

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

JOAN NEWTON : CIVIL ACTION  
 :  
 v. :  
 : No. 00-CV-5466  
 UNITED STATES RECYCLING, INC. , ET AL. :

**ORDER - MEMORANDUM**

**Ludwig, J.**

AND NOW, this 11<sup>th</sup> day of January, 2001, defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(6)<sup>1</sup> is denied. Jurisdiction is federal question. 28 U.S.C. § 1331.

This is an employment discrimination case in which the allegations of the complaint are as follows. On August 18, 1999, plaintiff Joan Newton began her employment with defendant United States Recycling, Inc. as an administrative assistant. Cmplt. ¶ 1. Two weeks later, she became the object of verbal sexual harassment by her immediate supervisor, Timothy Skammer. *Id.* ¶¶ 2-3. On September 17 and September 22, 1999, plaintiff complained about this behavior to Carol Fantazzi, the office manager, and Fantazzi reported it to defendant Melvin Lapin, president of the corporate employer. However, no immediate remedial

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<sup>1</sup> Under Rule 12(b)(6), the allegations of the complaint are accepted as true, and all reasonable inferences are drawn in the light most favorable to the plaintiff, and dismissal is appropriate only if it appears that plaintiff would prove no set of facts that would entitle her to relief. *See Wilson v. Quadramed Corp.*, Civ. No. 99-5758, 2000 WL 1222164, at \*2 (3d Cir. Aug. 28, 2000).

action occurred, id. ¶¶ 5-6, and a week thereafter, on September 27, 1999, Skammer told plaintiff he no longer wanted her to work with him. Id. ¶ 13. On October 6, 1999, plaintiff was terminated for “a lack of work.” Id. ¶ 14.

On October 29, 1999, plaintiff filed a charge of discrimination with the EEOC and, on August 2, 2000, received a right to sue notice. The complaint contains eight counts including Title VII disparate treatment – failure to transfer.<sup>2</sup>

According to defendants, plaintiff’s claim that she was “denied transfer, wage increases and benefits because of her sex,” cmplt. ¶ 31, should be dismissed because it was not the subject of her EEOC complaint.<sup>3</sup> “The relevant

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<sup>2</sup> The other counts are Title VII – termination (count one); retaliation (count three); violations of the Pennsylvania Human Relations Act (count four); negligence (count five); intentional infliction of emotional distress (count six); assault and battery (count seven); and gross, willful and wanton misconduct (count eight). Defendants move to dismiss count two for failure to exhaust administrative remedies.

<sup>3</sup> Plaintiff’s charge of discrimination submitted to the EEOC:

Approximately two (2) weeks after I was hired, Mr. Skammer began subjecting me to verbal sexual harassment. Almost on a daily basis he would make comments to me about the size of my breasts; inquired if I had any nude pictures of myself; suggesting that I apply for a job at a strip club or bar; questioned me about my sex life; and referring to the size of his penis in my presence while holding private telephone conversations. On or about September 17, 1999, I complained to Carol Fantazzi, Office Manager, a female, about the sexual harassment by Mr. Skammer. On or about the same date, Ms. Fantazzi informed Respondent President, Melvin Lapin, a male. Respondent took no remedial action and the sexual harassment continued. On or about September 24, 1999, I met with Ms. Fantazzi and Mr. Lapin regarding Mr. Skammer’s behavior. On or about September 27, 1999, Mr. Lapin informed me that my employment was terminated. Respondent’s stated reason to discharge me was allegedly for lack of work.

I believe Respondent has discriminated against me because of my sex (female), and terminated my employment as a form of

(continued...)

test in determining whether appellant was required to exhaust her administrative remedies . . . is whether the acts alleged in the subsequent Title VII suit are fairly within the scope of the prior EEOC complaint, or the investigation arising therefrom.” Walters v. Parsons, 729 F.2d 233, 237 (3d Cir. 1984). “The purpose of requiring exhaustion is to afford the EEOC the opportunity to settle disputes through conference, conciliation, and persuasion, avoiding unnecessary action in court.” Antol v. Perry, 82 F.3d 1291, 1296 (3d Cir. 1996).

Although plaintiff’s EEOC charge does not refer in so many words to disparate treatment, or failure to transfer, the claim is fairly within the scope of her allegations of sex discrimination and retaliation. See Hicks v. ABT Assoc., Inc., 572 F.2d 960, 965 (3d Cir. 1978) (permissible to add sex discrimination claim even though only race discrimination was investigated because both claims arose from the same acts); Fugarino v. University Services, No. Civ. A. 00-3234, 2000 WL 1801852, at \*2 (E.D. Pa. Dec. 7, 2000) (retaliation claim could “reasonably be expected to grow out of” charge of sex discrimination); but see Antol, 82 F.3d at 1295-96 (disability discrimination charge did not encompass a claim for gender discrimination although investigation revealed that plaintiff (male) was denied a position filled by two female employees); Ebert v. Office of Information Systems, No. 97-530, 1998 WL 324923, at \*5 (D. Del. June 12, 1998) (failure to promote

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<sup>3</sup>(...continued)

retaliation for having complained of employment practices made illegal under Title VII of the Civil Rights Act of 1964 as Amended (Title VII).

Defs.’ mem. exh B.

claim did not logically flow from EEOC charges of gender discrimination and retaliation).

Plaintiff's EEOC complaint charged that defendants "took no remedial action" after she reported the harassment. Inferentially, that allegation includes the refusal of a request to transfer. Moreover, the purpose of administrative exhaustion – to bring the parties together in an attempt to resolve the entire dispute – was fulfilled.

Accordingly, defendants' motion to dismiss must be denied.

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Edmund V. Ludwig, J.