiff was issued her second right-to-sue **[*16]** letter on June 9, 2008. On September 5, 2008, Plaintiff filed an application and order extending by twenty days her time to file her complaint under Rule 3 of the North Carolina Rules of Civil Procedure. Plaintiff claims that she then had until September 25, 2008 to file her complaint, and on that date she properly filed her complaint. Defendant recognizes the existence of Rule 3, but argues that "no explanation of justification for failing to file within 90-days was provided" and suggests that Plaintiff "failed to issue a summons before the expiration of the 90-day period" as is required by Rule 3. (Def.'s Mem. in Support of Mot. to Dismiss (Doc. 10) 8.)

Rule 3 of the North Carolina Rules of Civil Procedure provides that an action may be commenced by the issuance of a summons when "[a] person makes an application to the court stating the nature and purpose of his action and requesting permission to file his complaint within 20 days" and "[t]he court makes an order stating the nature and purpose of the action and granting the requested permission." N.C. R. Civ. P. 3(a). "Merely filing an application for extension of time is insufficient; a plaintiff must have a summons issued within **[*17]** the relevant statutory period to sustain his claims." Lassiter v. LabCorp Occupational Testing Servs., Inc., 337 F.Supp.2d 746, 751-52 (M.D.N.C.2004); see also Beall v. Beall, 156 N.C.App. 542, 547, 577 S.E.2d 356, 360 (2003) (affirming dismissal of claims because even though plaintiff filed a Rule 3 extension, summons was not issued until after the relevant statute of limitations expired).

A review of the record reveals that a "Civil Summons to be Served with Order Extending Time to File Complaint" was issued in the General Court of Justice, Superior Court Division, Durham County, on September 5, 2008, within the ninety-day period after Plaintiff's second right-to-sue letter was issued. (Notice of Removal (Doc. 1) Ex. A.) Therefore, Plaintiff's retaliation claim will not be dismissed, since the extension order was granted and a summons was issued within the ninety-day period after Plaintiff's second right-to-sue letter was issued.

Defendant further contends that Plaintiff should not be given the benefit of Rule 3, as it "is contrary to the clear language and intent of Title VII." (Def.'s Mem. in Supp. of Mot. to Dismiss (Doc. 10) 8.) However, a court in this district has previously **[*18]** held that a plaintiff may initiate a Title VII action in a North Carolina state court utilizing either means set forth in Rule 3 of the North Carolina Rules of Civil Procedure, as 42 U.S.C. § 2000e-5(f)(1) does not specify that the filing of a complaint is necessary to commence an action. Lassiter, 337 F.Supp.2d at 752 (M.D.N.C.2004). *See also* Sheaffer v. County of Chatham, 337 F.Supp.2d 709, 725 (M.D.N.C.2004) (Rule 3 procedure can properly be used in North Carolina state courts to extend the time in which to file claims under the ADA). This court finds these cases persuasive and concludes that Plaintiff brought the current Title VII retaliation action in a timely manner, and this claim will not be dismissed.

2009 U.S. Dist. LEXIS 91775, [WL] at **3-4. While none of these cases are binding on this court, they are the considered decisions of colleagues dealing with an identical issue. This court finds their reasoning persuasive.

The crux of defendant's argument is found in its Reply: "Plaintiff's filing of a Summons and Administrative Order Extending Time to File Complaint signed by a deputy clerk for Mecklenburg Superior Court does not equate to the filing of a Complaint." Reply, at 12. The problem with this argument **[*19]** is that it fails to recognize that Congress determined that an aggrieved employee could *commence* a Title VII or ADEA case in either state or federal court. In this case, plaintiff properly commenced his action in state court within the time allowed and defendant properly removed this action to this court by invoking the court's original (but not exclusive) jurisdiction. While Rule 3 of the Federal Rules of Civil Procedure does not provide a mechanism for enlargement of time to file a Complaint, that rule simply does not come into play or apply retroactively to an action timely commenced in a forum where jurisdiction was properly laid. Indeed, the Federal Rules provide that "[t]hese rules apply to a civil action after it is removed from a state court." Fed.R.Civ.P. 81(c)(1). Defendant's motion will, therefore, be denied.

C. Supplemental Claim for Wrongful Termination in violation of the NCEEPA

Defendant has also moved to dismiss plaintiff's supplement claim. "To state a claim for wrongful discharge in violation of public policy, an employee must identify a North Carolina public policy and plead that she was discharged for an unlawful reason or purpose that violates the public policy." **[*20]** Bratcher v. Pharm. Prod. Dev., Inc ., 545 F.Supp.2d 533, 544 fn. 8 (E.D.N.C.2009). "[T]he employee has the burden of pleading and proving that the employee's dismissal occurred for a reason that violates public policy." Salter v. E & J Healthcare, Inc., 155 N.C.App. 685, 693-94, 575 S.E.2d 46 (2003).

