No. 11-1917

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Tara V. Luevano
Plaintiff-Appellant,

v.

Wal-Mart Stores, Inc.,
Defendant-Appellee.

Appeal From The United States District Court
For the Northern District of Illinois,
Case No. 1:10-cv-3999
The Honorable Judge Virginia M. Kendall

BRIEF OF THE DEFENDANT-APPELLEE, WAL-MART STORES, INC.

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FEDERAL RULE OF APPELLATE PROCEDURE 26.1 AND CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The undersigned attorney for Defendant-Appellee Wal-Mart Stores, Inc. furnishes the following list in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

1. The full name of the party the undersigned represents in this case is Wal-Mart Stores, Inc.

2. The name of the law firm whose partners or associates have appeared for Wal-Mart Stores, Inc. in this case is Barnes & Thornburg LLP.

3. Wal-Mart Stores, Inc. discloses that it has no parent corporation, and no publicly held corporation owns more than ten percent (10%) of its stock.

Dated: December 28, 2012

/s/ Norma W. Zeitler
Norma W. Zeitler
Counsel of Record for
Defendant-Appellee
Wal-Mart Stores Inc.,

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JURISDICTIONAL STATEMENT

Pro se Plaintiff-Appellant Tara Luevano's ("Luevano") jurisdictional statement is not complete and correct. Luevano filed her initial Complaint against Wal-Mart Stores, Inc. ("Wal-Mart") on June 28, 2010 ("First Complaint"),[1] claiming that Wal-Mart violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et. seq. ("Title VII"). [A. 22-33].[2] The district court had federal question jurisdiction under 28 U.S.C. §§ 1331 and 1343.

On March 24, 2011, the district court granted Wal-Mart's motion to dismiss Luevano's Third Amended Complaint, and entered final judgment pursuant to Federal Rule of Civil Procedure 58. [A. 10-17]. Luevano timely filed a notice of appeal on April 19, 2011 with respect to that judgment. [A. 18]. The United States Court of Appeals for the Seventh Circuit has jurisdiction over this appeal solely as to the judgment entered on March 24, 2011, pursuant to 28 U.S.C. §§ 1291 and 1294.

This Court does not have jurisdiction over the Order entered by the district court on July 9, 2010, dismissing Luevano's First Complaint because that dismissal became final on July 14, 2010 when the statute of limitations ran on those claims and Luevano did not file notice of appeal as to those claims. *See Lee v. Cook County*, 635 F.3d 969, 972 (7th Cir. 2011); *Elmore v. Henderson*, 227 F.3d 1009,

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[1] For ease of reference, Wal-Mart has adopted the short citations used by Luevano to refer to the four Complaints she filed.

[2] Abbreviations: "Dkt. ___" refers to the district court docket number for the cited item; "App. Dkt. ___" refers to this Court's docket number for the cited item; "Br. ____" refers to in the Record Luevano's opening brief; "A. ____" refers to Luevano's appendix; and "R. ___" refers to the Record on Appeal.

1012 (7th Cir. 2000). This Court also does not have jurisdiction over the claims in Luevano's First Complaint because Luevano failed to include any reference to the July 9 Order in her notice of appeal and her docketing statement.

STATEMENT OF THE ISSUES

Wal-Mart respectfully sets forth the following issues presented for review:

I. Whether lack of jurisdiction prevents this Court from addressing Luevano's assertion that the district court erroneously dismissed Luevano's First Complaint?

II. If this Court determines that Luevano's challenge of the district court's dismissal of Luevano's First Complaint is properly before it, whether the district court correctly determined that the First Complaint did not state a plausible claim for relief when it screened Luevano's First Complaint as required by 29 U.S.C. § 1915(e)(2)?

III. Whether the district court correctly determined that equitable tolling did not apply and correctly dismissed Luevano's Fourth Complaint with prejudice as untimely?

STATEMENT OF THE CASE

On June 28, 2010, Luevano initiated the underlying lawsuit against her employer Wal-Mart, using the Northern District of Illinois check-the-box form for employment discrimination cases ("First Complaint") [A. 22-33]. Also on June 28, 2010, Luevano filed a petition to proceed *in forma pauperis* and a request for appointment of counsel.

On July 9, 2010, the Honorable Virginia M. Kendall screened Luevano's First Complaint, as the district court is required to do by 28 U.S.C. § 1915 when a plaintiff files a petition to proceed *in forma pauperis*. [A. 7-8]. The district court denied Luevano's motion to proceed *in forma pauperis* and dismissed Luevano's First Complaint without prejudice for failure to state a claim upon which relief may be granted, finding Luevano failed to allege any basis giving rise to a plausible claim for relief under Title VII ("July 9 Order"). [A. 7-8].

On August 4, 2010, Luevano filed a motion seeking leave to file the first of three amended complaints. [Dkt. 7]. In that motion, Luevano renewed her request that the district court appoint counsel to represent her. [Dkt. 7]. On August 9, 2010, the district court granted Luevano's motion, and Luevano filed her Amended Complaint of Employment Discrimination (the "Second Complaint"). [Dkt. 10, 11; A. 35-46]. On August 31, 2010, Luevano was granted leave to file a second amended complaint ("Third Complaint"), which her court-appointed counsel did on September 29, 2010. [Dkt. 13-14; A.48-59]. On October 21, 2010, Wal-Mart filed a motion to dismiss the Third Complaint as untimely. [Dkt. 19-20]. On November 23, 2010, Luevano requested leave to file her third amended complaint ("Fourth Complaint"), which was granted on November 24, 2010. [Dkt. 33-37; A. 61-73]. On December 22, 2010, Wal-Mart filed a motion to dismiss the Fourth Complaint as untimely. [Dkt. 41-42].

On March 24, 2011, the district court granted Wal-Mart's motion to dismiss the Fourth Complaint and entered final judgment that disposed of all claims

("March 24 Order"). [A. 10-17]. Luevano timely filed a notice of appeal on April 19, 2011 with respect to the minute order issued on March 24, 2011 (Dkt. 50), the Memorandum Opinion and Order entered on March 24, 2011 (Dkt. 51), and the Judgment entered on March 24, 2011 (Dkt. 52) (collectively "March 24 Orders"). [A 10-17]. This appeal was docketed with the March 24, 2011 Orders as the only Orders being appealed. [App. Dkt. 1].

