UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2640

September Term, 2015

YVETTE PHILLIPS

v.

STATE OF MARYLAND, *et al.*

Meredith,
Arthur,
Beachley,

JJ.

Opinion by Arthur, J.

Filed: February 15, 2017

Yvette Phillips brought an employment action against the State of Maryland, the Department of Social Services, and seven of her co-workers or supervisors. Collectively, the defendants filed a motion to dismiss.

After a hearing, the Circuit Court for Prince George's County issued an order dismissing the State alone. Ms. Phillips filed a notice of appeal of that order. Later the court issued an amended order in which it dismissed the remaining defendants. Ms. Phillips did not file another notice of appeal.

We dismiss the appeal, on our own motion, for want of appellate jurisdiction.

PROCEDURAL BACKGROUND

On May 26, 2015, Ms. Phillips, representing herself, filed her complaint in the Circuit Court for Prince George's County. After engaging counsel, Ms. Phillips amended the complaint three times.

The State and the individual defendants moved to dismiss Ms. Phillips's third amended complaint. Ms. Phillips opposed the motion.

The court conducted a hearing on the motion on January 8, 2016. At the end of the hearing, the court stated that it was taking the matter under advisement. The court did not announce a ruling or decision.

On January 20, 2016, the court signed an order granting the State's motion to dismiss, but making no mention of the other defendants. The order was stamped as

received in the clerk's office on January 28, 2016, but was not entered on the docket until June 22, 2016.[1]

Uncertain as to whether the court had overlooked the other defendants, the attorney for the State and the other defendants filed a motion asking the court to amend its order on February 8, 2016. The motion specifically requested that the court expressly dismiss all of the defendants. Meanwhile, on February 9, 2016, Ms. Phillips noted an appeal.

On March 1, 2016, the court entered an order that expressly dismissed all claims against all defendants. The clerk entered that order on the docket on March 8, 2016. Ms. Phillips did not note an appeal from that order.

APPELLATE JURISDICTION

Ms. Phillips poses five questions for appellate review, which we have listed in Appendix A to this opinion. We lack the authority to decide those questions, however, because Ms. Phillips filed a premature appeal and did not appeal from the final judgment in the circuit court.

"This Court has jurisdiction over an appeal when the appeal is taken from a final judgment or is otherwise permitted by law, and a timely notice of appeal was filed." *Doe v. Sovereign Grace Ministries, Inc.*, 217 Md. App. 650, 661 (2014). On the other hand, "'[p]remature notices of appeal,'" filed before the entry of a final judgment, "'are

[1] The defendants had submitted a proposed order that dismissed all defendants, but the court drafted its own order that mentioned the State alone.

generally of no force and effect.'" *Id*. at 662 (quoting *Jenkins v. Jenkins*, 112 Md. App. 390, 408 (1996)).

We have the duty to ask, on our own motion, whether we lack appellate jurisdiction because a notice of appeal was premature. *See Jenkins*, 112 Md. App. at 395-96; *see also Miller and Smith at Quercus, LLC v. Casey PMN, LLC*, 412 Md. 230, 240 (2010) ("we must dismiss a case *sua sponte* on a finding that we do not have jurisdiction"); Md. Rule 8-602(a)(1) ("[o]n motion or on its own initiative, the Court may dismiss an appeal . . . [if] the appeal is not allowed by these rules or other law"). We conclude that the appeal was premature because the order dated January 20, 2016, was not a final judgment.

Md. Rule 2-602(a) states, in pertinent part, that:

> an order or other form of decision, however designated, that adjudicates . . . the rights and liabilities of fewer than all the parties to the action:
>
> (1) is not a final judgment;
>
> (2) does not terminate the action as to any of the claims or any of the parties; and
>
> (3) is subject to revision at any time before the entry of a judgment that adjudicates all of the claims by and against all of the parties.

