

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

WILLIE LEE JACKSON, ET AL. : CIVIL ACTION  
: :  
: :  
v. : :  
: :  
LOCAL UNION 542, INTERNATIONAL : :  
UNION - OPERATING ENGINEERS : 00-854

**MEMORANDUM**

Ludwig, J.

July 25, 2000

Defendant, Local Union 542, International Union of Operating Engineers, moves for partial judgment on the pleadings, which consist of the complaint and the answer. Fed. R. Civ. P. 12(c). Jurisdiction is federal question and supplemental. 28 U.S.C. §§ 1332, 1367.

This is an employment discrimination action arising under Title VII and 42 U.S.C. §§ 1981 and 1985, with supplemental claims of race discrimination and intentional infliction of emotional distress. According to the complaint, plaintiffs Willie Jackson, Terry Styer, and Gerald Phillip Howard were subjected to race discrimination, including discriminatory employment practices, by the conduct of their labor organization.<sup>1</sup> The facts are viewed from plaintiffs' standpoint, as required for this ruling.<sup>2</sup>

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<sup>1</sup> In Styer et al. v. Waste Management of Pennsylvania, Inc. (G.R.O.W.S.), Civ. No. 98-4770, plaintiffs' employer was sued for Title VII violations arising out of the same employment as the subject matter of this action. That lawsuit was settled in September of 1999 before this action was instituted.

<sup>2</sup> Under Rule 12(c), judgment on the pleadings is appropriate only if accepting as the true the allegations in the non-moving parties pleadings, it appears beyond doubt that plaintiffs can prove no set of facts to support a

In summary, the motion asserts that the complaint is deficient because: (1) the Title VII and §§ 1981 and 1985 claims are time-barred; (2) the Pennsylvania Human Relations Act (PHRA) and intentional infliction of emotional distress claims are preempted by the Labor Management Relations Act (LMRA); and (3) the elements of intentional infliction of emotional distress are not present.

### **I. Title VII**

On January 12, 1999, plaintiffs filed an administrative charge of discrimination with the EEOC and were referred to the Pennsylvania Human Relations Commission that same day. Amended Complaint ¶¶ 2-4. Under Title VII, an administrative charge must be filed with the EEOC within 300 days after the unlawful practice occurred, see Sendall v. Boeing Helicopters, 827 F. Supp. 325, 327 (E.D.Pa. 1993), aff'd., 22 F.3d 303 (3d Cir. 1994). Therefore, acts that occurred prior to March 17, 1998 are time-barred, unless the continuing violation exception applies, which permits the inclusion of acts pre-dating the 300-day cutoff. See West v. Philadelphia Elec. Co., 45 F.3d 744, 755 (3d Cir. 1995).

A continuing violation requires proof of at least one discriminatory act within the limitations period and, further, the acts, viewed together, must amount to a pattern of discrimination – “more than the occurrence of isolated or sporadic acts of intentional discrimination.” Id. at 754, quoting Jewett v. Int. Tel. and Tel. Corp., 653 F.2d 89, 91 (3d Cir. 1981). In determining whether there was a

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claim for relief. See Taj Mahal Travel, Inc. v. Delta Airlines Inc., 164 F.3d 186, 189 (3d Cir. 1998).

pattern of discrimination, the subject matter, frequency and permanence of the conduct must be considered. Rush v. Scott Specialty Gases, Inc., 113 F.3d 476, 481 (3d Cir. 1997). The separate acts must be scrutinized “to establish that they are related,” because, “to allow a stale claim to proceed would be inconsistent with the . . . prompt filing of charges.” Id. at 478.

Here, at least one alleged discriminatory act took place within the 300-day period. The otherwise time-barred acts generally consist of non-facially discriminatory acts that relate to plaintiffs’ employment and membership in Local 542, such as failure to promote and payment of lower wages – in addition to prima facie acts of discrimination, such as racial slurs and epithets. Conceivably, these acts can add up to a pattern of discrimination, sufficient for a continuing violation. So, at this procedural stage, defendant’s motion must be denied.