STATEMENT OF FACTS

Luevano works for Wal-Mart as a People Greeter. [Br. 7; A. 28]. On March 16, 2010, Luevano filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), Charge No. 440-2010-02955, alleging sex discrimination, harassment, and retaliation under Title VII (the "First Charge"). [A. 28]. Two weeks later, on April 1, 2010, the EEOC issued the First Right to Sue because it was "unable to conclude that the information obtained establishes violations of the statutes." [A. 29]. The First Right to Sue warned Luevano that she had 90 days to file any lawsuit based on her First Charge or her "right to sue based on this charge will be lost." [A. 29].

On June 7, 2010, Luevano filed her second charge of discrimination with the EEOC, claiming that Wal-Mart retaliated against her after she "complained of discrimination (EEOC # 440-2010-02955)" (the "Second Charge"). [A. 72]. Again, within a matter of weeks, on June 30, 2010, the EEOC issued the Second Right to Sue, determining that it was "unable to conclude that the information obtained establishes violations of the statutes." [A. 73]. The Second Right to Sue also

warned Luevano that she had 90 days to file any lawsuit based on the Second Charge, or her "right to sue based on this charge will be lost." [A. 73]. Luevano received the Second Right to Sue on June 30, 2012. [Br. at p. 9; A. 73.]

On June 28, 2010 – two days before Luevano received the EEOC's Second Right to Sue – Luevano initiated a lawsuit against Wal-Mart alleging sex discrimination, harassment, and retaliation under Title VII, and attached a copy of the First Charge and the First Right to Sue, a single-page handwritten statement, and a police report. [A. 22-33]. The police report indicated (among other things) that Luevano reported that a co-worker who works at Wal-Mart as a door greeter stated that "he hates her" and that "he respects dirt more than her" and that he had threatened to harm her. [A. 32]. Luevano also filed an application to proceed *in forma pauperis* and a motion for appointment of counsel. [Dkt. 4-5].

On July 9, 2010, the district court denied the motion to proceed *in forma pauperis*, denied the motion for appointment of counsel, and dismissed the Complaint without prejudice for failure to state a claim upon which relief may be granted ("July 9th Dismissal"). [A. 7-8]. The district court noted the obligation under 28 U.S.C. § 1915 to review the claims of a plaintiff who seeks to proceed *in forma pauperis* and "dismiss the action … if it fails to state a claim…" [A. 7-8]. The district court, in analyzing the First Complaint, noted that "Luevano's Complaint is based upon verbal abuse that she suffered from a male co-worker over a period of time." [A. 7]. The district court also analyzed the documents that Luevano attached to the Complaint, including the police report. [A.7-8]. The district court

concluded that "the harassment of which [Luevano] complains does not appear to have been sexual in nature, rather it seems to have been generally threatening and intimidating." [A. 8]. The district court further stated: "Keeping in mind that Title VII is not 'a general civility code for the American workplace' [citation omitted], Luevano has not presented a plausible basis for a claim of discrimination based on her sex." [A. 8]. Luevano received the July 9 Order on July 12, 2010. [App. Dkt. 15, Orig. Br. Argument ¶ 4 a.].

On August 4, 2010 (35 days after Luevano received the Second Right To Sue), Luevano filed a motion to amend her Complaint and reinstate her case, [Dkt. 7-8], which the district court granted on August 9, 2010. [Dkt. 10]. Luevano attached and incorporated the First Charge and First Right to Sue as part of her Second Complaint, which alleged sex discrimination, harassment, and retaliation under Title VII. [A. 35-46]. Luevano did not allege in her Second Complaint that she had been retaliated against for filing the First Charge. [A. 35-46]. Nor did she attach to her Second Complaint the Second Right To Sue, which Luevano received on June 30, 2010. [Br. at p. 9; A. 73]

On August 19, 2010, the district court issued an order appointing Luevano counsel, and stating that "Luevano appears to have timely claims under Title VII and the assistance of counsel appears reasonably necessary to enable her to present those claims to the Court. ("August 19 Order"). [Dkt. 11]. On September 29, 2010, Luevano, through her court-appointed counsel, filed her Second Amended Complaint, alleging sex discrimination, harassment, and retaliation under Title VII

(the "Third Complaint"). [A. 48-59]. Luevano did not allege in her Third Complaint that she was retaliated against for filing the First Charge. [A. 48-59]. Again Luevano attached and incorporated the First Charge and First Right to Sue but did not attach the Second Charge or the Second Right to Sue. [A. 56-59]. Wal-Mart timely filed a motion to dismiss on October 21, 2010. [Dkt. 19-20].

On November 23, 2010, Luevano sought leave to amend her Third Complaint. [Dkt. 33]. In that motion, Luevano stated that her counsel did not become aware of the Second Right to Sue until after Luevano's counsel had filed Luevano's Third Complaint and requested "leave to amend her Complaint to include information about the second Charge of Discrimination and Notice of Rights." [Dkt. 33, pp. 1-2, ¶¶ 5-6, 9]. On November 24, 2010, the district court granted the motion and the Fourth Complaint was filed the same day. [Dkt. 35-37; A. 61-73]. Luevano attached to her Fourth Complaint a copy of the First Charge and First Right to Sue, as well as the Second Charge and Second Right to Sue. [A. 70-73]. Wal-Mart filed a motion to dismiss the Fourth Complaint [Dkt. 41-42], which the district court granted on March 24, 2011. [A.10-16]. A final judgment was entered on March 24, 2011 ("March 24th Judgment"). [A. 18]

SUMMARY OF THE ARGUMENT

Under Title VII, plaintiffs have only ninety (90) days within which to file a lawsuit after receiving a right to sue notice. 42 U.S.C. § 2000e-5(f)(1). Instead of immediately filing this action to preserve her rights, Luevano waited until Day 88 of the first 90-day right-to-sue period to initiate her Title VII lawsuit against Wal-

Mart. Then, after the district court issued notice to Luevano that her First Complaint had been dismissed, Luevano – without explanation – waited nearly one full month before taking any additional action to file an Amended Complaint (during which time Luevano's rights with respect to the First Charge expired).