The order dated January 20, 2016, "adjudicate[d] . . . the rights and liabilities of fewer than all the parties to the action" (Md. Rule 2-602(a)), because it dismissed the claims against the State alone, but did not address the claims against the numerous other defendants. Under the plain terms of Rule 2-602(a), therefore, the order dated January 20, 2016, was "not a final judgment," but a mere interlocutory ruling that was "subject to

revision at any time before the entry of a judgment that adjudicates all of the claims by and against all of the parties."

The court did not enter a final judgment that adjudicated the rights and liabilities of all the parties to the action until March 8, 2016, when the clerk docketed the order dated March 1, 2016. *See* Md. Rule 2-601(d) ("the date of the judgment is the date that the clerk enters the judgment on the electronic case management system docket"). Because Ms. Phillips noted her appeal on February 9, 2016, almost a month before the entry of the final judgment, her appeal was premature. As a result of that "'jurisdictional defect'" (*Doe*, 217 Md. App. at 662 (quoting *Jenkins*, 112 Md. App. at 408)), we lack appellate jurisdiction, unless another rule steps in to save the appeal.

One such savings provision is Rule 8-602(d), which states that "[a] notice of appeal filed after the announcement or signing by the trial court of a ruling, decision, order, or judgment but before entry of the ruling, decision, order, or judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket." Rule 8-602(d) is designed to protect a litigant who files a notice of appeal after the court has announced a decision or an order, but who is so prompt and diligent that her notice of appeal makes it to the clerk's office before the court's written order.

Rule 8-602(d) would have saved the appeal had Ms. Phillips filed her notice after the court signed the order dated March 1, 2016, but before the clerk entered that order on the docket on March 8, 2016. *See McMillan v. Love*, 379 Md. 551, 557 n.6 (2004). Rule 8-602(d) would also have saved the appeal if the court had announced a decision to

dismiss all claims against all defendants at the hearing on January 8, 2016, and Ms. Phillips had appealed before the clerk docketed a written order that reflected that oral decision. *See Bussell v. Bussell*, 194 Md. App. 137, 154 (2010). In this case, however, neither of those contingencies occurred. The court announced no oral ruling or decision at the hearing on January 8, 2016. Nor did Ms. Phillips note any appeal after the court signed the order dated March 1, 2016, whether before or after the clerk entered that order on the docket. Rule 8-602(d), therefore, does not save this appeal.

The only other applicable savings provision[2] is Rule 8-602(e), which states:

> (1) If the appellate court determines that the order from which the appeal is taken was not a final judgment when the notice of appeal was filed but that the lower court had discretion to direct the entry of a final judgment pursuant to Rule 2-602(b), the appellate court, as it finds appropriate, may (A) dismiss the appeal, (B) remand the case for the lower court to decide whether to direct the entry of a final judgment, (C) enter a final judgment on its own initiative or (D) if a final judgment was entered by the lower court after the notice of appeal was filed, treat the notice of appeal as if filed on the same day as, but after, the entry of the judgment.

In other words, if the circuit court had discretion to direct the entry of a final judgment pursuant to Rule 2-602(b), Rule 8-602(e) allows this Court, among other things, to "enter a final judgment on its own initiative." *See*, *e.g.*, *Zilichikhis v.*

[2] Rule 8-202(c) contains another savings provision, but it does not apply in the circumstances of this case. In general, Rule 8-202(c) provides that when a party files a timely post-judgment motion under Rule 2-532, 2-533, or 2-534, it is unnecessary to note an appeal until 30 days after the motion is either withdrawn or decided. Rule 8-202(c) also provides that if a party files a timely post-judgment motion under Rule 2-532, 2-533, or 2-534 after a notice of appeal has been filed, "the notice of appeal shall be treated as filed on the same day as, but after, the entry of a notice withdrawing the motion or an order disposing of it." Rule 8-202(c) has no bearing on this case, because no one filed any post-judgment motions after the docketing of the judgment on March 8, 2016.