## **II. Sections 1981 and 1985**

For §§ 1981 and 1985 claims, the limitations period, as taken from state law – 42 Pa.C.S.A. § 5524 – is two years. See Goodman v. Lukens Steel Co., 482 U.S. 656, 661-62, 107 S. Ct. 2617, 2621, 96 L. Ed.2d 572 (1987); Bougher v. Univ. of Pittsburgh, 882 F.2d 74, 79 (3d Cir. 1989). This action having been filed on February 25, 2000, acts occurring prior to February 25, 1998 are time-barred unless, again, the continuing violation exception applies.

As with Title VII, the continuing violation exception is part of § 1981 and §

1985 jurisprudence.<sup>3</sup> See Clark v. Sears, Roebuck & Co., 816 F. Supp. 1064, 1069 (E.D. Pa. 1993) (§ 1981); Jersey Heights Neighborhood Assoc. v. Glendening, 174 F.3d 180, 189 (4<sup>th</sup> Cir. 1999) (§ 1985). For the same reasons, the motion must be denied, given the state of the pleadings.

### **III. Pennsylvania Human Relations Act**

Defendant argues that the PHRA claims are preempted by § 301 of the LMRA – there should be breach of the duty of fair representation claims, filed under that title.

Section 301 of the LMRA provides a cause of action for violations of collective bargaining agreements. 29 U.S.C. § 185(a). To ensure uniformity, § 301 preempts state law claims that require an interpretation of a collective bargaining agreement. Allis-Chambers Corp. v. Lueck, 471 U.S. 202, 219, 105 S. Ct. 1904, 1915, 85 L. Ed.2d 206 (1985). State law claims that are “substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract . . . must either be treated as a § 301 claim . . . or dismissed as preempted by federal labor-contract law.” Id. at 220, 105 S. Ct. at 1916 (citations omitted). However, when a state law claim is independent – in that the resolution of the claim “does not require construing the collective-bargaining agreement” –

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<sup>3</sup> Some courts have rejected the applicability of the continuing violation exception to § 1981 actions, finding the exception appropriate only when administrative procedures are available, such as under Title VII. Thomas v. Denny’s Inc., 111 F.3d 1506, 1513-14 (10<sup>th</sup> Cir. 1997). These courts consider time-barred acts as to the statement of an actionable claim, but restrict damages to acts within the limitations period. Id. at 1514.

the claim is not preempted. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 407, 108 S. Ct. 1877, 1882, 100 L. Ed.2d 410 (1988).

Plaintiffs' discrimination claims are of two types – non-facially discriminatory claims that charge Local 542 with having improperly made employment decisions based upon race; and claims involving facially discriminatory acts, such as racial slurs or epithets. The non-facially discriminatory acts, those involving employment and union-related decisions, are preempted. These claims require an analysis of the collective bargaining agreement to determine whether Local 542 made decisions based not on the agreement, but on racially impermissible reasons.<sup>4</sup>

The claims that relate to facially discriminatory acts, however, are not preempted. There, no analysis of the collective bargaining agreement is required to determine if they are discriminatory.

Accordingly, the motion will be granted in part and denied in part. Plaintiffs may amend the complaint to include a § 301 claim for breach of the duty of fair representation. The PHRA claim will remain only as it relates to facially discriminatory acts.

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<sup>4</sup>The LMRA does not preempt Title VII claims – preemption of claims arising under federal statutes is not necessary to ensure uniformity. See Chopra v. Display Producers, Inc., 980 F. Supp. 714, 719 (S.D.N.Y. 1997). It is noteworthy, however, that for the most part, the acts that form the basis for plaintiffs' PHRA claim, the Pennsylvania equivalent to Title VII, are preempted, while those same acts, are the gravamen of plaintiffs' Title VII action.

#### **IV. Intentional Infliction of Emotional Distress**

As to whether plaintiffs' intentional infliction of emotional distress claims are also preempted by the LMRA, the analysis is much the same. However, an exception for claims of intentional infliction of emotional distress has been recognized for outrageous conduct. Farmer v. United Brotherhood of Carpenters, 430 U.S. 290, 305, 97 S. Ct. 1056, 1066, 51 L. Ed.2d 388 (1977).