Even after the district court appointed an attorney to represent Luevano free of charge, Luevano by all appearances failed to inform her court-appointed counsel of the existence of the Second Charge and Second Right-to-Sue until after the 90-day limitations period had run, thus dooming any timely Complaint as to allegations raised in the Second Charge. Finally, in her opposition to Wal-Mart's motion to dismiss the Fourth Complaint, Luevano shirked responsibility for her own actions by blithely asserting without any concrete factual support that she had acted "in good faith" and that therefore her failure to abide by statutory time limits should be excused. [Dkt. 48, p.5- 6]. Luevano did not identify or argue to the district court that some "extraordinary circumstance" stood in her way and prevented her from timely pursuing her claims.

Although at first blush this case poses a procedural labyrinth, the appeal should be dispatched post-haste with a succinct order that affirms the district court's dismissal of Luevano's Fourth Complaint on March 24, 2011. However, because Luevano now has challenged as erroneous the district court's July 9 Order – and devoted a significant portion of her Brief to this separate and distinct Order – Wal-Mart is compelled to provide argument and authority on that Order as well.

This Court should not reach Luevano's challenges to the substance of the July 9 Order because (1) Luevano did not timely appeal the dismissal of her First Complaint when it became clear that the dismissal effectively was final and thus this Court lacks jurisdiction to hear that appeal now, and (2) Luevano did not identify the July 9 Order in her Notice of Appeal or Docketing Statement as required under Fed. R. App. P. 3 and Circuit Rule 3.

But even if the July 9 Order is taken as part of this Appeal, the district court's dismissal of the First Complaint was correct and should be affirmed. The district court properly screened the initial Complaint as required for an *in forma pauperis* pleading under 28 U.S.C. § 1915 and correctly determined Luevano's First Complaint failed to state a plausible claim for harassment or retaliation under Title VII. Therefore, to the extent this Court reaches the substance of the July 9 Order, the district court court's decision was correct and should be affirmed.

The district court's decision also should be affirmed because the district court (a) correctly dismissed Luevano's Fourth Complaint after concluding that Luevano did not comply with the statutory requirement under Title VII to bring a timely claim within 90 days of receipt of a right-to-sue notice and (b) its decision that Luevano failed to establish a basis for applying the doctrine of equitable tolling was not an abuse of discretion. The district court also properly ruled that Luevano's retaliation claim based on the Second Charge was untimely because it was not brought within 90 days of Luevano's receipt of the Second Right to Sue.

STANDARD OF REVIEW

On July 9, 2010, the district court properly dismissed the First Complaint, determining that Luevano's First Complaint did not state a plausible claim for relief. That Order is not a proper part of this Appeal, but if it were, the standard of review would be de novo. *Arnett v. Webster,* 658 F.3d 742, 751 (7th Cir. 2011).

On March 24, 2011, the district court dismissed Luevano's claims in her Fourth Complaint as untimely pursuant to Federal Rule of Civil Procedure 12(b)(6) after determining that equitable tolling was not appropriate. The standard of review is de novo for a dismissal under Rule 12(b)(6). *See, e.g., Logan v. Wilkins*, 644 F.3d 577, 581 (7th Cir. 2011) (reviewing de novo dismissal of action as untimely); *Andonissamy v. Hewlett-Packard Co.*, 547 F.3d 841, 847 (7th Cir. 2008) (same). However, the standard of review as to whether the district court properly denied equitable tolling is an abuse of discretion standard. *See Socha v. Pollard,* 621 F.3d 667, 670 (7th Cir. 2010).

ARGUMENT

I. This Court Lacks Jurisdiction To Hear Luevano's Arguments Regarding The First Complaint.

This case presents an exception to the general rule that a dismissal for failure to state a claim without prejudice is not a final and appealable order. While in most instances a dismissal without prejudice permits re-filing at any time, if circumstances preclude re-filing such as when a claim is time-barred, it is treated as final and appealable. *Lee v. Cook County*, 635 F. 3d at 972 (dismissal without prejudice "nominally is not final, and thus can't be appealed, [but] when the

decision effectively precludes re-filing … it is treated as final and appealable). That is precisely what happened here.

For reasons known only to Luevano, Luevano did not file her initial Complaint until Day 88 of the 90-day time period for filing a lawsuit under Title VII. Thus, there were only two days left in the applicable limitations period when the Clerk of the Court marked Luevano's pro se Complaint as "received" under Rule 3 of the Local Rules for the Northern District of Illinois. Because Luevano also filed a motion to proceed *in forma pauperis* and for appointment of counsel, the time period was tolled while her *in forma pauperis* petition was pending. *Williams-Guice v. Bd. of Educ. of the City of Chicago*, 45 F.3d 161, 164 (7th Cir. 1995). Once the district court issued the July 9 Order denying the application to proceed *in forma pauperis*, and Luevano received notice of it on July 12, 2010, the limitations period resumed, the final two days of the 90-day limitations period passed, and Luevano no longer could file a timely amended complaint based on her First Charge and First Right-to-Sue Notice. *See, e.g., Lee*, 635 F.3d at 971-72 ([W]hen a suit is dismissed, "the tolling effect of filing the suit is wiped out and the statute of limitations is deemed to have continued running from whenever the cause of action accrued, without interruption by that filing.") (citation omitted).

Thus, as of July 14, 2010, the district court's dismissal of Luevano's First Complaint effectively became final and appealable because nothing remained to be decided in the district court *See Adams v. Lever Bros. Co.*, 874 F.2d 393, 394 (7th Cir. 1989); *see also Furnace v. Board of Trustees of Southern Illinois Univ.*, 218

F.3d 666, 669-70 (7th Cir. 2000) (dismissal of complaint without prejudice may constitute adequate finality for appeal if amendment cannot save the action);[3] *see also O'Donnell v. Vencor, Inc.*, 466 F.3d 1104, 1111 (9th Cir. 2006) (dismissal of suit, "even though labeled as without prejudice, nevertheless may sound the death knell for plaintiff's underlying cause of action if sheer passage of time precludes prosecution of new action.") (citation omitted).

Because Luevano did not file a notice of appeal with respect to the district court's dismissal of her First Complaint within 30 days after July 14, 2010, this Court does not have jurisdiction over Luevano's challenge to the dismissal of the First Complaint. *Lee*, 635 F. 3d at 972; s*ee also Elmore v. Henderson*, 227 F.3d 1009, 1012 (7th Cir. 2000) ("*W*aiving the statute of limitations is not the proper remedy for an erroneous dismissal; [t[]he proper remedy is appeal.").

