

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

MICHAEL S. REMBERT	:	CIVIL ACTION
	:	
v.	:	
	:	
ALLSTATE INSURANCE	:	
COMPANY	:	No. 00-848

MEMORANDUM ORDER

Plaintiff alleges that he was unlawfully terminated from employment by defendant. He has asserted claims of violations of Title VII, 42 U.S.C. §§ 1981, 1983 and 1985, and "violation of U.S. Constitution," as well as state law claims for defamation, breach of contract, violation of § 1 through § 26 of Article I of the Pennsylvania Constitution and violation of the Pennsylvania Human Relations Act (PHRA).¹ Presently before the court is defendant's Motion to Dismiss Counts II, III, IV, V, VI, VII, VIII, IX, XI and XII of plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state cognizable claims, in part because of the bar of the statute of limitations.²

¹Plaintiff also set forth counts captioned "Exhaustion of Administrative Remedies," "Punitive Damages" and "Jury Trial Demand." Of course, none of these are causes of action. In dismissing these as distinct counts, however, the court will construe Count XI as a prayer for punitive damages as part of the requested relief, Count XII as a jury demand pursuant to Fed. R. Civ. P. 38(b) and Count III as an allegation that plaintiff has exhausted the administrative requirements in connection with his Title VII and PHRA claims.

²The motion encompasses all but plaintiff's Title VII (Count I) and PHRA (Count X) claims.

Dismissal for failure to state a claim is appropriate when it clearly appears that plaintiff can prove no set of facts to support the claim which would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Robb v. Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984). Such a motion tests the legal sufficiency of a claim accepting the veracity of the claimant's allegations. See Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). A claim may be dismissed when the facts alleged and the reasonable inferences therefrom are legally insufficient to support the relief sought. See Pennsylvania ex. rel. Zimmerman v. PepsiCo., Inc., 836 F.2d 173, 179 (3d Cir. 1988).³

Plaintiff's amended complaint contains the following pertinent factual allegations which the court accepts as true for purposes of this motion. Plaintiff is an African-American male. He was employed by defendant on November 15, 1982. He received satisfactory performance evaluations thereafter. As an agency manager, defendant was responsible for reviewing and approving sales leads reported by his subordinates who then received compensation for supplying the leads. Defendant investigated

³A claim may be dismissed pursuant to Rule 12(b)(6) where it appears from the complaint itself that the claim is time barred. See Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.1. (3d Cir. 1994).

plaintiff for allegedly approving a sales lead which the subordinate had not actually solicited. Plaintiff was then terminated on June 24, 1996 on the ground of "employee dishonesty and misrepresentation."

Plaintiff's breach of contract claim is predicated on defendant's employee handbook and personnel policy guide. Under Pennsylvania law, an employee handbook can form the basis for an implied contract only when it contains "unequivocal provisions that the employer intended to be bound by it and renounced the principle of at-will employment." Mercante v. Preston Trucking Co., Inc., 1997 WL 288614, *2 (E.D. Pa. May 21, 1997). See also Jacques v. Akzo Int'l Salt, Inc., 619 A.2d 748, 773 (Pa. Super. 1993)(same). Plaintiff has alleged no facts and suggested none in his response from which one could reasonably infer such an intent on the part of defendant.

To state a defamation claim, a plaintiff must identify specifically individuals to whom the allegedly defamatory comments were made. See Metzgar v. Lehigh Valley Housing Auth., 1999 WL 562756, *6 (E.D. Pa. July 27, 1999) (claim defective because it did not identify to whom allegedly defamatory statements were made); Jaindl v. Mohr, 637 A.2d 1353, 1358 (Pa. Super. 1994) (complaint claiming defamatory comments were made publicly must name at least one person to whom such comments were made). Plaintiff does not identify any person to whom any

defamatory comments were made, and does not suggest in his response that he can cure this deficiency.⁴

The statute of limitations for claims under 42 U.S.C. §§ 1981, 1983 and 1985 is two years from the date of accrual. See Goodman v. Lukens Steel Co., 482 U.S. 656, 663-64 (1987) (§ 1981); Wilson v. Garcia, 471 U.S. 261, 276-80 (1985) (§ 1983); Bougher v. Univ. of Pittsburgh, 882 F.2d 74, 78-79 (3d Cir. 1989)(§§ 1983 and 1985). Plaintiff's termination occurred on June 24, 1996 and his claims clearly accrued by that date. Plaintiff filed his initial complaint almost four years later.

In his claim for "violation of U.S. Constitution," plaintiff refers to the First, Fourth, Fifth and Fourteenth Amendments. To sustain a claim for a violation of any of these amendments, a plaintiff must show that the defendant is a state actor. See United States v. Woodrum, 202 F.3d 1, 10 (1st Cir. 2000) (Fourth Amendment); Johnson v. Resources for Human Dev., Inc., 843 F. Supp. 974, 977 (E.D. Pa. 1994) (First, Fifth and Fourteenth Amendments). Claims based on Article I of the Pennsylvania Constitution also require state action. See Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen'l Life

⁴Plaintiff never sets forth the content of the alleged defamatory statements or specifies when they were made, but seems to suggest they were made in connection with the investigation and his termination. Of course, any claim for a defamatory statement made more than a year after plaintiff filed his complaint on February 16, 2000 would also be time barred. See 42 Pa.C.S.A. § 5523(1).

Ins. Co., 515 A.2d 1331, 1335-36 (Pa. 1986); Professional Ins. Agents Ass'n of Pennsylvania, Maryland, and Delaware, Inc. v. Chronister, 625 A.2d 1314, 1318 (Pa. Commw. Ct. 1993). Plaintiff contends that defendant "act[ed] under state and local law, custom and usage" because it was regulated by the state Insurance Department, was subject to Pennsylvania laws and cooperated with state enforcement officials and District Attorneys in investigations and prosecutions of insurance fraud.

The three tests employed in assessing whether a private entity is a state actor are the traditional government function test, the "close nexus" test and the "symbiotic relationship" test. See Klavan v. Crozer-Chester Medical Center, 60 F. Supp. 2d 436, 441 (E.D. Pa. 1999). Defendant is clearly not a state actor under the first test as insurance-related activities "ha[ve] not been traditionally the exclusive prerogative of the state." See Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982). Plaintiff does not allege that Pennsylvania "coerce[d] or encourage[d]" defendant to violate his rights and clearly fails to satisfy the "close nexus" test. See Klavan, 60 F. Supp. 2d at 442. The same is true of the symbiotic relationship test. Even heavy regulation of a private entity does not transform its actions into state action. Id. at 443. See also Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357-58 (1974). Defendant's cooperation in fraud investigations also does not

render it a state actor. See Center for Bio-Ethical Reform v. Comcase-Spectacor, 1999 WL 601014, *2 (E.D. Pa. July 29, 1999). If being subject to Pennsylvania laws renders defendant a state actor, then the conduct of every Commonwealth resident would be state action.⁵

ACCORDINGLY, this day of November, 2000, upon consideration of defendant's Motion to Dismiss Counts II, III, IV, V, VI, VII, VIII, IX, XI and XII (Doc. #3), and plaintiff's response thereto, **IT IS HEREBY ORDERED** that said Motion is **GRANTED**.

BY THE COURT:

JAY C. WALDMAN, J.

⁵Plaintiff also alleges no facts which remotely demonstrate any violation of the First or Fourth Amendment even if defendant were a state actor. The Fifth Amendment, of course, applies only to the federal government.