UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-11139
Summary Calendar

ILLES P. CSORBA,

Plaintiff-Appellant,

versus

VARO, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Texas
(3:94-CV-1250-T)

(June 6, 1995)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:[*]

Plaintiff-appellant Illes P. Csorba (Csorba), proceeding *pro se*, filed this suit against his former employer, defendant-appellee Varo, Inc. (Varo), on June 16, 1994. In his complaint, Csorba levelled a series of claims and broad, severe accusations against Varo, most stemming from his allegation that Varo wrongfully

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

discharged and refused to rehire him, then conspired with other companies in the field to bar him, violently, "from employment in the entire U.S. industry and education, [and to] isolate him from the scientific community."[1] Csorba's complaint has been construed to attempt to assert the following state and federal claims: wrongful discharge, failure to rehire, defamation, and discrimination and retaliation based on Csorba's age and national origin (Hungary). Varo moved to have Csorba's suit dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6)SQpart because, allegedly, Csorba had failed to demonstrate federal jurisdiction over his claims. The district court granted Varo's motion and, on November 30, 1994, dismissed the entire suit without prejudice.[2] Csorba filed a timely notice of appeal.

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[1] Csorba has alleged that Varo, in an attempt "to scare and drive [his] family from this country," is responsible for, among other things, the burglary of his residence, the death of his dog, assaults on his wife, and the rape and poisoning of his daughter.

[2] With regard only to the state law wrongful-discharge claim, the district court determined that Csorba had failed to state any facts which would fit his claim within the public policy exception to Texas' employment-at-will doctrine. Accordingly, the district court, on this alternative basis, dismissed this portion of the suit under Rule 12(b)(6), but did so without prejudice. Normally, such dismissals are dismissals on the merits and so should be dismissed with prejudice, *Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977), or with leave to amend, whereas dismissals on jurisdictional grounds are without prejudice under Rule 12(b)(1). *Id.* Although the district court here framed its dismissal for lack of jurisdiction also under Rule 12(b)(6), the dismissal should have been made under Rule 12(b)(1), which is the proper basis for dismissing a suit in which the plaintiff's allegations are insufficient to demonstrate federal subject matter jurisdiction because of a failure to exhaust administrative prerequisites to suit. 5A Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1350 (1990 & Supp. 1995). Further, where there is a jurisdictional basis for the dismissal, as here, the district

In its order granting Varo's motion to dismiss, the district court concluded that Csorba's discrimination and retaliation claims should be dismissed for failure to allege a basis for federal subject matter jurisdiction. The district court grounded this conclusion on Csorba's failure to state in his complaint whether he had filed a discrimination charge with the EEOC or whether he had received a right-to-sue letter. *See National Ass'n of Gov't Employees v. City Pub. Serv. Bd. of San Antonio*, 40 F.3d 698, 711 (5th Cir. 1994) (the failure to exhaust administrative remedies constitutes a jurisdictional bar).[3] The district court offered no other basis for the dismissal of the federal discrimination claims, nor has Varo, either below or on appeal. After determining a lack of jurisdiction over the federal claims, the district court concluded it also lacked supplemental or diversity jurisdiction over the state law claims.[4] 28 U.S.C. §§ 1332, 1367.

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court usually should dismiss on that ground only. *Hitt*, 561 F.2d at 608. We thus do not consider this alternative basis (which may well have merit) for the dismissal of the wrongful-discharge claim at this time.

[3] Although the exhaustion of administrative remedies is a jurisdictional prerequisite, the timely filing of a claim within the ninety-day rule of 42 U.S.C. § 2000e-5(f)(1) is not; rather, it is akin to a statute of limitations. *Nilsen v. City of Moss Point*, 701 F.2d 556, 563 (5th Cir. 1983) (en banc); *see also Espinoza v. Missouri Pac. R.R. Co.*, 754 F.2d 1247, 1248 n.1 (5th Cir. 1985).

[4] In his complaint, Csorba failed to allege a basis for diversity jurisdiction, as he did not state his or Varo's state citizenship. On appeal, Csorba repeatedly complains that the district court ignored the fact that he is an American citizen. Diversity jurisdiction over claims brought by Americans against Americans, however, requires that opposing parties not be citizens of the same *state*. 28 U.S.C. § 1332(a)(1). Although we agree with the district court that Csorba has failed to demonstrate the existence of diversity jurisdiction, his state

The jurisdictional basis for the dismissal of Csorba's suit depends ultimately on whether he satisfied the administrative prerequisites to suit by first filing a charge with the EEOC and then obtaining from the agency a right-to-sue letter. Liberally construing Csorba's *pro se* complaint, *Morrow v. FBI*, 2 F.3d 642, 643 n.2 (5th Cir. 1993), we do not agree with the district court that Csorba has not sufficiently alleged the exhaustion of administrative remedies. Csorba refers to an EEOC proceeding against Varo in his complaint, attached to which is a letter written by the clerk of court which specifically references not only Csorba's EEOC claim by its EEOC case number but also a right-to-sue letter dated March 10, 1994. Moreover, in his request for appointed counsel, also attached to his complaint, Csorba referenced and gave the date of the EEOC determination as well as a "letter of notification."[5]

Given the above and the fact that Csorba is a *pro se* litigant, we believe that a dismissal was too harsh a penalty for the bare failure to attach the right-to-sue letter, especially as any refiling would likely be time-barred under the ninety-day rule of 42 U.S.C. § 2000e-5(f)(1). *See Price v. Digital Equipment Corp.*, 846 F.2d 1026, 1027 (5th Cir. 1988) (dismissal of suit without prejudice does not toll the ninety-day rule). At the very least, the district court should have directed Csorba to amend or

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law claims may still come under the federal court's supplemental jurisdiction, 28 U.S.C. § 1367(a) & (c), an issue which we do not decide here.

[5] The right-to-sue letter was not itself included in the record until Csorba attached it to his notice of appeal.

conditionally dismissed with leave to amend. *See Tuley v. Heyd*, 482 F.2d 590, 594 (5th Cir. 1973); *see also* 28 U.S.C. § 1653 (allowing amendment of pleadings to cure defective allegations of jurisdiction); 5A Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1350 (1990). We therefore vacate the order of the district court and remand for further proceedings consistent with this opinion.[6]

VACATED and REMANDED

[6] We express no opinion concerning whether Csorba's suit was timely filed within ninety days after he received the right-to-sue letter. 42 U.S.C. § 2000e-5(f)(1); *see Espinoza*, 754 F.2d at 1248-49 (5th Cir. 1985). Neither do we express any opinion concerning the merits of Csorba's state and federal claims or whether any of them are otherwise time-barred.