Luevano tries to get around this result by raising various arguments, which amount to after-the-fact rationalizations unsupported by the facts. Luevano is incorrect when she argues that "on the day the [July 9] Order was entered on the docket, the district court explicitly informed Luevano that she could file an amended complaint." (Br. at 17.) In fact, the district court did not say anything at all about the limitations period. [A. 7-8] Rather, the district court assessed the issue of Luevano's request for appointment of counsel and stated that Luevano had not yet provided sufficient information for the court to determine whether her

[3] In *Furnace*, the Seventh Circuit determined that the appeal was premature because the Order was not final, in that the plaintiff was free to refile. In contrast, under the facts presented here, Luevano could not have proceeded with a viable Amended Complaint once the two remaining days on the statute of limitations had expired, and thus the July 9 Order effectively was final and appealable at that point.

claims were particularly difficult or complex, and therefore denied without prejudice Luevano's motion for appointment of counsel, and let her know that she could reiterate her request for appointment of counsel "if she provide[d] the Court with an amended Complaint providing sufficient basis for the Court to find that the harassment of which she complains was due to her sex." [A. 8].

The July 9 Order was silent as to the issue of the 90-day limitations period, and this Court has made it quite clear that it is not the responsibility of the district court to provide legal advice to litigants. See *Arnett*, 658 F.3d at 756 ("district judges have no obligation to act as counsel or paralegal to pro se litigants."). Nor did the district court have the power to extend the statute of limitations. *See Lee,* 635 F. 3d at 972 ("[a] statute of limitations confers rights on putative defendants; judges cannot deprive those persons of entitlements under a statute.").

If, as Luevano argues for the first time on appeal, Luevano truly believed that the district court's July 9 Order was erroneous, she could have and should have acted right away to address the purported errors by filing an appeal within 30 days after the July 9 Order effectively became final on July 14, 2010. Luevano also could have brought her claims of error to the attention of the district court by filing a motion for reconsideration, which effectively would have tolled the time for Luevano to appeal that dismissal. *See Adams*, 874 F.2d at 395 (appeal period can be tolled by a motion for reconsideration). Luevano did not file a notice of appeal within 30 days after July 14 and she never raised the purported errors in the district court (so as to toll the 30-day period). Because she failed to do so, this Court lacks

jurisdiction over the district court's dismissal of Luevano's First Complaint on July 9, 2010. *See* Fed. R. App. P. 4.

Furthermore, Luevano failed to include in her Notice of Appeal or Docketing Statement the Order dismissing her Complaint on July 9, 2010. Because she did not do so, that order is not properly before this Court for this additional reason as well. *See Adams*, 874 F.2d at 395 (explaining that the Notice of Appeal presents to the appellate court only the decision identified); Fed. R. App. P. 3(c); *See also Trustees of the Electricians Salary Deferral Plan v. Wright*, 688 F.3d 922, 925 n.2 (8th Cir. 2012) (even for *pro se* litigants, intent to appeal must be apparent and there must be no prejudice to the adverse party; declining to consider plaintiff's argument that the district court erred in denying her request for appointment of counsel because the intent to appeal that intermediate order was not apparent from the notice of appeal). Luevano does not argue in her brief that Wal-Mart will not be prejudiced by this Court's review of the July 9 Order. Nor can she, given that Wal-Mart has been forced to defend this Appeal (including filing a motion to dismiss and an earlier appellate brief) and Luevano's lack of diligence in pursuing this appeal has added further time, expense, and delays.

Luevano contends in her brief that she was required to raise her objection to the district court's July 9 dismissal under Section 1915 only after the district court's final order on March 24, 2011, *citing Habitat Educ. Ctr. v. U.S. Forest Serv.*, 607 F.3d 453, 456 (7th Cir. 2010) for the general principle that when a final order is appealed, the appellant can challenge any interlocutory rulings. But *Habitat* did

not address the requirement of notice under Fed. R. App. P. 3, nor did Luevano address in her opening brief why she failed to provide the required notice that she intended to appeal the earlier ruling. For all the foregoing reasons, Luevano's challenges to the July 9, 2010, Order are not properly before this Court.

II. Even If The Dismissal Of The First Complaint Could Be Challenged Now, The District Court Was Correct In Dismissing Both Counts Of The Original Complaint.

If this Court reaches Luevano's substantive argument that the district court's dismissal of the First Complaint was incorrect, the district court's dismissal of that Complaint should nevertheless be affirmed. As a matter of policy, Congress, both through Title VII and 28 U.S.C. § 1915, established schemes for the screening of employment discrimination allegations and *pro se* complaints to streamline proceedings in the federal courts. In particular, Title VII includes a charge-filing requirement with short time limits, and an administrative process through the EEOC that provides for the initial assessment, investigation, and conciliation of employment discrimination claims before they ever reach the courts. In this instance, the administrative process worked – the EEOC properly exercised its role to assess each of Luevano's Charges, determined them to be without merit, and expeditiously issued the Notice of Dismissal and Right to Sue for each Charge.[4] The

[4] EEOC's Priority Charge Handling Procedures adopted in 1995, set out a scheme as to how best to use its limited resources. At the outset the EEOC categorizes Charges with an A, B, or C priority. Charges with an A are considered to be most in need of investigation, Charges with a B are to be investigated as resources permit, and Charges with a C are designated as ready for immediate dismissal without further investigation. www.eeoc.gov/eeoc/litigation/manual/1-3-a_intro.html. In this instance, the EEOC dismissed each of Luevano's Charges within a matter of days, a signal that they were not meritorious Charges.

district court also properly exercised its role to screen Luevano's First Complaint under 28 U.S.C. § 1915.

As such, this Court should reject each of the three alleged errors that Luevano contends the district court made in its July 9, 2010, Order. First, the district court did not fail to apply the lenient pleading standard used to construe *pro se* complaints. Second, the district court did not fail to apply the correct legal standard for supervisor-based hostile work environment claims because this case does not involve supervisor-based harassment. Third, the district court correctly dismissed both the harassment claim and the retaliation claim in the First Complaint.

