

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

JOHN SHARPLESS, JR.,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
LAWRENCE A. SUMMERS,	:	
Secretary, Department of the	:	
Treasury, and	:	
ROBERT MORRIS, Chief U.S. Mint	:	
Police,	:	
Defendants	:	NO. 00-3260
 Newcomer, S.J.		 February , 2001

M E M O R A N D U M

Presently before this Court are the Government's Motion to Dismiss Counts One, Count Three, Count Four, and Count Five as against the United States and all claims against Defendant Robert Morris, as well as plaintiff's Motion to Amend Complaint pursuant to Federal Rule of Civil Procedure 15. For the reasons stated below, the Government's Motion to Dismiss will be granted and plaintiff's Motion to Amend Complaint will be denied.

I. BACKGROUND

Plaintiff John Sharpless, a black male, was employed as a police officer at the Department of Treasury's U.S. Mint in Philadelphia, Pennsylvania for over ten years. Plaintiff's Complaint avers that during the course of his employment, defendants subjected plaintiff to various instances of discrimination on the basis of race and color. Allegedly, plaintiff was subjected to dissimilar and disparate standards of treatment, harassment, and continuous and unnecessary criticism

of his work performance. In addition, the Complaint avers that defendants withheld certain jobs, advancement opportunities, and training from plaintiff.

In 1995, plaintiff applied for a position as Supervisory Police Officer. Defendant Robert Morris, Chief of the U.S. Department of Treasury's Mint Police based in Philadelphia, allegedly selected Francis McIntyre, a white male, for the position despite the fact that plaintiff had more seniority and police experience. Shortly after the promotion was awarded to McIntyre, plaintiff filed a complaint with the Equal Employment Opportunity Commission ("EEOC") alleging discriminatory treatment due to his race.

According to the instant Complaint, after plaintiff filed his EEOC Complaint, an investigation into the circumstances surrounding the denial of plaintiff's promotion took place. Shortly thereafter, defendants allegedly retaliated against plaintiff for filing the EEOC Complaint, causing plaintiff to be harassed, humiliated, and embarrassed, as well as ultimately fired on January 15, 1999.

Plaintiff then filed the instant action, alleging the following counts in his Complaint¹: (1) Count One, for race-based discrimination in violation of Title VII; (2) Count Two, for

¹All the counts are seemingly alleged as to all defendants, except where certain defendants are specifically noted.

unlawful retaliation for engaging in protected activity under Title VII; (3) Count Three, for defamation and libel; (4) Count Four against Defendant Morris, for discrimination against plaintiff on the basis of race and color in contravention of Title VII; and (5) Count Five, for intentional infliction of emotional distress.

The Government² subsequently filed the instant Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b), arguing that: (1) Count One must be dismissed for failure to state a claim insofar as it alleges hostile work environment; (2) the United States is immune from suit for common law torts by its employees, including defamation and libel; and (3) all claims against Defendant Robert Morris must be dismissed for failure to state a claim.

In addition to responding to the Government's Motion to Dismiss, plaintiff filed a Motion to Amend Complaint pursuant to Federal Rule of Civil Procedure 15 in an effort to add his wife, Shirley Sharpless, as a plaintiff and her claim for loss of consortium.

II. THE GOVERNMENT'S MOTION TO DISMISS

A. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a court should dismiss a claim for failure to state a cause of

²The United States files the instant Motion to Dismiss on behalf of the named employees, Secretary Summers and Chief Morris, in their official capacities.

action only if it appears to a certainty that no relief could be granted under any set of facts which could be proved. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). Because granting such a motion results in a determination on the merits at such an early stage of a plaintiff's case, the district court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 664-65 (3d Cir. 1988) (quoting Estate of Bailey by Oare v. County of York, 768 F.2d 503, 506 (3d Cir. 1985)).

With respect to a motion filed pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, because the defendant's challenge is not merely facial, the court is not confined to the allegations in the plaintiff's complaint but may consider affidavits, depositions, and testimony to resolve factual issues bearing on jurisdiction. See Gotha v. United States, 115 F.3d 176, 179 (3d Cir. 1997). Accordingly, the Court takes into consideration the various exhibits submitted with the instant Motions.

