

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

EVELYN KOZLOWSKI	:	
Plaintiff	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 99-4338
EXTENDICARE HEALTH SERVICES, INC.	:	
and NORTHERN HEALTH FACILITIES, INC.	:	
Defendants	:	

**MEMORANDUM AND ORDER**

YOHN, J. February , 2000

Plaintiff Evelyn Kozlowski brought suit against her former employers, defendant Extendicare Health Services, Inc. and defendant Northern Health Facilities, Inc., for discrimination in violation of Title VII of the Civil Rights Act of 1964 [“Title VII”], 42 U.S.C. § 2000e-2, the Age Discrimination in Employment Act [“ADEA”], 29 U.S.C. § 623, and the Pennsylvania Human Relations Act [“PHRA”], 43 Pa. Cons. Stat. § 955.<sup>1</sup> Pending before the court is the defendants’ motion to dismiss (Doc. No. 4).

Because the plaintiff did not cooperate with the investigation of her claim by the Equal Employment Opportunity Commission [“EEOC”] as Title VII required her to do and, thus, failed to exhaust her administrative remedies, the court will grant the defendants’ motion to dismiss with respect to the plaintiff’s Title VII claim (Count II) and will dismiss that claim with prejudice. Because it is unclear that the plaintiff’s failure to cooperate occurred within the sixty-

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<sup>1</sup>In Count III, the plaintiff attempts to state a claim for the violation of 42 U.S.C. § 1981a. *See* Am. Compl. ¶¶ 49-52. Because 42 U.S.C. § 1981a only provides for the recovery of damages and does not create a separate cause of action, the court will not address Count III as a claim and will consider 42 U.S.C. § 1981a when and if damages are determined.

day period during which cooperation is required by the ADEA, the court will deny the defendants' motion to dismiss with respect to the plaintiff's ADEA claim (Count I). Because the plaintiff filed this suit before the expiration of the required one year period of exclusive Pennsylvania Human Relations Commission ["PHRC"] jurisdiction and, thus, failed to exhaust her administrative remedies as required by the PHRA, the court will grant the defendants' motion to dismiss with respect to the plaintiff's PHRA claim (Count IV) and will dismiss that claim without prejudice.

## **I. Background**

The amended complaint contains the following allegations. The plaintiff was hired by the defendants on September 9, 1989, to be a business office manager at one of the defendants' nursing homes. *See* Am. Compl. ¶ 12. For the next ten years, she worked for the defendants in a variety of positions, eventually being promoted to run the Admissions Department. *See id.* ¶¶ 12-25. As early as 1995 and continuing until the time she left in 1999, the plaintiff suffered discrimination on the basis of her age and her sex, including being passed over for promotions and for raises. *See id.* ¶¶ 17-43. Perceiving that she was about to be forced out of her job, the plaintiff resigned her position on March 5, 1999. *See id.* ¶ 40.

On March 17, 1999, the plaintiff filed a written charge of discrimination with the EEOC and cross-filed it with the PHRC. *See id.* ¶¶ 9.A, 9D. The EEOC issued a Dismissal and Notice of Rights to the plaintiff on May 28, 1999. *See id.* ¶ 9.B. The plaintiff initiated this suit on August 27, 1999. *See* Compl.

## **II. Legal Standard**

The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the complaint. *See Sturm v. Clark*, 835 F.2d 1009, 1011 (3d Cir. 1987). In deciding a motion to dismiss, the court must “accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the [non-moving party].” *Jordan v. Fox, Rothschild, O’Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994). At this stage of the litigation, then, “[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). In deciding a motion to dismiss, a district court also may consider exhibits attached to the complaint and matters of public record. *See Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993). Moreover, “a court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff’s claims are based on the document.” *Id.* (citations omitted).

## **III. Discussion**

Before bringing a suit for judicial relief, a plaintiff must exhaust all required administrative remedies. *See Robinson v. Dalton*, 107 F.3d 1018, 1020 (3d Cir. 1997). If the plaintiff has not exhausted the required administrative remedies before bringing suit, then a Rule 12(b)(6) motion is appropriate. *See Anjelino v. New York Times Co.*, 200 F.3d 73, —, 1999 WL 1085828, at \*11 (3d Cir. Dec. 2, 1999).