A. The District Court Properly Considered Pleading Standards Applicable To *Pro Se* Complaints.

Luevano leans heavily on the fact that she initiated her lawsuit against her employer Wal-Mart as a *pro se* plaintiff. Indeed, Luevano's Brief is littered with references to her *pro se* status (*see, e.g.,* Br. at 14, 18, and 27-29) and she takes every opportunity to repeat her mantra that courts are supposed to be lenient with *pro se* parties. Wal-Mart does not dispute the general principle that lenient pleading standards apply to *pro se* complaints. But even a *pro se* litigant is not excused from compliance with legal standards that are designed to protect defendants from baseless claims and costly discovery as outlined in *Ashcroft v. Iqbal,* 556 U.S. 662, 685-86 (2009). Moreover, when a *pro se* plaintiff is seeking to proceed *in forma pauperis*, the district court must screen the complaint under 28 U.S.C. § 1915.

As courts repeatedly have explained, one of the primary purposes of 28 U.S.C. § 1915 is to ensure that before a Court determines that a plaintiff should be relieved of the obligation to pay the filing fees associated with initiating a lawsuit, the Court must conduct an initial screening of the complaint to determine whether the complaint states a claim under the standards enunciated in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) and *Iqbal*. *See Arnett*, 658 F.3d at 751-52 (affirming district court's dismissal for failure to state a claim against certain defendants under 28 U.S.C. § 1915 screening of complaint tied to in forma pauperis petition).

The district court conducted the required screening of Luevano's First Complaint, and as a result, dismissed it without prejudice, after concluding that it failed to state a claim for relief under the pleading standards set forth in *Iqbal* and *Twombly.*[5] [A. 7-8]. In reaching that conclusion, the district court not only considered the allegations in Luevano's First Complaint but also Luevano's handwritten statement and the police report, both of which were attached to Luevano's Complaint. [A 7-8]. Based on that deep dive review, the district court correctly concluded that no plausible inference could be drawn that the conduct about which Luevano complained in her pleadings was sexual in nature but instead was "generally threatening and intimidating" – conduct which does not implicate the protections of Title VII. [A. 7-8].

[5] Under *Iqbal*, the district court was not required to accept allegations that were conclusory, such as the first sentence of Luevano's First Complaint: "I have been subjected to a hostile and offensive work environment." *Iqbal*, 556 U.S. at 678: "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."

In fact, Luevano concedes in her Brief that her First Complaint did not state a claim for co-worker sexual harassment. [Br. at 21]. As discussed in Section (2) below, that concession is fatal. But even if it were not, Luevano has pointed to no allegations in her First Complaint that give rise to a plausible claim for relief that she was discriminated against because of her sex or that she was retaliated against because she complained about such unlawful discrimination. Instead, Luevano points to the fact that she checked the boxes marked sex discrimination and retaliation and attached "a page long description to the complaint alleging specific facts related to her supervisor's harassing and retaliatory conduct." [Br. at 20]. She then cites *Swanson v. Citibank N.A.,* 614 F.3d 400, 406-06 (7th Cir. 2010), as support for her argument that the district court failed to apply lenient pleading standards to her *pro se* Complaint.

The problem with Luevano's argument, however, is that unlike the plaintiff in *Swanson* (who pleaded that the alleged discrimination was based upon a protected characteristic), Luevano failed to plead that the alleged harassment – in the form of verbal abuse – was sexual in nature or otherwise based upon her sex. In pertinent part, Luevano alleged that the co-worker was "angry", "invaded [her] space," said he "hates her," and said that he "respects dirt more than her." [A. 26, 32]. Luevano also alleged that when she complained to her supervisor, who was male, the supervisor (allegedly) said "he understood [the] harasser because he's a male" and that "management made excuses for [the associate's] disorderly conduct." [A. 26]. As the district court correctly concluded, these allegations have nothing to

do with sex and thus dismissal of Luevano's sex discrimination claim in her First Complaint was proper.[6] *Oncale v. Sundowner Offshore Servs. Inc.,* 523 U.S. 75, 80 (1998) ("Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at discrimination because of sex.").

B. Luevano Did Not Plead That She Was Subjected To Sexual Harassment By Her Supervisor, And Thus The District Court Was Correct In Dismissing The First Complaint.

Luevano did not allege in her First Complaint (or in the attachments thereto) that her supervisor harassed her because of her sex. Luevano's First Charge, attached to her First Complaint, does not identify anyone as the alleged harasser, and her handwritten First Complaint and attachments identify the alleged harasser as a co-worker, as Luevano concedes in her Brief. [Br. 21]. As much as Luevano tries to turn this lawsuit into a case of supervisor harassment, it was not and is not such a case. The district court correctly described the allegations in this case as co-worker harassment (albeit not sexual in nature), based on the four corners of Luevano's Complaint and the documents attached thereto. In the police report she attached to her Complaint, Luevano identified the alleged harasser as another People Greeter at Wal-Mart, not a supervisor.[7] [A. 32]. Luevano's handwritten allegations also described the alleged harasser as an Associate, not a supervisor.

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[6] As discussed in Section (c) below, dismissal of Luevano's retaliation claim was proper because no plausible inference can be drawn that Luevano made a complaint that was protected by Title VII.

[7] In the Third Complaint and Fourth Complaint, both drafted and filed after Luevano was represented by counsel, the Factual History section of the Complaints contained, under the subheading "Harassing Conduct Against Luevano," allegations that focus solely on the alleged conduct of "a male associate, employed by and working for defendant as a People Greeter." (A. 48-59 at Paragraphs15-19; A. 61-73. at Paragraphs 18-22)

[A. 26]. Luevano admits in her Brief at page 21 that she "did not plead facts in her First Complaint that the coworker harassed her because of her sex." [Br. 21].

Put simply, there is nothing in the First Complaint that gives rise to any inference that Luevano was claiming that she was harassed by her supervisor, much less a plausible claim. While a court must accept factual allegations as true, some factual allegations "will be so sketchy or implausible" that they fail to provide sufficient notice to defendants of the plaintiff's claim. *Brooks v. Ross*, 578 F.3d 574 (7th Cir. 2009) (affirming dismissal on the pleadings for failure to state a claim where plaintiff "failed to ground his legal conclusions in a sufficiently plausible factual basis," applying *Iqbal* and *Twombly* pleading standards); *see also EEOC v. Concentra Health Servs., Inc.,* 496 F.3d 773, 776 (7th Cir. 2007) (affirming dismissal of Title VII retaliation claim for failure to state a claim and reiterating that the allegations in a complaint under Title VII "must plausibly suggest that the plaintiff has a right to relief, raising the possibility above a speculative level; if they do not, the plaintiff pleads itself out of court."). As such, the district court properly dismissed Luevano's sex discrimination claim.