Montgomery County, 223 Md. App. 158, 172, *cert. denied*, 444 Md. 641 (2015); *McCormick v. Medtronic, Inc.*, 219 Md. App. 485, 504 (2014). Consequently, we must ask whether the circuit court would have had the discretion to enter a final judgment after it had signed the order dated January 20, 2016, which dismissed the claims against the State, but not against the other defendants.

Under Rule 2-602(b), a circuit court may direct the entry of a final judgment "as to one or more but fewer than all of the . . . parties" if it "expressly determines in a written order that there is no just reason for delay." The order of January 20, 2016, falls within the literal scope of Rule 2-602(b), because it adjudicates all of the claims against one of multiple parties: the State. Nonetheless, under Rule 2-602(b), a circuit court's discretion is "very 'narrow' and is 'circumscribed by strong policy considerations' disfavoring piecemeal appeals.'" *Doe*, 217 Md. App. at 666 (quoting *Canterbury Riding Condo. v. Chesapeake Investors, Inc.*, 66 Md. App. 635, 648 (1986)).

In our view, the circuit court, if asked, could not have properly exercised its discretion to transform the order dated January 20, 2016, into a final judgment under Rule 2-602(b). Under Maryland jurisprudence, Rule 2-602(b) is reserved for the "very infrequent harsh case" (*Silbersack v. ACandS, Inc.*, 402 Md. 673, 679 (2009)), such as a case in which long delay would result in extreme financial hardship. *See Doe*, 217 Md. App. at 667 (discussing *Curtiss-Wright v. Gen. Elec. Co.*, 446 US. 1 (1980)). Yet, not only would Ms. Phillips suffer no such hardship in waiting (six weeks) for the court to adjudicate all claims against all defendants, but the entry of final judgment as to the State

alone would have violated the strong policy against piecemeal appeals, because it would have necessitated multiple appeals involving related parties and the same subject matter. *See Doe*, 217 Md. App. at 667. In short, because the circuit court could not have employed Rule 2-602(b) to transform the order dated January 20, 2016, into a final judgment, we cannot transform that order into a final judgment under Rule 8-602(e).

In response to this Court's order to show cause why the appeal should not be dismissed for lack of appellate jurisdiction, Ms. Phillips argued that her adversaries' motion to amend the order dated January 20, 2016, was in the nature of a post-judgment revisory motion under Rule 2-535, because it was filed more than 10 days after that order. As a revisory motion, she argued, the motion would not stay the time for taking an appeal from the order dated January 20, 2016. The difficulty with Ms. Phillips's argument is that it assumes what she has to prove – that the order dated January 20, 2016, was a final judgment. The motion to amend the order dated January 20, 2016, would not count as a motion to revise a *judgment* (as opposed to a motion to revise an *interlocutory ruling* that was subject to revision at any time before the entry of a final judgment) unless the order dated January 20, 2016, was itself a final judgment. As previously demonstrated, however, that order was plainly not a final judgment, because it "adjudicate[d] the rights and liabilities of fewer than all the parties to the action." Md. Rule 2-602(a).[3]

[3] Although Ms. Phillips does not argue that the order dated January 20, 2016, falls within one of the narrow exceptions to the rule that one can appeal only from a final judgment (*see*, *e.g.*, *FutureCare NorthPoint, LLC v. Peeler*, 229 Md. 108, 118 (2016)),

In summary, Ms. Phillips took a premature appeal from an order that was not a final judgment. When the court later entered a final judgment that adjudicated the rights and liabilities of all of the parties, Ms. Phillips did not note another appeal. Consequently, we lack appellate jurisdiction and must dismiss her appeal.[4]

APPEAL DISMISSED. COSTS TO BE PAID BY APPELLANT.

we have considered that issue and have concluded that it does not. Because the court would not have had discretion to direct the entry of a final judgment under Rule 2-602(b), the only applicable exceptions are the statutory exceptions in Md. Code (1973, 2013 Repl. Vol.), § 12-303 of the Courts and Judicial Proceedings Article and the collateral order doctrine. The order does not fall within any of the statutory exceptions in § 12-303, which concerns, for example, orders concerning writs of attachment, injunctions, and receiverships, orders depriving a parent of the care and custody of a child, and orders staying arbitration. The order does not fall within the collateral order doctrine because it is not collateral to the merits (rather, it goes directly to the merits of the case against the State), and because it would be effectively reviewable on appeal from a final judgment. *See Maryland Bd. of Physicians v. Geier*, 225 Md. App. 114, 130 (2015).