In this case, plaintiff has stated a common law cause of action for wrongful termination in violation of the public policy of North Carolina, as expressed in the NCEEPA, which is as follows:

> It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees.

N.C. Gen.Stat. § 143-422.2 (2009). See Amos v. Oakdale Knitting Co., 331 N.C. 348, 353, 416 S.E.2d 166 (1992) ("at the very least public policy is violated when an employee is fired in contravention of express policy declarations contained in the North Carolina General Statutes"). To the extent that plaintiff may be attempting to assert a private civil action under the NCEEPA -and not a common law claim for wrongful discharge **[*21]** based on the policy articulated by the NCEEPA — the court would agree with defendant that there is no private right of action under the statute itself. Plaintiff's response makes it clear, however, that he is *only* asserting a common law claim for wrongful discharge based on the public policy expressed in the NCEEPA. Response (#9), at p. 10. The Rule 12(b)(6) motion will be denied.

ORDER

IT IS, THEREFORE, ORDERED that defendant's Motion to Dismiss (#3) is **DENIED.**

IT IS FURTHER ORDERED that defendant Answer the Complaint within 14 days.

Signed: May 16, 2011

/s/ Max O. Cogburn Jr.

Max O. Cogburn Jr.

United States District Judge

End of Document

Vail v. Harleysville Group, Inc.

United States District Court for the Eastern District of Pennsylvania

August 24, 2003, Decided

Civil Action No. 2002-CV-02933

Reporter
2003 U.S. Dist. LEXIS 17405 *; 14 Am. Disabilities Cas. (BNA) 1909

KENNETH T. VAIL, Plaintiff vs. HARLEYSVILLE GROUP, INC., Defendant

Disposition: Defendant's motion to dismiss denied.

Core Terms

praecipe, writ of summons, notice, state court, statute of limitations, defense motion, Prothonotary, contends, initiate, lawsuit, cause of action

Case Summary

Procedural Posture

Defendant filed a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)* contending that plaintiff's claims were barred by the statute of limitations.

Overview
Plaintiff brought an action for discrimination pursuant to the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA). Plaintiff commenced the action by filing a praecipe for writ of summons with the prothonotary of the state court. The writ of summons was served on defendant. The case was removed to federal district court. Plaintiff had filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) alleging violations of the ADEA and ADA. Defendant asserted that if plaintiff had brought his claims in federal court, he would have been required to file a complaint to commence the action, and would have had to service the complaint within 120 days. Defendant averred that because plaintiff obeyed the state rules, which did not require the filing of a complaint to initiate an action, and not the federal rules, plaintiffs' complaint was time-barred. The court found that because plaintiff had filed his praecipe for writ of summons, that action tolled the statute of limitations. Defendant did not take advantage of Pa. R. Civ. P. 1037(a) where it could have ensured the earlier filing of a complaint.

Outcome
The court denied defendant's motion to dismiss.

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN1[] **Motions to Dismiss, Failure to State Claim**

A *Fed. R. Civ. P. 12(b)(6)* motion to dismiss examines the sufficiency of the complaint. In determining the sufficiency of the complaint, the court must accept all plaintiff's well-pled factual allegations as true and draw all reasonable inferences therefrom in favor of plaintiff. The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. Thus, a court should not grant a motion to dismiss unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Concurrent Jurisdiction

Family Law > Adoption > Adoption Assistance & Child Welfare Act

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Pleadings > Service of Process > General Overview

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Labor & Employment Law > ... > Age Discrimination > Scope & Definitions > General Overview

Labor & Employment Law > Discrimination > Age Discrimination > Statute of Limitations

Business & Corporate Compliance > ... > Discrimination > Disability Discrimination > ADA Enforcement

Labor & Employment Law > ... > Title VII Discrimination > Statute of Limitations > Waiver

Labor & Employment Law > ... > Civil Actions > Time Limitations > General Overview