C. The District Court Correctly Dismissed The Retaliation Claim.

The district court also correctly dismissed the retaliation claim. Title VII allows a claim for retaliation where an employee can establish that her employer retaliated against her because she "opposed a practice made an unlawful employment practice" by Title VII. 42 U.S.C. § 2000e-3(a). Because the district court determined that Luevano had not pleaded that the alleged harassment by her

co-worker was based on sex, it logically follows that the retaliation claim as pleaded in the First Complaint was not viable because Luevano could not have had a good faith belief that the conduct about which she allegedly complained was a violation of Title VII. *O'Leary v. Accretive Health, Inc.*, 657 F.3d 625, 631 (7th Cir. 2011) (finding that male employee did not engage in protected activity in support of Title VII retaliation claim when he reported comments a female supervisor made at a dinner, where reasonable employee would not believe the remarks constituted severe or pervasive harassment based on sex).

To state a claim for retaliation, Luevano had to have both an objective and subjective belief that the conduct about which she allegedly complained was a violation of Title VII. *Id.* at 631. Here, Luevano complained that her co-worker was verbally abusive towards her and subjected her to threats such that she feared for her safety, not that her co-worker had engaged in any conduct that objectively or subjectively was sexual in nature or directed at her because of her sex.[8] Because Luevano's complaint to Wal-Mart was not about conduct protected by Title VII, the district court correctly dismissed Luevano's retaliation claim.

[8] Even if this Court accepts Luevano's contention that the district court "ignored" the allegations related to her retaliation claim (Br. 23), this Court can affirm for any reason in the record. *Brooks*, 578 F.3d at 578. Since there is nothing in the record to support a plausible claim of retaliation for engaging in protected activity, the district court's dismissal of the retaliation claim should be affirmed. *Concentra*, 496 F.3d at 776.

III. The District Court's Dismissal Of Luevano's Fourth Complaint Should Be Affirmed Because Luevano's Claims Were Untimely And Equitable Tolling Does Not Apply.

As to the district court's dismissal of Luevano's Fourth Complaint, all of Luevano's arguments were waived or are unavailing, and the district court's decision should be affirmed.

A. Luevano's Sex Discrimination And Retaliation Claims In The Fourth Complaint That Are Based On Luevano's First Charge Are Time Barred.

Under Title VII, plaintiffs have only ninety days in which to file a lawsuit after he or she has received a right to sue letter. 42 U.S.C. § 2000e-5(f)(1).

> For purposes of the statute of limitations, when an [*in forma pauperis* ("IFP")] petition is submitted to the clerk, the court will temporarily suspend or toll the limitations period while the court determines whether to grant or deny the IFP petition. However, the limitation period resumes running upon the date the plaintiff receives notification of the denial.

Humphries v. CBOCS West, Inc., 343 F. Supp.2d 670, 673 (N.D.Ill. 2004) (*citing Williams-Guice*, 45 F.3d at 162).

Luevano pleaded that she received her First Right to Sue on April 1, 2010. [A.24]. Plaintiff did not file her Complaint with the Court until June 28, 2010, two days before the statutory deadline (or 88 days after the date on which she received her First Right to Sue). [A. 22]. Luevano also filed a motion to proceed *in forma pauperis* ("IFP") on June 28, 2010, which temporarily tolled the 90-day statute of limitations period while Plaintiff's IFP petition was pending. *See Humphries*, 343 F. Supp. 2d at 673. On July 9, 2010, the district court denied Luevano's petition to proceed *in forma pauperis* and dismissed her First Complaint for failure to state a

claim. [A. 7-8]. Therefore, the 90-day limitations period began to run again on the date Luevano received notification that the Court denied her IFP petition and dismissed her Complaint.

Taking into account three days for mail service pursuant to Federal Rule of Civil Procedure 6(d) subsequent to the issuance of the Court's July 9, 2010 Order, and the two days "remaining on the statute of limitations clock," Luevano had until July 14, 2010 to file her Amended Complaint. *Id.* At 675 (noting that plaintiff had until "the end of the limitations period, to file a timely complaint.") *Id.* However, Luevano did not file her Motion to Amend the Complaint, her draft Amended Complaint, or her second petition to proceed *in forma pauperis* until August 4, 2010 – 20 days after the 90-day limitations period on the First Charge had run. Consequently, the district court correctly ruled Luevano's claims based on the First Charge in the Fourth Complaint were time-barred.

B. The District Court's Decision Not To Apply The Doctrine of Equitable Tolling To Save Luevano's Claims Was Not An Abuse of Discretion.

Luevano tries to avoid the effect of the statute of limitations issue by shifting the burden of compliance with the 90-day limitations period from Luevano to the district court. As an initial matter, as set forth in Section 1 below, portions of Luevano's equitable tolling argument are waived. But even if Luevano's argument is not considered waived, the district court's dismissal of Luevano's Fourth Complaint nevertheless should be affirmed because the district court did not affirmatively mislead Luevano or otherwise stand in her way of complying with her obligations under Title VII to file a timely lawsuit. *See Arnett,* 658 F.3d at 756

(district court was not required to inform plaintiff that he could amend his complaint, or that he should; "fomenting litigation is not part of the judicial function" and "district judges are not required to solicit more litigation spontaneously.") (citations omitted).

As courts repeatedly have explained, "equitable tolling is a doctrine to be applied sparingly in Title VII cases." *Jones v. Res-Care, Inc.*, 613 F.3d 665, 670 (7th Cir. 2010) (citation omitted). Moreover, equitable tolling cannot be used by courts "out of a vague sympathy for particular litigants." *MacGregor v. DePaul Univ.*, No. 1:10-cv-00107, 2010 WL 4167965, at *3 (N.D. Ill. Oct. 13, 2010) (quoting *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984)). "A litigant is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, *and* (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Lee*, 635 F.3d at 972 (quotation omitted) (emphasis added). *See* also *Elmore*, 227 F.3d at 1013 (statute of limitations can be equitably tolled when *through no fault of his* own the plaintiff was unable to sue within the limitations period but sued as soon as he possibly could) (emphasis added). Because Luevano made no showing of equitable tolling in the district court, and in fact, she didn't even argue before that court that an extraordinary circumstance prevented her from timely file her Complaint, the district court's dismissal of Luevano's Fourth complaint as to the allegations based on the First Charge should be affirmed.