[4] Even if we had appellate jurisdiction, however, we would conclude that the circuit court did not err in dismissing Ms. Phillips's third amended complaint. *See* Appendix B.

APPENDIX A

Phillips phrased her questions presented as follows:

1. Was the trial court's dismissal of Appellant's constitutional claims Liberty Interest (count 1) and Property Interest (count 2) pursuant to Article 24 of the Maryland Declaration of Rights legally correct when section 11-305 states that skilled and professional service employees are granted certain statutory protections regarding their continued employment?

2. Was the trial court's dismissal of the Appellant's claim for Defamation (count 3), Wrongful Discharge (count 12) and Negligence (count 13) legally correct when the Appellant has satisfied the administrative procedures pursuant to the Maryland Tort Claims Act and has sufficiently plead that the individual Appellee's conduct, in the scope of their employment, was performed with malice or gross negligence?

3. Was the trial court's dismissal of the Appellant's claim for Discrimination, Pursuant to the Maryland Fair Employment Practices Act (count 4), Failure to Accommodate, Pursuant to the Maryland Fair Employment Practices Act (count 5), Disparate Treatment Based on Disability in Violation of Title VII of the Civil Rights Act (count 6), Retaliation in Violation of the Civil Rights Act (count 7), Hostile Work Environment in Violation of Title VII (count 8), and Failure to Accommodate in violation of Title VII of the Civil Rights Act (count 14) legally correct when the Appellant satisfied all administrative remedies pursuant to the Title VII and the Maryland Fair Employment Practices Act?

4. Was the trial court's dismissal of the Appellant's claim for Breach of Contract (count 9) and Promissory Estoppel (count 10) legally correct when the Appellant alleged that she in fact had in possession a written contractual agreement and alleged with certainty and definiteness facts showing contractual obligation owed by the Appellee to the Appellant?

5. Was the trial court's dismissal of the Appellant's claim for violation of the Family Medical Leave Act ("FMLA") (count 14), legally correct when the Appellant has alleged FMLA violations within the statute of limitations?

APPENDIX B

Count	Legal Theory	Defendant	Reason for Dismissing
I	Violation of Property Interest in Violation of the Due Process Clause of Article 24 of the Maryland Declaration of Rights	State of Maryland and the "State of Maryland Department of Social Services"	A. The Maryland Tort Claims Act ("MTCA") establishes a limited waiver of the State's immunity in certain actions if specific procedural conditions are met. Md. Code (1984, 2014 Repl. Vol.), 12-106(b), of the State Government Article ("SG"). Under the MTCA, "a claimant may not institute an action . . . unless: (1) the claimant submits a written claim to the Treasurer or a designee of the Treasurer within 1 year after the injury to person or property that is the basis of the claim; (2) the Treasurer or designee denies the claim finally; and (3) the action is filed within 3 years after the cause of action arises." SG § 12-106(b)(1)-(3). Ms. Phillips asserts that she mailed a signed letter of complaint to the Office of the State Treasurer on October 24, 2014. Pursuant to the MTCA, the State would be deemed to have received notice for injuries that allegedly occurred up to one year before her October 24, 2014, letter. However, this count relates to injuries Ms. Phillips claims to have sustained as a result of her purportedly wrongful termination in May 2015. Therefore, the State did not waive its sovereign immunity, because Ms. Phillips failed to comply with the mandatory notice requirement of the MTCA.
		The Individual Defendants	B. A claim against an individual classified as State personnel that sufficiently alleges malice or gross negligence falls outside of the MTCA, and the State Treasurer does not require early notice. *Barbre v. Pope*, 402 Md. 157, 181-82 (2007). Ms. Phillips's claims are subject to the MTCA because she did not sufficiently allege malice or gross negligence in her claims against any of the individual defendants. The individual defendants retain their immunity from suit and liability because Ms. Phillips failed to comply with the mandatory notice requirement.