### A. Count II: Title VII Claim

Before filing a Title VII suit, a plaintiff must file a timely discrimination charge with the EEOC. *See EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 110 (1988). Once a charge is filed, the EEOC then has at least 180 days<sup>2</sup> in which to attempt to fulfill the purposes for which Congress designed it: “to investigate individual charges of discrimination” and “to settle disputes through conference, conciliation, and persuasion before the aggrieved party [is] permitted to file a lawsuit.” *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *see* 42 U.S.C. § 2000e-5(f)(1). Thus, if a plaintiff fails to cooperate with the EEOC during its 180-day investigation and conciliation period, the plaintiff is preventing the EEOC from even attempting to accomplish, much less actually accomplishing, its congressionally-mandated purpose and is “thwart[ing] the policy underling [sic] the enactment of Title VII.” *McLaughlin v. State Sys. of Higher Educ.*, No. 97-CV-1144, 1999 WL 239408, at \*2 (E.D. Pa. Mar. 31, 1999) (internal quotation marks omitted). For this reason, “a plaintiff whose case has been dismissed by the EEOC for lack of cooperation on her part, may not bring the same Title VII claims in federal court.” *McLaughlin*, 1999 WL 239408, at \*2; *see Duncan v. Consolidated Freightways Corp.*, No. 94 C 2507, 1995 WL 530652, at \*3 (N.D. Ill. Sept. 7, 1995); *Davis v. Mid-South Milling Co.*, No. 89-2829-TUB, 1990 WL 275945, at \*3 (W.D. Tenn. Dec. 14, 1990); *Dates v. Phelps Dodge Magnet Wire Co.*, 604 F. Supp. 22, 27 (N.D. Ind. 1984). *But see Melincoff v. East Norriton Physician Serv., Inc.*, No. CIV. A. 97-4554, 1998 WL 254971, at \*6 (declining to follow the reasoning of other district courts and refusing to bar a Title VII claim despite the plaintiff’s failure to cooperate with the

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<sup>2</sup>The statute permits a complainant to sue after receiving a notice of the right to sue, which the EEOC must issue 180 days after the complainant’s charge is filed or when the EEOC dismisses the charge, whichever is later. *See* 42 U.S.C. § 2000e-5(f)(1).

EEOC). Allowing a plaintiff to bring a Title VII claim after failing to cooperate with the EEOC would “emasculate[] Congressional intent by short circuiting [sic] the twin objectives of investigation and conciliation.” *McLaughlin*, 1999 WL 239408, at \*2 (quoting *Robinson v. Red Rose Communications, Inc.*, No. 97-CV-6497, 1998 WL 221028, at \*3 (E.D. Pa. May 5, 1998)) (alteration in original).

According to the EEOC’s Dismissal and Notice of Rights, the EEOC closed its file on the plaintiff’s charge seventy-eight days after the charge was filed because the plaintiff “failed to provide information, failed to appear or be available for interviews/conferences, or otherwise failed to cooperate to the extent that it was not possible to resolve [her] charge.” Mem. of Law in Supp. of Def.’s Mot. to Dismiss the Am. Compl. (Doc. No. 4) [“Defs.’ Mem.”] Ex. B. Apparently, the plaintiff’s failure “to provide information in response to a set of written questions” was interpreted by the EEOC to constitute a failure to cooperate. Pl.’s Reply to the Mot. to Dismiss of Defs. (Doc. No. 5) [“Pl.’s Resp.”] at 4. The plaintiff argues that she did not need to respond to the EEOC’s letter requesting information because the charge she initially filed with the EEOC was sufficiently detailed to provide all of the information requested by the EEOC. *See id.* There is, however, no support offered for the plaintiff’s assertion that the charge actually contained the information sought by the EEOC nor any indication that the plaintiff alerted the EEOC to the fact that her charge contained that information. Likewise, the plaintiff has not sought reconsideration of her charge by the EEOC.

The EEOC concluded that the plaintiff failed to cooperate with its investigation. The defendants argue that in failing to cooperate with the EEOC, the plaintiff failed to exhaust her administrative remedies as she was required to do by Title VII. *See* Defs.’ Mem. at 8-10. The

court agrees. *See McLaughlin*, 1999 WL 239408, at \*2. This failure to exhaust her administrative remedies is fatal to the plaintiff's Title VII claim, so her Title VII claim is not properly before the court. For this reason, the court will grant the defendants' motion to dismiss with respect to Count II and will dismiss that count with prejudice.

**B. Count I: ADEA Claim**

Under Title VII, a complainant cannot bring suit before receiving a notice of the right to sue from the EEOC. *See* 42 U.S.C. § 2000e-5(f)(1). With respect to the ADEA, however, the Third Circuit has recognized that:

Unlike Title VII . . . [the] ADEA does not require that a right-to-sue letter be first obtained. Rather, a complainant must simply file a charge with the EEOC not less than 60 days before commencing suit, to permit EEOC to attempt to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

*Seredinski v. Clifton Precision Prods. Co.*, 776 F.2d 56, 63 (3d Cir. 1985) (internal quotation marks omitted); *see* 29 U.S.C. § 626(d) (“No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission.”).<sup>3</sup> Thus, the ADEA allows a complainant to bring suit sixty days after the filing of a charge of discrimination without having received a notice of the right to sue.