1. Luevano Waived Her Argument As To Any Extraordinary Circumstances To Support Equitable Tolling Because She Failed To Develop That Argument In The District Court.

Luevano did not argue in the district court that some extraordinary circumstance prevented her from timely filing her Complaint. To the contrary, she only argued (without citing any specific facts) that she had acted in good faith and made no reference whatsoever to any extraordinary circumstance that prevented her from timely filing her initial Complaint. [Dkt. 48, p.5- 6]. Because Luevano failed to make this argument in the district court, she has waived her ability to do so on appeal. "It is axiomatic that an issue not first presented to the district court may not be raised before the appellate court as a ground for reversal." *Domka v. Portage County*, 523 F.3d 776, 783 (7th Cir. 2008) (citation omitted).

2. The District Court's Determination That Luevano Was Not Diligent Was Not Erroneous.

As the district court determined when it granted Wal-Mart's Motion to Dismiss, Luevano did not pursue her rights diligently. In fact, rather than immediately initiating this action after she received her First Right To Sue (as she was advised to do by the EEOC in the notice), Luevano waited 88 days to file suit. Then, after the district court screened Luevano's initial Complaint and dismissed it after finding that it failed to state a claim, Luevano did not act within the time period she had remaining in the limitations period. Nor did she explain to the district court why she could not have done so. Instead, Luevano waited nearly one month before she sought leave to file an amended complaint. As courts have

explained, "[e]quitable tolling does not protect a party who omits ordinary precautions." *Luckett v. Rent-A-Center, Inc.*, 53 F.3d 871, 873 (7th Cir. 1995).

Moreover, even *pro se* litigants are expected to know the statute of limitations. *Jackson v. Astrue*, 506 F.3d 1349, 1356 (11th Cir. 2007) (ignorance of the law is not on its own a basis for equitable tolling); *Davis v. Browner*, 113 F. Supp. 2d 1223, 1227 (N.D. Ill. 2000) ("A presumption exists that the plaintiff could have filed within the statutory period, and he must show why he could not have learned of the deadline through due diligence."). Luevano did not claim in the district court that she was unaware of the statute of limitations. In fact, all she argued in support of her diligence argument was that she filed within a reasonable period of time after the district court's dismissal of her initial Complaint. [Dkt. 48 at 2]. That falls far short of the diligence required of *pro se* plaintiffs to support equitable tolling.

Simply put, Luevano provided the district court with no facts to find that she acted diligently. As such, the district court's conclusion that equitable tolling was not warranted is not an abuse of discretion. *See Montoya v. Chao*, 296 F.3d 952, 958 (10th Cir. 2002) (finding equitable tolling inappropriate where plaintiff presented only "garden variety" excuses).

3. The District Court Also Properly Determined That There Were No Extraordinary Circumstances That Prevented Timely Filing.

Although equitable tolling may be appropriate where the court "takes some action that lulls or misleads a plaintiff into filing late," the district court took no such action here. *See Grzanecki v. Bravo Cucina Italiana*, 408 Fed. Appx. 993, 996

(7th Cir. 2011). In fact, Luevano does not argue that the district court took some affirmative act to mislead her. Instead, Luevano argues that the district court "failed to give adequate notice regarding the subsequent deadlines connected with the nuances of jurisdiction following its dismissal without prejudice" when it dismissed Luevano's Fourth Complaint. [Br. 29]. But Luevano provides no authority to impose such an affirmative obligation on the district court. Indeed, the opposite is true: "District judges have no obligation to act as counsel to pro se litigants." *Arnett*, 658 F.3d at 756 (citation omitted).

Nothing in the July 9 Order even addressed the limitations issue – indeed, there is no evidence in the record that the district court even knew (or was required to know) how much time, if any, remained of the 90-day period for Luevano to file a lawsuit. Moreover, even if the district court had done the calculation to figure out how much time was left on the 90-day statute of limitations when the initial Complaint was dismissed – and Luevano cites no authority that requires a district court to do so – the district court still had no power to extend the deadline. *Lee,* 635 F.3d at 972 (noting that "[a] district judge can't say something like: The statute gives plaintiff 90 days to sue, but this is too short, so I am extending the time to 14 months.")[9] (internal quotation marks omitted).

The district court did not tell Luevano that the 90-day limitations period was no longer applicable, did not give Luevano a set number of days to file an amended complaint, and did not grant Luevano an extension of time to file an amended

[9] There is social utility in statutes of limitations, and this importance "is underscored by the brevity" of the 90-day deadline in employment cases. *Elmore*, 227 F.3d at 1013.

complaint. [*See* A. 7-8]. Nor was Luevano told that if she met the pleading requirements she could (or should) file an amended complaint whenever she wanted. *See Jackson*, 506 F. 3d at 1356 (finding no basis for equitable tolling where plaintiff claims he was misled by the court clerk as the record did not establish that the clerk "deliberately misled [plaintiff] or otherwise actively concealed material information from her"); *Montoya*, 296 F.3d at 958 (finding no basis for equitable tolling when plaintiff claimed that he was "misdirected" by federal agencies because he did not even assert "that he was actively or intentionally misled" by them). For all these reasons, the district court's conclusion that equitable tolling was not warranted is not erroneous.

4. Wal-Mart Has Been Prejudiced And Will Continue To Be Prejudiced If Luevano's Time-Barred Claims Are Revived.

Luevano argues that because Wal-Mart received notice of the lawsuit that Wal-Mart is not prejudiced if equitable tolling applies. While that might have been true had the district court decided to apply equitable tolling in 2010 or early 2011, that is certainly not the case now as 2013 begins. To the contrary, Wal-Mart has been forced to defend this Appeal (including filing a motion to dismiss and an earlier appellate brief) and Luevano's lack of diligence in pursuing this appeal has added further time, expense, and delays. Thus, Luevano's unsupported conjecture that Wal-Mart has not been prejudiced should be disregarded.

C. The District Court Properly Ruled That Claims Alleged In The Second Charge Are Untimely Because They Were Not Brought Within 90 Days Of Luevano's Receipt Of The Second Right To Sue.