HN2[] **Jurisdiction Over Actions, Concurrent Jurisdiction**

A prerequisite to filing suit under either the Americans with Disabilities Act (ADA) or the Age Discrimination in Employment Act (ADEA) is that a plaintiff must first file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) and must receive from the EEOC a notice of the right to sue. A plaintiff then has 90 days after receipt of the notice in which to commence a civil action. *29 U.S.C.S. § 626(e)*; *42 U.S.C.S. § 2000e-5(f)(1)(A)* and *12117(a)*. The 90-day filing period acts as a statute of limitations. Federal and state courts have concurrent jurisdiction for claims brought under the ADA and ADEA. Pursuant to Pa. R. Civ. P. 1007, an action may be commenced by the filing of a praecipe for writ of summons. However, the original process (the praecipe for writ of summons) will toll the 90-day statute of limitations for a period of time equivalent to the length of the initial statute of limitation only if a good faith effort is made to effectuate service of the writ. This state law procedural rule has been recognized in discrimination cases by federal courts sitting in Pennsylvania. Moreover, compliance with the Pennsylvania procedural rule satisfies the tolling requirement in cases removed to this court.

Civil Procedure > ... > Pleadings > Complaints > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN3[] **Pleadings, Complaints**

Pa. R. Civ. P. 1037(a) enables a defendant to file a praecipe requesting the prothonotary to enter a rule upon plaintiff to file a complaint within 20 days if an action is not commenced by the filing of a complaint. Thereafter, if a complaint is not filed within 20 days after service of the rule, the prothonotary, upon praecipe of the defendant, shall enter a judgment of non pros. Pa. R. Civ. P. 1037(a).

Counsel: [*1] DONALD P. RUSSO, ESQUIRE, On behalf of Plintiff:

ANTHONY B. HALLER, ESQUIRE, On Behalf of Defendant.

Judges: JAMES KNOLL GARDNER, United States District Judge.

Opinion by: James Knoll Gardner

Opinion

Memorandum May 21, 2002. [1] Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss was filed June 10, 2003. Upon consideration of the briefs of the parties and for the reasons expressed below, we deny defendant's motion to dismiss.

This is an action for discrimination brought pursuant to

[1] This case was originally assigned to our colleague United States District Judge Petrese B. Tucker. The case was transferred from the docket of District Judge Tucker to our docket on December 19, 2002.

the *Age Discrimination in Employment Act* ("ADEA") [2] **[*2]** (Count I), and the *Americans with Disabilities Act* ("ADA") [3] (Count II). Plaintiff Kenneth T. Vail is a resident of Bethlehem, Northampton County, Pennsylvania. Defendant Harleysville Group, Inc., has offices located in Harleysville, Montgomery County, Pennsylvania.

This action is before the court on federal question jurisdiction. [4] Venue is proper because there is general jurisdiction over the defendant in Pennsylvania and plaintiff avers in his Complaint that the facts and circumstances giving rise to his causes of action occurred in Montgomery County, Pennsylvania. [5]

Plaintiff commenced this action on November 2, 2001 by filing a Praecipe for Writ of Summons with the Prothonotary of the Court of Common Pleas of Northampton County, Pennsylvania. On November 6, 2001 the Prothonotary issued a Writ of Summons. On November 15, 2001 the Writ of Summons was served on defendant by the Northampton County Sheriff. [6]

[*3] On April 18, 2002 plaintiff filed his Complaint in the Court of Common Pleas of Northampton County. Defendant contends that it received plaintiff's Complaint on April 26, 2002. On May 16, 2002 defendant filed its Notice of Removal pursuant to *28 U.S.C. § 1441(b)*. Plaintiff has not contested removal to this court.

In his Complaint, plaintiff avers that he was hired by defendant on March 27, 2000 as a Loss Control Manager for the Mid-Atlantic Region. Plaintiff contends that he was terminated by defendant on September 7, 2000. Thereafter, plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging violations of the ADA and ADEA. On August 7, 2001 the EEOC issued a Notice of Dismissal and Right to Sue Letter to plaintiff.

In its motion to dismiss, defendant contends that plaintiff's claims are barred by the statute of limitations. Defendant asserts that if plaintiff had brought his claims in federal court, plaintiff would have been required to file a complaint to commence the action, and would have had to serve that complaint within 120 days pursuant to *Federal Rule of Civil Procedure 4(m)* **[*4]** . Defendant avers that because plaintiff obeyed the state rules, which do not require the filing of a complaint to initiate an action, and not the federal rules in this properly removed action, plaintiff's Complaint is time-barred.

Defendant further contends that plaintiff's action should not be salvaged by the filing of the Praecipe for Writ of Summons filed in the Court of Common Pleas of Northampton County filed November 2, 2001 because the writ states no cause of action. Moreover, the writ does not put defendant on notice of a federal cause of action pursuant to either the ADA or ADEA, rather than some inchoate state cause of action. Based on the foregoing, defendant asserts that plaintiff's Complaint should be dismissed because plaintiff failed to bring his action within the 90-day statute of limitation. Defendant contends that the failure forecloses plaintiff's right to sue.