Union discrimination in employment opportunities cannot itself form the underlying 'outrageous' conduct on which the state-court tort action is based; to hold otherwise would undermine the pre-emption principle. . . . Simply stated, it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself.

Id. The offending conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." McKeerman v. Corestates Bank, 751 A.2d 655, 661 (Pa. Super. Ct. 2000) (citing Restatement (Second) of Torts §46); Greer v. Manusov, Civ. No. 92-6212, 1992 WL 57928 at \*1 (E.D. Pa. Mar. 17, 1992)(citing Restatement (Second) of Torts § 46). Rarely will conduct rise to such an opprobrious level. See Cox v. Keystone Carbon, 861 F.2d 390, 395 (3d Cir. 1988). It is not enough that it is offensive, tortious or criminal. See Hoy v. Angelone, 554 Pa. 134,151, 720 A.2d 745, 754 (1998).

Here, the major portion of the conduct underlying plaintiffs' claims relates to their employment. However, the amended complaint does plead acts of discrimination that are unrelated to employment, and which, making favorable

inferences, could be regarded as outrageous. Accordingly, here, also, the motion must be denied at this time.<sup>5</sup>

### **C. Capacity**

The general rule in Pennsylvania provides that “members of an unincorporated association may not recover from the association in tort because of the negligence of a member, including the association and its officers, is imputed to all members.” Plasterer v. Paine, 375 Pa. Super. 407, 411, 544 A.2d 985, 988-89 (1988); see also DeVillars v. Hessler, 363 Pa. 498, 501, 70 A.2d 333, 335 (1950). The non-liability of unincorporated associations for tortious conduct extends to labor unions. DeVillars, 363 Pa. at 501, 70 A.2d at 335.

Here, plaintiffs’ claims are for an intentional tort, not a tort arising from mere negligence.<sup>6</sup> Immunity for unincorporated associations is sensible when the tort sounds in negligence, in that all members of the association, can be considered to be responsible for maintaining or not correcting the negligent condition. See Zehner v. Wilkinson Mem’l United Methodist Church, 399 Pa. Super. 165, 167, 581 A.2d 1388, 1389 (1990). Intentional torts, however, are different, in that knowledge, a required element of negligence, is not imputed to

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<sup>5</sup> Defendant is correct that the applicable limitations period is two years. See Bougher v. Univ. of Pittsburgh, 882 F.2d 74, 80 (3d Cir. 1989). Since no argument has been presented that any tolling or exception applies, acts occurring prior to February 25, 1998 are time-barred.

<sup>6</sup> There are no reported decisions in Pennsylvania on point. Since the issue is one of substantive law, it becomes unnecessary to anticipate how the Pennsylvania Supreme Court would rule if given the same set of facts. See Polselli v. Nationwide Mutual Fire Ins., 126 F.3d 524, 528 (3d Cir. 1997).

an association member, and therefore an individual member can not be said to act in concert with the tortfeasor.

Moreover, the claims do not involve physical injuries, but instead are for the alleged infringement of plaintiffs' civil rights. At this point, it is unclear which members of Local 542 are alleged to have discriminated against plaintiffs and, more importantly, whether such members held elected or supervisory positions within the union.<sup>7</sup>

Accordingly, the motion will be denied pending further development of the factual record.

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Edmund V. Ludwig, J.

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<sup>7</sup> Their claims will be limited to facially discriminatory acts.

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**ORDER**

AND NOW, this 25<sup>th</sup> day of July, 2000, defendant's motion for judgment on the pleadings is ruled on as follows:

1. Counts I and II – §§ 1981 and 1985 – denied.
2. Count III – Title VII – denied.
3. Count IV – PHRA – as to all non-facially discriminatory acts – granted. Otherwise, denied.
4. Count V – intentional infliction of emotional distress, as to all non-facially discriminatory acts – granted. Otherwise, denied.
5. Plaintiffs are granted until August 11, 2000 within which to amend the complaint to include a claim for breach of the duty of fair representation under § 301 of the Labor Management Relations Act.

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Edmund V. Ludwig, J.