

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

OSVALDO DAVILA :
 :
 v. : C.A. No. 13-675S
 :
 WALCO ELECTRIC COMPANY :

**REPORT AND RECOMMENDATION FOR
SUMMARY DISMISSAL PURSUANT TO 28 U.S.C. § 1915(e)**

Lincoln D. Almond, United States Magistrate Judge

Background

Pending before me for determination (28 U.S.C. § 636(b)(1)(A)) is Plaintiff's Application to Proceed In Forma Pauperis ("IFP") (Document No. 2) pursuant to 28 U.S.C. § 1915. On October 4, 2013, Plaintiff filed a pro se Complaint against Walco Electric Company ("Walco"). Plaintiff's Complaint was accompanied by an Application to Proceed IFP without being required to prepay costs or fees, including the \$400.00 civil case filing fee. After reviewing Plaintiff's IFP Application signed under penalty of perjury, I conclude that Plaintiff is financially unable to pay the fees and costs of this proposed civil case and thus, Plaintiff's Application to Proceed IFP (Document No. 2) is GRANTED.

Having granted IFP status to Plaintiff, this Court is required by statute to further review the Plaintiff's Complaint sua sponte under 28 U.S.C. § 1915(e)(2) and to dismiss this suit if it is "frivolous or malicious," "fails to state a claim on which relief may be granted" or "seeks monetary relief against a defendant who is immune from such relief." For the reasons discussed below, I recommend that Plaintiff's Complaint be DISMISSED WITHOUT PREJUDICE because, as

presently drafted, it “fails to state a claim on which relief may be granted” pursuant to 28 U.S.C. § 1915(e)(2)(B).

Facts

Plaintiff’s pro se Complaint is cursory and conclusory. He describes this action as a “court appeal” and references a prior discrimination charge filed with the Equal Employment Opportunity Commission against his former employer Walco. He claims that Walco’s lawyer made a false statement to the Commission that he was “given a company policy nor [sic] a hand book, stating to keep out of the office nor [sic] to keep the door closed.” (Document No. 1 at p. 1). However, his Complaint, the attachments to it or the Civil Cover Sheet he submitted do not provide any insight as to the nature of the alleged discrimination (e.g., race, national origin, gender, disability, age, etc.) or facts from which this Court might reasonably infer the nature of the alleged discrimination. He alleges that “the only reason I was terminated was discrimination and Retaliation. This all happen [sic] right after I went back to the company after my injuries. They wore [sic] very angry after loosing [sic] a case in court against [sic] me. They did not wanted [sic] to accept that I was injur [sic] in the job.” Id. It is unclear if Plaintiff is claiming he was terminated because he was disabled due to a workplace injury or because Walco was “angry” that he filed a workers’ compensation claim against it.

Standard of Review

Section 1915 of Title 28 requires a federal court to dismiss an action brought thereunder if the court determines that the action is frivolous, fails to state a claim or seeks damages from a defendant with immunity. 28 U.S.C. § 1915(e)(2)(B). The standard for dismissal of an action taken IFP is identical to the standard for dismissal on a motion to dismiss brought under Fed. R.

Civ. P. 12(b)(6). See Fridman v. City of N.Y., 195 F. Supp. 2d 534, 538 (S.D.N.Y. 2002). In other words, the court “should not grant the motion unless it appears to a certainty that the plaintiff would be unable to recover under any set of facts.” Roma Constr. Co. v. aRusso, 96 F.3d 566, 569 (1st Cir. 1996). Section 1915 also requires dismissal if the court is satisfied that the action is “frivolous.” 28 U.S.C. § 1915(e)(2)(B)(I). A claim “is frivolous where it lacks an arguable basis either in law or in fact.” Neitzke v. Williams, 490 U.S. 319, 325 (1989). The First Circuit has held that the affirmative defense of the statute of limitations may justify dismissal under Section 1915, see Street v. Vose, 936 F.2d 38, 39 (1st Cir. 1991), and other courts have upheld dismissals under Section 1915 because of other affirmative defenses appearing on the face of a complaint. See e.g., Kimble v. Beckner, 806 F.2d 1256, 1257 (5th Cir. 1986).

Discussion

I am recommending that Plaintiff’s Complaint be summarily dismissed without prejudice pursuant to 28 U.S.C. § 1915(e)(2) and with leave to file an Amended Complaint. In making this recommendation, I have taken all of the allegations in Plaintiff’s Complaint as true and have drawn all reasonable inferences in his favor. Estelle v. Gamble, 429 U.S. 97 (1976). In addition, I have liberally reviewed Plaintiff’s allegations and legal claims since they have been put forth by a pro se litigant. See Haines v. Kerner, 404 U.S. 519, 520-521 (1972). However, even applying these liberal standards of review to Plaintiff’s Complaint, dismissal is required.

There are several deficiencies in Plaintiff’s Complaint as presently drafted. First, it does not, as required by Fed. R. Civ. P. 8(a), contain “a short and plain statement of the grounds” for federal subject matter jurisdiction in this Court. On the Civil Cover Sheet, Plaintiff indicates that both he and Walco are citizens of Rhode Island for diversity purposes and thus this Court has no

independent basis for jurisdiction under 28 U.S.C. § 1332 (diversity of citizenship) over any state statutory or common law claims Plaintiff may seek to pursue against Walco. He also fails to specifically identify any claims arising under federal law that would support this Court's jurisdiction under 28 U.S.C. § 1331 (federal question). Second, the cursory and conclusory nature of Plaintiff's Complaint does not identify the specific statute(s) or law(s) which he alleges that Walco violated and does not contain sufficient facts to ascertain the nature of his claim. See Rule 8(a)(2), Fed. R. Civ. P. (The Complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief.) The Complaint also fails to include "a demand for the relief sought" as required by Rule 8(a)(3), Fed. R. Civ. P. In other words, as presently drafted, Plaintiff's Complaint does not provide either the Court or Walco with fair notice as to the legal and factual basis of his claim. See Thomas v. Rhode Island, 542 F.3d 944, 948 (1st Cir. 2008) (a complaint must contain sufficient factual allegations to assert "a plausible entitlement to relief" under the law).

Conclusion

For the reasons stated, Plaintiff's Motion to Proceed In Forma Pauperis (Document No. 2) is GRANTED. Additionally, pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii), I further recommend that Plaintiff's Complaint be DISMISSED WITHOUT PREJUDICE and WITH LEAVE to file an Amended Complaint within thirty days which remedies the pleading deficiencies identified in this Report and Recommendation.

Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of the Court within fourteen (14) days of its receipt. See Fed. R. Civ. P. 72(b); LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to

review by the District Court and the right to appeal the District Court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
October 10, 2013