Plaintiff counters that he properly initiated his lawsuit in Pennsylvania, under the Pennsylvania Rules of Civil Procedure. He contends that *Pennsylvania Rule of Civil Procedure 1007* permits him to initiate an action in Pennsylvania by filing a Praecipe for a Writ of Summons. Moreover, he asserts that he **[*5]** is not required to file a complaint to initiate an action in Pennsylvania. Therefore, plaintiff claims that he has satisfied the procedural requirement of initiating a lawsuit within the 90- day framework set forth in the EEOC's Right to Sue Letter. For the following reasons, we agree with plaintiff.

Standard of Review

HN1[↑] A *Rule 12(b)(6)* motion to dismiss examines the sufficiency of the complaint. *Conley v. Gibson, 355 U.S. 41, 45, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80, 84 (1957)*. In determining the sufficiency of the complaint, the court must accept all plaintiff's well-pled factual allegations as true and draw all reasonable inferences therefrom in favor of plaintiff. *Graves v. Lowery, 117 F.3d 723, 726 (3d Cir. 1997)*.

The Federal Rules of Civil Procedure do not require

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[2] *29 U.S.C. § 621 to 634*

[3] *42 U.S.C. § 12101 to 12213*.

[4] *28 U.S.C. § 1331*.

[5] See *28 U.S.C. § 118and 1391*.

[6] Because neither party provided the court with the either the date that the Writ of Summons was issued by the Prothonotary or the date that the Writ of Summons was served on defendant, we requested and received a copy of the docket entries from the Prothonotary of the Court of Common Pleas of Northampton County, Pennsylvania. A copy of the docket entries are attached hereto and made a part of this Opinion.

> a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

*Conley, 355 U.S. at 47, 78 S. Ct. at 103, 2 L. Ed. 2d at 85. (Internal footnote **[*6]** omitted.)* "Thus, a court should not grant a motion to dismiss 'unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Graves, 117 F.3d at 726*, *citing* *Conley, 355 U.S. at 45-46, 78 S. Ct. at 102, 2 L. Ed. 2d at 84*.

Discussion

HN2[⬆] A prerequisite to filing suit under either the ADA or the ADEA is that a plaintiff must first file a charge of discrimination with the EEOC and must receive from the EEOC a notice of the right to sue. A plaintiff then has 90 days after receipt of the notice in which to commence a civil action. See *29 U.S.C. § 626(e)*; *42 U.S.C. § 2000e-5(f)(1)(A)and 12117(a)*. The 90-day filing period acts as a statute of limitations. *McCray v. Corry Manufacturing Company, 61 F.3d 224 (3d Cir. 1995)*.

Federal and state courts have concurrent jurisdiction for claims brought under the ADA and ADEA. [7] In the within matter, plaintiff chose to initiate his action in state court. Pursuant to *Pennsylvania Rule of Civil Procedure 1007*, an action may be commenced by the filing of a praecipe for writ **[*7]** of summons. [8] However, the original process (the praecipe for writ of summons) will toll the 90-day statute of limitations for a period of time equivalent to the length of the initial statute of limitations only if a good faith effort is made to effectuate service of the writ. *Lamp v. Heyman, 469 Pa. 465, 366 A.2d 882 (1976)*.

This state law procedural rule has been recognized in discrimination cases by federal courts sitting in Pennsylvania. *See* **[*8]** *Deily v. Waste Management of Allentown, No. 00-CV-1100, 2000 U.S. Dist. LEXIS 18205 (E.D. Pa. Dec. 19, 2000)*; *Perry v. City of Philadelphia, No. 99-CV-2989, 1999 U.S. Dist. LEXIS 12915 (E.D. Pa. Aug. 17, 1999)*; *Krouse v. American Sterilizer Company, 872 F. Supp. 203 (E.D. Pa. 1994)*. Moreover, "compliance with the Pennsylvania procedural rule satisfies the tolling requirement in cases removed to this court." *Perry, 1999 U.S. Dist. LEXIS 12915 at *4*.

In this case, the EEOC issued plaintiff a Right to Sue Letter on August 7, 2001. The presumption under the Federal Rules of Civil Procedure is that plaintiff received the Right to Sue Letter three days later on August 10, 2001. See *Fed.R.Civ. P. 6(e)*. Therefore, plaintiff had until November 8, 2001 to initiate a lawsuit alleging violations of the ADA and ADEA.