The EEOC issued Luevano her Second Right to Sue for her Second Charge on June 30, 2010. [A. 73]. Despite (again) being warned by the EEOC that she would lose her right to sue in federal court if she did not file a lawsuit within 90 days of receiving the notice, Luevano waited until November 23, 2010 to add allegations based on her Second Charge to her lawsuit, well after the 90-day limitations period had expired.

Tellingly, it was not until after Wal-Mart filed its motion to dismiss the Third Complaint that Luevano made any mention of the Second Charge at all. Even then, instead of responding to Wal-Mart's motion by arguing that some of the claims in her Second and Third Complaint were based on the Second Charge, Luevano sought leave to file the Fourth Complaint and, in her motion, admitted that her counsel was not aware of the Second Charge when she filed the Third Complaint (which necessarily belies Luevano's claims on appeal that the Third Complaint's retaliation allegations were based on the Second Charge). [Dkt. 33 at ¶6]. On these facts, the district court correctly found that all claims alleged in the Fourth Complaint based on the Second Charge were untimely because they were not brought within 90 days after Luevano's receipt of the Second Right to Sue. *See* 42 U.S.C. § 2000e-5(f)(1) (plaintiffs must file Title VII suit within 90 days of receiving right to sue notice).

In an effort to save her untimely claims, Luevano contends (for the first time on appeal) (Br. 32, n. 9) that it was merely an "oversight" on her part not to have

attached her Second Right to Sue or her Second Charge to her Second Complaint.[10] But this cannot be the case, given the distinct factual differences between the two Charges and the timeline of events. As the district court correctly decided, Luevano's First Charge and Second Charge make separate and distinct claims and involve separate and distinct time periods. [A. 15-16]. In her First Charge, Luevano alleged that she was harassed by a co-worker and that she was retaliated against by complaining to management. [A. 28, 32]. In her Second Charge, Luevano alleged that after she filed the First Charge – taking her issues outside the workplace to the EEOC – Wal-Mart retaliated against her. [A. 72]. Luevano did not allege in her Second or Third Complaints that she was retaliated against because she complained to the EEOC (which was the basis for her Second Charge). [A. 35-46; A. 48-59]. Moreover, instead of attaching the Second Right to Sue to the Second and/or Third Complaints, Luevano attached the First Right To Sue to both. [A. 46; A. 59].

As such, the district court's decision to dismiss as untimely any claims in the Fourth Complaint based on the Second Charge should be affirmed because the district court correctly found that "Luevano simply never mentioned in either [the Second or Third] Complaint that Wal-Mart retaliated against her for going to the EEOC." (A. 15).

[10] Luevano's argument on appeal that the Fourth Complaint merely corrected a "technical deficiency" designed to plead exhaustion of administrative remedies is waived because it was not brought in the district court. It also misses the point of the district court's dismissal – the Second Complaint (and subsequent untimely Complaints) contained none of the allegations of retaliation encompassed in the Second Charge – that is, that Wal-Mart's retaliation was connected to Luevano's filing of her First EEOC Charge.

D. Luevano Waived Her "Relation Back" Argument By Failing To Argue It In The District Court, And Even So, Her Argument Fails.

Luevano's brief in opposition to Wal-Mart's motion to dismiss the Fourth Complaint contained no argument with respect to her argument now – for the first time on appeal – that relation back under Federal Rule of Civil Procedure 15(c) should have saved the claims she alleged in the Fourth Complaint. Arguments that were not made in the district court cannot be made for the first time on appeal – they are waived. *Domka*, 523 F.3d at 783. But even if the arguments were not waived, it is baseless.

Perhaps Luevano included the argument in her Brief because the district court, in its order dismissing Luevano's Fourth Complaint, made reference to relation back in a footnote. But the district court did not fail to apply the correct legal standard for relation back, as Luevano belatedly argues. Rather, the district court pointed out that "Luevano properly does not assert the third and fourth complaints relate back to one of the earlier complaints." [A. 16, n. 3]. As the district court succinctly noted, the First Complaint and the Second Complaint were untimely and "an amended complaint does not relate back to the filing of the original complaint if the original complaint was untimely itself." *Id. citing Henderson v. Bolanda*, 253 F.3d 928, 931 (7th Cir. 2001) (stating that "it simply makes no sense to hold that a complaint that was dead on arrival can breathe life into another complaint").

For all these reasons, the district court properly determined that Luevano could not proceed on the allegations in the Second EEOC Charge because they were not pleaded until the Fourth Complaint, which she filed far past the 90-day limitations period.

CONCLUSION

The district court's dismissal of Luevano's Fourth Complaint should be affirmed because the (1) district court correctly decided that the claims raised by Luevano in her Fourth Complaint relating to her First Charge were untimely, (2) the district court's decision that equitable tolling should not be applied to save Luevano's untimely claims relating to the second charge was not an abuse of discretion, and (3) the district court correctly decided that the claims raised by Luevano in her Second Charge were not included in either the Second or Third Complaints, and thus also were untimely. Furthermore, to the extent that the district court's July 9, 2010, Order dismissing Luevano's First Complaint is considered as part of this appeal, the district court also was correct in dismissing the Original Complaint and the decision should be affirmed.

WHEREFORE, Defendant-Appellee Wal-Mart Stores, Inc. respectfully requests that this Court affirm the district court's final judgment dismissing Plaintiff-Appellant Tara V. Luevano's Fourth Complaint in its entirety, and award Wal-Mart its costs in defending this matter.

Date: December 28, 2012

Respectfully submitted,

/s/ Norma W. Zeitler

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CERTIFICATE OF COMPLIANCE

I certify that Appellee's Brief complies with the type-volume requirement set forth in Federal Rule of Appellate Procedure 32. Based on the word count program contained in Microsoft Word 2003, with the exception of portions of Appellee's Brief properly excluded under Rule 32(a)(7)(B), Appellee's Brief contains 8,940 words and 736 lines of text.

/s/ Norma W. Zeitler
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CERTIFICATE OF SERVICE

I, the undersigned counsel for Defendant-Appellee, hereby certify that I caused this brief to be electronically filed with the Clerk of the Seventh Circuit Court of Appeals on December 28, 2012, which will send the electronic filing to the persons listed below:

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