Count	Legal Theory	Defendant	Reason for Dismissing
II	Violation of Liberty Interest in Violation of the Due Process Clause of Article 24 of the Maryland Declaration of Rights	State of Maryland and the "State of Maryland Department of Social Services"	A. Same as Count I(A).
		The Individual Defendants	B. Same as Count I(B).
III	Defamation	State of Maryland and the "State of Maryland Department of Social Services"	A. Same as Count I(A).
		The Individual Defendants	B. Same as Count I(B).

Count	Legal Theory	Defendant	Reason for Dismissing
IV	Discrimination in Violation of the Maryland Fair Employment Practices Act ("MFEPA")	State of Maryland and the "State of Maryland Department of Social Services"	A. Same as Count I(A).
		The Individual Defendants	B. Same as Count I(B).
		All	C. Additionally, this claim is barred by the statute of limitations. A plaintiff may bring a civil action under the MFEPA if: (1) the complainant initially filed a timely administrative charge or a complaint under federal, State, or local law alleging an unlawful employment practice by the respondent; (2) at least 180 days have elapsed since the filing of the administrative charge or complaint; and (3) the civil action is filed within two years after the alleged unlawful employment practice occurred. SG § 20-1013(a). Ms. Phillips did not satisfy the statute of limitations because she filed her complaint over two years after the last discriminatory act identified in her administrative charges. Furthermore, Ms. Phillips failed to exhaust her administrative remedies for discriminatory acts that she contends occurred in violation of the MFEPA between 2013 and May 14, 2015, because she failed to identify them in her administrative charges.

Count	Legal Theory	Defendant	Reason for Dismissing
V	Failure to Accommodate in Violation of the MFEPA	All	A. Same as Count IV(C). B. This claim is based on Ms. Phillips's association with her disabled son. To establish a prima facie case for a failure to accommodate claim, an employee must first show that he or she has a disability. 29 C.F.R. app. § 1630; *Peninsula Reg'l Med. Ctr. v. Adkins*, 448 Md. 197, 213 (2016). Ms. Phillips does not suffer from any disability, nor does she allege that she suffers from one. Therefore, she cannot establish a prima facie case for failure to accommodate.
VI	Disparate Treatment Based on Disability in Violation of Title VII	All	A. This count fails to state a claim upon which relief can be granted. Title VII does not protect against employment discrimination on the basis of disability. *See* 42 U.S.C. § 2000e-2(a). B. Even if analyzed under the Americans with Disabilities Act ("ADA"), this claim is barred by the statute of limitations. Ms. Phillips filed her complaint almost four years after the most recent discriminatory act for which she brought a timely EEOC charge. *See Semenova v. Maryland Transit Admin.*, 845 F.3d 564, 567 (4th Cir. 2017); *Innes v. Bd. of Regents of Univ. Sys. of Maryland*, 29 F. Supp. 3d 566, 572 (D. Md. 2014) (ADA claims are subject to a three-year statute of limitations).