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<sup>3</sup>In a deferral state like Pennsylvania, a suit cannot be filed until sixty days after the charge of discrimination is filed with the appropriate state authorities instead of the EEOC. *See* 29 U.S.C. § 633(b) (“[N]o suit may be brought under section 626 of this title [the operative section] before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated.”).

In 1991, the ADEA was amended to provide that if a charge filed with the EEOC is dismissed, then the EEOC must notify the complainant of such dismissal and the complainant's right to sue. *See* 29 U.S.C. § 626(e). The amendments also provided that any suit based on a charge dismissed by the EEOC had to be brought within ninety days of the notice of dismissal and the right to sue. *See id.* The 1991 amendments to the ADEA did not, however, change the ability of a complainant to bring suit without waiting for a notice of dismissal and the right to sue as long as the complainant waited sixty days after filing the charge of discrimination. *See McCray v. Corry Mfg. Co.*, 872 F. Supp. 209, 214-16 (W.D. Pa. 1994) (reviewing the legislative history of the 1991 amendments to the ADEA and concluding that a complainant could still bring suit without a notice of dismissal and the right to sue as long as the complainant waited sixty days after filing the charge of discrimination); *Weaver v. Ault Corp.*, 859 F. Supp. 256, 257-59 (N.D. Tex. 1993) (same).

As a Title VII complainant is required to cooperate with the EEOC during the EEOC's 180-day period of exclusive jurisdiction over the complainant's Title VII claim, *see supra* Part III.A, an ADEA complainant should be required to cooperate with the EEOC (or the appropriate state agency) during its exclusive jurisdiction over the complainant's ADEA claim. For an ADEA claim, though, this exclusive jurisdiction lasts for only 60 days instead of the 180 days for a Title VII claim. Thus, a complainant's lack of cooperation after the sixty-day period is irrelevant.<sup>4</sup>

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<sup>4</sup>The parties' memoranda of law do not adequately address the issue of when, in relation to non-cooperation with the EEOC, a complainant may bring suit against a private employer. In her response, the plaintiff cites no cases in support of her assertion that all a complainant need do before bringing suit for an ADEA claim is wait 60 days after filing the charge of discrimination, cooperation or no cooperation. *See* Pl.'s Resp at 6-7. On the other hand, the defendants cite only

In this case, the EEOC dismissed the plaintiff's charge for lack of cooperation seventy-eight days after the plaintiff had cross-filed her charge with the EEOC and the PHRC. *See* Am. Compl. ¶ 9.B. The non-cooperation on which the EEOC focused was apparently the plaintiff's failure "to provide information in response to a set of written questions." Pl.'s Resp. at 4. Because the parties have not provided the court with any indication that this non-cooperation occurred entirely within the sixty-day period, the court has no way of knowing whether this non-cooperation bars the plaintiff's pursuit of her ADEA claim.<sup>5</sup> Therefore, with respect to Count I, the court will deny the defendants' motion to dismiss.

### **C. Count IV: PHRA Claim**

Before filing a PHRA suit, a plaintiff must file a complaint with the PHRC and exhaust the remedies provided for by the PHRA. *See Clay v. Advanced Computer Applications, Inc.*, 559 A.2d 917, 919-20 (Pa. 1989); *Schweitzer v. Rockwell Int'l*, 586 A.2d 383, (Pa. Super. 1990) ("[I]nvocation of the procedures set forth in the [PHRA] entails more than the filing of a

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one case concerning a complainant's cooperation with the EEOC in pursuing an ADEA claim against a non-federal government employer (claims against federal government employers are governed by different parts of the ADEA). *See* Def.'s Reply Br. in Supp. of its Mot. to Dismiss Pl.'s Am. Compl. (Doc. No. 6) ["Defs.' Reply"] at 4 (citing *Green v. Heidelberg U.S.A.*, 854 F. Supp. 511 (N.D. Ohio 1994)). The *Green* opinion does not, however, address the relationship between the timing of the non-cooperation and the 60-day period.

<sup>5</sup>Additionally, if the EEOC was not dealing with the plaintiff's ADEA claim but had deferred to the PHRC, then any failure of the plaintiff to cooperate with the EEOC would appear to be irrelevant to the plaintiff's exhaustion of administrative remedies for her ADEA claim.

complaint; it includes the good faith use of the procedures provided for disposition of the complaint.”). Once the complaint is filed, the PHRC has one year within which to attempt conciliation. *See* 43 Pa. Cons. Stat. § 962(c)(1).

