

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF MONROE

---

Elijah Sims,

Plaintiff,

vs.

Index #07/12170

Wegmans Grocery Stores,

Defendant.

---

Supreme Court, County of Monroe, Special Term  
November 8, 2007

Appearances:

Elijah Sims, Pro Se  
10 Sedgefield Court  
Rochester, NY 14622

Harter Secrest & Emery LLP  
Steven G. Carling, Esq., of counsel  
Attorneys for Defendants  
1600 Bausch & Lomb Place  
Rochester, NY 14604

State Division of Human Rights  
Caroline J. Downey, Esq., General Counsel  
One Fordham Plaza, 4<sup>th</sup> Floor  
Bronx, NY 10458

**DECISION, ORDER/JUDGMENT**

**GALLOWAY, J. :**

The defendant's motion for an order dismissing this action is granted.

The plaintiff, a former employee of defendant-Wegmans, previously commenced an administrative proceeding against defendant by filing a claim with the Division of Human Rights ("Division") seeking damages for alleged discriminatory employment practices. Following its investigation, the Division dismissed the claim without a hearing, having found there was no probable cause to believe that Wegmans "has engaged or is engaging in the unlawful

discriminatory practice complained of.” Plaintiff then commenced this action against defendant-Wegmans only, seeking damages and “other” unspecified relief. The summons and complaint do not name the Division as a party and the complaint asserts no claim against the Division

Responding to plaintiff’s complaint and in lieu of serving an answer, the defendant moved pursuant to CPLR 3211 for an order dismissing the complaint on grounds that plaintiff, having already opted to pursue his administrative remedy, thereby forfeited his judicial remedy; and that this action for damages is an unauthorized attempt to assert the already-forfeited judicial remedy; and that plaintiff’s sole remedy is limited to one for judicial review of the Division’s decision dismissing his claim. Such relief, however, was not requested in the original complaint.

Thereafter, on October 16, 2007, the plaintiff served what defendant has termed an “amended complaint” but which consists of a request to amend his complaint to include a claim for judicial review, citing Section 298 of the Executive Law. The amended complaint, however, failed to allege that the decision in question was arbitrary, capricious, or irrational, and failed to allege any particulars establishing why the decision is defective and should be overturned. Also, it did not name the Division as a party, and it contained no request to add the Division as a party, although the Division would be a jurisdictionally necessary party if judicial review were sought.

The defendant then moved for dismissal of the amended complaint on the additional ground that plaintiff’s claim for judicial review is time-barred as it was not commenced within the 60-day period required by § 298 of the Executive Law. Plaintiff then filed a response to defendant’s earlier motion, together with an unsworn declaration signed by plaintiff, a request for discovery, and a motion to amend his complaint further so as to include alleged violations of OSHA § 654, and the Labor Law § 27-b, and finally a request for a subpoena for certain records.

## I

Having initially pursued his administrative remedy plaintiff cannot now pursue his judicial remedy for damages against defendant Wegmans. Executive Law § 297 (9) provides in pertinent part as follows: "Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages \* \* \* unless such person had filed a complaint hereunder or with any local commission on human rights." "Under Executive Law § 297 (9), a person claiming to be aggrieved by unlawful discriminatory practices may elect to seek redress in either an administrative or a judicial forum. As a general rule, the remedies are to be mutually exclusive \* \* \* . Once a complainant elects the administrative forum by filing a complaint with the Division, a subsequent judicial action on the same complaint is generally barred." *Legg v Eastman Kodak Co.*, 248 AD2d 936, 937 (4<sup>th</sup> Dept 1998) (citations omitted). Accordingly, plaintiff's claim for damages against Wegmans herein must be dismissed.

## II

In view of the foregoing, plaintiff's only remedy would be one for judicial review of the administrative decision, but a proceeding for such review must be commenced within 60 days after service of the unfavorable decision upon plaintiff. Thus, the issue here is whether plaintiff has timely commenced a proceeding against the Division for judicial review.

The decision by the Division is dated 8/2/07; and an affidavit of service contained in the transcript of proceedings filed by the Division herein, indicates that service of the decision on plaintiff was made by mail on 8/2/07. Accordingly, a timely proceeding by plaintiff would have to have been commenced on or before 10/1/07, i.e., the 60<sup>th</sup> day after service upon him of the

decision in question. See *Matter of Gil v New York State Div. of Human Rights*, 17 AD3rd 365, 366. This proceeding was commenced against Wegmans only prior to 10/1/07 by filing on 9/21/07 and by service upon Wegmans on 9/24/07. The amended complaint asserting (for the first time) a claim for judicial review (against Wegmans only) was served on 10/16/07 (i.e., after 10/1/07). It appears that plaintiff also served a copy of the amended complaint on the non-party Division, as the Division has interposed an answer dated October 26, 2007 and also filed a transcript of proceedings herein with the Monroe County Clerk. No proof has been submitted, however, establishing the date or method of service on the Division, or identifying the papers served. In its answer the Division indicates that it will not actively participate "because the Complainant and Respondent are the parties in interest." It is clear, however, that as of the return date herein (11/8/07), the papers served on the Division had not named the Division as a party, that no proof of timely, personal service of proper papers on the Division had been presented, and, further, that more than 60 days had elapsed since the service of the Division's decision on the plaintiff.

Section 296 of the Executive Law states that a " \* \* \* proceeding under this section must be instituted within sixty days after service of the order." 22 NYCRR § 202.57 (a) provides that a proceeding seeking judicial review of an order of the Division "shall be commenced by the filing of a notice of petition and petition naming as respondents the State Division of Human Rights and all other parties appearing in the proceeding before the State Division of Human Rights (emphasis added)." Because of plaintiff's failure to name the Division as a party, and to timely serve the Division as a party by personal service of an amended complaint asserting a claim against the Division for judicial review, this court did not acquire the jurisdiction necessary

to hear and determine plaintiff's request for judicial review of the Division's decision.

Accordingly, the claim for review must be dismissed for lack of jurisdiction and all of plaintiff's various requests are denied as moot.

In any event, and notwithstanding the absence of jurisdiction herein, the court has reviewed the aforementioned transcript of proceedings conducted by the Division in its determination of the claim filed there by the plaintiff. The transcript describes in detail the investigation conducted by the Division and the results of that investigation which led to its finding of no cause. Based on that review the court would note, without deciding, that the Division's determination of no probable cause would appear to be amply supported by the transcript and thus its determination would not appear to be arbitrary, capricious or irrational.

Finally, as the determination here in question was apparently not made as a result of a hearing, a transfer of this matter to the Appellate Division would not be proper. *See Matter of Simmons v New York State Div. of Human Rights*, 188 AD2d 475.

Now, therefore, after due consideration, it is hereby

ORDERED AND ADJUDGED that the plaintiff's complaint and amended complaint be and the same are dismissed; and it is further

ORDERED AND ADJUDGED that the plaintiff's requests for (1) a stay of proceedings to conduct discovery, (2) a subpoena for certain records, (3) leave to proceed as a poor person, and (4) leave to amend further his complaint to allege violations of OSHA Section 654 and Labor Law Section 27-b, are denied as moot.

DATED: November 26, 2007  
Rochester, NY

  
HAROLD L. GALLOWAY, J.S.C.