Count	Legal Theory	Defendant	Reason for Dismissing
VII	Retaliation in Violation of Title VII	All	A. Ms. Phillips failed to exhaust her administrative remedies because she did not file an EEOC charge alleging retaliation. Before a plaintiff may bring a civil action under Title VII, she must exhaust her administrative remedies by filing a timely administrative charge. 42 U.S.C. § 2000e-5(e). However, a retaliation claim may be raised for the first time in a civil action by relating back to a previous EEOC charge if the alleged retaliatory conduct arose from the EEOC charge and occurred after the charge was filed. *Jones v. Calvert Grp., Ltd.*, 551 F.3d 297, 302-03 (4th Cir. 2009). Therefore, allegations of retaliatory conduct that predated her September 13, 2012, EEOC charge are not properly before us, because she failed to exhaust her administrative remedies. Additionally, a court may consider a retaliation claim that relates back to an EEOC charge only where the EEOC charge is properly before the court. *See, e.g.*, *Jones*, 551 F.3d at 304. Because Ms. Phillips's EEOC charges are barred by the statute of limitations and are not properly before us, her claim for retaliatory conduct that allegedly occurred after September 13, 2012, has no charge on which to attach itself and must also be dismissed for failure to exhaust administrative remedies.
VIII	Hostile Work Environment in Violation of Title VII	All	A. Ms. Phillips failed to exhaust her administrative remedies because she never alleged a hostile work environment in either of her EEOC charges. Her EEOC charges state two generalized allegations of harassment, which are devoid of the specifics necessary to support a hostile work environment claim. *See Byington v. NBRS Fin. Bank*, 903 F. Supp. 2d 342, 351 (D. Md. 2012).

Count	Legal Theory	Defendant	Reason for Dismissing
IX	Breach of Contract	All	A. This claim fails to state a claim upon which relief can be granted. The State waives its statutory immunity in contract actions only where there is "a written contract that an official or employee executed for the State or 1 of its units while the official or employee was acting within the scope of the authority of the official or employee." SG § 12-201(a). Ms. Phillips's complaint does not adequately allege that the defendants entered into a written contract sufficient to waive sovereign immunity.
X	Promissory Estoppel	All	A. This claim fails to state a claim upon which relief can be granted. The State and its officers waive sovereign immunity only where there is a written contract, not an obligation that arises through promissory estoppel. *See Md. Transp. Auth. Police Lodge No. 34 of Fraternal Order of Police, Inc. v. Md. Transp. Auth.*, 195 Md. App. 124, 219-20 (2010), *rev'd on other grounds*, 420 Md. 141 (2011). Accordingly, Ms. Phillips's claim for promissory estoppel is barred by sovereign immunity.

Count	Legal Theory	Defendant	Reason for Dismissing
XI	Violation of the Family and Medical Leave Act	All	A. FMLA claims have a two-year statute of limitations, unless an action is brought for a willful violation, in which case the statute of limitations is three years. 29 U.S.C § 2617(c)(1)-(2). Ms. Phillips initially alleged an FMLA violation in her first amended complaint, which she filed on August 11, 2015. Therefore, even if she sufficiently alleged willful violations, any incidents that occurred before August 11, 2012, fall outside of the three-year statute of limitations. Ms. Phillips's FMLA interference claim fails because her allegations of conduct that occurred after August 11, 2012, fail to show that the defendants discouraged or denied her from utilizing her FMLA rights. Ms. Phillips's FMLA retaliation claim also fails to state a claim upon which relief can be granted. Ms. Phillips failed to allege a prima facie case of retaliation because she did not plead facts sufficient to establish that she took FMLA leave after August 2012, or that her employer knew she had taken FMLA leave. *See Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 657 (4th Cir. 1998); *Bosse v. Baltimore Cty.*, 692 F. Supp. 2d 574, 588 (D. Md. 2010).

Count	Legal Theory	Defendant	Reason for Dismissing
XII	Wrongful Discharge	State of Maryland and the "State of Maryland Department of Social Services"	A. Same as Count I(A).
		The Individual Defendants	B. Same as Count I(B).
XIII	Negligence	State of Maryland and "the State of Maryland Department of Social Services"	A. Same as Count I(A).
		The Individual Defendants	B. Same as Count I(B).
XIV	Failure to Accommodate in Violation of Title VII	All	A. Same as Count VI(A). B. However, if analyzed under the ADA, same as Count V(B).