The defendants argue, and the plaintiff does not contest, that if a plaintiff brings suit for an alleged PHRA violation during the PHRC’s one year conciliation period then the plaintiff has not exhausted his remedies as required by the PHRA and is, thus, barred from asserting a PHRA claim. *See* Def.’s Mem. at 5-7. The defendants are correct. *See Walker v. IMS America, Ltd.*, Civ. A. No. 94-4084, 1994 WL 719611, at \*5 (E.D. Pa. Dec. 22, 1994) (holding that a PHRA claim was barred because the plaintiff had stopped the PHRC conciliation process during the one year period provided for by the PHRA); *Lyons v. Springhouse Corp.*, Civ. A. No. 92-6133, 1993 WL 69515, at \*3 (E.D. Pa. Mar. 10, 1993) (same); *see also Schweitzer*, 586 A.2d at 387 (noting that not allowing the PHRC to work toward conciliation during the one year period did not constitute “a good faith attempt to exhaust [the plaintiff’s] remedies under the [PHRA]”). *But see Violanti v. Emery Worldwide A-CF Co.*, 847 F. Supp. 1251, 1258 (M.D. Pa. 1994) (allowing the survival of a PHRA claim despite the filing of the plaintiff’s federal complaint four months before the expiration of the one year conciliation period).

The plaintiff filed her initial complaint in this suit just over five months after filing her administrative complaint with the PHRC. *See* Am. Compl. ¶¶ 9.A, 9.D; Compl. In doing so, she refused to give the PHRC the opportunity to resolve her complaint through conciliation and failed even to make a good faith attempt to exhaust her remedies as required by the PHRA. Thus, the plaintiff’s PHRA claim is not properly before the court. Consequently, the court will grant the defendants’ motion to dismiss with respect to Count IV and will dismiss that count

without prejudice to the plaintiff's right to amend her complaint to reinstate her PHRA claim following the completion of the administrative process if that claim has not been administratively resolved.

#### **D. Continuing Violations**

As an alternative to dismissing the plaintiff's claims in their entirety, the defendants ask the court to dismiss any claims that the plaintiff has made for discrimination occurring in 1995, 1996, 1997, and early 1998. *See* Defs.' Mem. at 10. The reason given for barring these claims is that they fall outside either the 300-day statute of limitations imposed by Title VII and the ADEA or the 180-day statute of limitations imposed by the PHRA. *See id.* The plaintiff argues that these claims should be allowed because the discriminatory acts in the years at issue constituted continuing violations under *Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476 (3d Cir. 1997), and, thus, are actionable outside the 300- or 180-day windows. *See* Pl.'s Resp at 8-9.

The determination of whether or not particular acts of discrimination constituted continuing violations requires a fact-based "inquiry into the nature or subject matter, frequency and permanence of the occurrences." *Bjorklund v. Philadelphia Hous. Auth.*, No. Civ. A. 98-2838, 1999 WL 83944, at \*1 (E.D. Pa. Jan. 22, 1999); *see Rush*, 113 F.3d at 481-82 (performing a very fact-intensive inquiry). Because the plaintiff has pleaded at least one timely discriminatory act, the court declines to consider at this time the question of continuing violations. Such an inquiry is better performed "on a more developed record," such as the one accompanying a motion for summary judgment. *Bjorklund*, 1999 WL 83944, at \*1; *see Ross v. Franklin Mint Co.*, No. Civ. A. 94-7048, 1995 WL 322526, at \*1 (E.D. Pa. May 22, 1995).

#### **IV. Conclusion**

Because the plaintiff failed to exhaust the administrative remedies required by Title VII and the PHRA, the court will grant the defendants' motion to dismiss with respect to Counts II and IV and will dismiss those counts. Because there is no indication that the plaintiff failed to exhaust the administrative remedies provided for by the ADEA insofar as she was required to exhaust them, the court will deny the defendants' motion to dismiss with respect to Count I. An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

EVELYN KOZLOWSKI	:	
Plaintiff	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 99-4338
EXTENDICARE HEALTH SERVICES, INC.	:	
and NORTHERN HEALTH FACILITIES, INC.	:	
Defendants	:	

**ORDER**

YOHN, J.

AND NOW, this    day of February, 2000, upon consideration of the motion to dismiss of defendants Extencicare Health Services, Inc. and Northern Health Facilities, Inc. (Doc. No. 4), plaintiff Kozlowski's response thereto (Doc. No. 5), and the defendants' reply thereto (Doc. No. 6), IT IS HEREBY ORDERED that the motion to dismiss is GRANTED IN PART AND DENIED IN PART. The motion to dismiss is GRANTED with respect to Counts II and IV of the plaintiff's amended complaint. Count II is DISMISSED WITH PREJUDICE. Count IV is DISMISSED WITHOUT PREJUDICE to the plaintiff's right to amend her complaint to reinstate that count following the completion of the administrative process if that claim has not been administratively resolved. The motion to dismiss is DENIED with respect to Count I.

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William H. Yohn, Jr.