Specifically, the Right to Sue Letter sent by the EEOC to plaintiff stated in pertinent part:

> This will be your one and only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against respondent(s) under federal law based on **[*9]** this charge in federal or state court. Your lawsuit **must be filed *WITHIN 90 DAYS* from your receipt of this Notice;** otherwise your right to sue based on this charge will be lost. (The time limit for filing suit based on a state claim may be different.)

See plaintiff's Complaint, Exhibit A. (Emphasis in original.)

As noted above, plaintiff initiated an action in Pennsylvania by way of a Praecipe for a Writ of Summons on November 2, 2001. This fell within the 90-day period (ending November 8,2001) under federal law. Moreover, the Prothonotary issued a Writ of Summons on November 6, 2001 and the writ was served on defendant on November 15, 2001.

Defendant correctly states that plaintiff did not file his Complaint in state court until April 18, 2002, 254 days after the EEOC issued the Right to Sue Letter and over five months after the 90-day filing period elapsed. Nevertheless, under Pennsylvania procedural rules, a complaint is not required to initiate a lawsuit. Hence, we agree with plaintiff, disagree with defendant and conclude that plaintiff properly commenced this action in Pennsylvania state court prior to defendant removing this action to federal court.

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[7] Plaintiff cites no authority for this proposition. However, our own research reveals that plaintiff is correct, and that claims under either the ADA or ADEA may be brought in either state or federal court. See *29 U.S.C. § 626(c)(1)* (*ADEA); Jones v. Illinois Central Railroad Company, 859 F. Supp. 1144 (N.D. Ill. 1994)* (ADA).

[8] ***Pennsylvania Rule of Civil Procedure 1007*** provides that "an action may be commenced by filing with the prothonotary (1) a praecipe for a writ of summons, or (2) a complaint."

[*10] Because plaintiff filed his praecipe for writ of summons in the Court of Common Pleas of Northampton County on November 2, 2001, we conclude this satisfied *Pennsylvania Rule of Civil Procedure Rule 1007* relating to commencement of an action. Moreover, because the Prothonotary promptly issued the writ four days later (on November 6, 2001), and the writ was served on defendant by the Sheriff on November 15, 2001, we conclude that plaintiff made the good faith effort to effectuate service required by *Lamp, supra.* Accordingly, we conclude the filing of the praecipe for a writ of summons by plaintiff on November 2, 2001 tolled the statute of limitations.

Furthermore, the fact that plaintiff's praecipe for writ of summons did not notify defendant of the specifics of plaintiff's federal causes of action, and the fact that defendant did not learn those details until months later when plaintiff filed his Complaint, neither results in harm or prejudice to defendant, nor entitles defendant to a defense under the statute of limitations.

HN3[↑] *Pennsylvania Rule of Civil Procedure 1037(a)* enables a defendant to file a praecipe requesting the prothonotary to enter a rule upon plaintiff to file **[*11]** a complaint within 20 days if an action is not commenced by the filing of a complaint. Thereafter, if a complaint is not filed within 20 days after service of the rule, the prothonotary, upon praecipe of the defendant, shall enter a judgment of non pros. *Pa.R.C.P. 1037(a)*. Accordingly, defendant had a powerful mechanism at its disposal to ensure the earlier filing of a complaint.

However, defendant did not take advantage of this procedural option. Rather, defendant waited until plaintiff filed a complaint in state court. Defendant then removed this case to federal court. It is not until defendant filed the within motion to dismiss on May 21, 2002, 200 days after plaintiff commenced this action, that defendant first complains that plaintiff did not file his Complaint earlier.

Because it is clear that defendant had a mechanism to require plaintiff to file a complaint in Pennsylvania state court and did not avail itself of the opportunity to do so, we reject defendant's contention that plaintiff's claims should be barred because defendant did not receive a complaint earlier.

For all the foregoing reasons, we deny defendant's motion to dismiss. Defendant shall have until October 24, 2003 to **[*12]** file an answer to plaintiff's Complaint.

ORDER

NOW, this 30th day of September, 2003, upon consideration of Defendant's Motion to Dismiss under *Federal Rules of Civil Procedure 12(b)(6)*, which motion was filed May 21, 2002; upon consideration of Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss filed June 10, 2002; and for the reasons expressed in the accompanying Opinion, *IT IS ORDERED* that defendant's motion to dismiss is denied.

IT IS FURTHER ORDERED that defendant shall have until on or before October 24, 2003 to file an answer to plaintiff's Complaint.

BY THE COURT:

James Knoll Gardner

United States District Judge

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