B. DISCUSSION

1. COUNT ONE - HOSTILE WORK ENVIRONMENT

The Government moves to dismiss Count One of the Complaint because plaintiff failed to exhaust his administrative

remedies with respect to his hostile work environment claim. Plaintiff argues that his hostile work environment claim should not be barred by 42 U.S.C. § 2000e-16(c) or 29 C.F.R. § 1601.105(a) because his claim was within the scope of his EEOC Complaint, and was or should have been part of the EEOC investigation that took place. Furthermore, plaintiff contends that his Complaint in this action does not allege facts which were not addressed in his EEOC Complaint, and thus the Government's ability to defend against plaintiff's claims has not been prejudiced in any way.

The relevant test in determining whether a plaintiff is required to exhaust his 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. See Antol v. Perry, 82 F.3d 1291, 1295 (3d Cir. 1996) (citing Walters v. Parsons, 729 F.2d 233, 237 (3d Cir. 1984)).

In the instant case Plaintiff sought informal counseling in July 1995 as a result of his not being hired as a Supervisory Police Officer. In preparing a counseling report for plaintiff, EEO counselor Gregory Hawes checked the boxes for "Race" and "Sex" (depicting gender) to describe the "Basis or Type of Discrimination." Mr. Hawes also checked the box for "Promotion" to indicate the "Matter Causing Complaint or Issue."

Other "Matters" that could have been checked, but were not, included "Harassment," "Working Conditions," and "Other." Plaintiff signed the EEO Counseling report to authorize the revealing of his identity during the counseling stage.

In September 1995, plaintiff filed a formal complaint as a result of the lack of resolution of his informal complaint. Although the complaint form did not include a block for "harassment" or "hostile work environment," it did provide space for plaintiff to state his complaint. Plaintiff failed to mention any harassment or hostile work environment in said space, or in any other place on the formal complaint form. However, on September 16, 1995, plaintiff wrote a letter to the Director of the EEOC at the Department of the Treasury, Regional Complaints Center in Chicago, Illinois. In the letter, plaintiff stated that the reason for filing his complaint was because he was qualified for the Supervisory Police Officer position. In addition, plaintiff pointed to the following other reasons for his filing the complaint: (1) discrimination; (2) pre-selection; (3) merit system principles governing the federal personnel system; (4) nepotism; and (5) affirmative action. Again, plaintiff failed to indicate that he was subjected to any harassment or hostile work environment.

Finally, after an administrative hearing in the case before an EEO judge, the Treasury Department issued a final

decision in the case on September 21, 1999. In the Procedural Chronology section of the decision, the judge noted that "the Agency accepted the following issue for processing: Whether the Complainant was discriminated against based on his race (Black), color (black) [sic] and retaliated against for his prior involvement in the EEO process when on June 23, 1995, he was not selected for the position of Supervisory Police Officer" The decision did not indicate that there was any investigation conducted, or decision rendered, with respect to hostile work environment.

Based on the foregoing, the Court determines that plaintiff failed to exhaust his administrative remedies with respect to his hostile work environment claim. Review of the record reveals that neither the EEOC Complaint, nor the investigation arising from the Complaint, entailed or contemplated a hostile work environment claim. Therefore, the Court concludes that the hostile work environment claim alleged in the subsequent Title VII suit was not fairly within the scope of the prior EEOC complaint, or the investigation arising therefrom. Accordingly, the Government's Motion to Dismiss will be granted as to that issue, and Count One will be dismissed.

2. COUNT THREE - DEFAMATION AND LIBEL

The Government moves to dismiss plaintiff's claims for the common law torts of defamation and libel, contending that

said claims are not cognizable under the Federal Tort Claims Act ("FTCA"). Plaintiff concedes that libel and slander claims are specifically exempted from the FTCA, see 28 U.S.C. § 2680(h).³ However, plaintiff asserts that the defamation claim should apply against Defendant Morris because the statements made by Defendant Morris were not made within the scope of his employment, nor as a part of a personnel action taken against plaintiff.

As the parties admit, claims "arising out of . . . libel, slander, misrepresentation [or] deceit" are excepted from the United States's general waiver of sovereign immunity. 28 U.S.C. § 2680(h). Therefore, the Court finds that plaintiff's claim for libel should be dismissed. With respect to defamation, the FTCA bars such actions against the United States as well. See id.; Brumfield v. Sanders, 232 F.3d 376, 382 (3d Cir. 2000). The Court in Brumfield noted, however, that defamation committed by a federal employee acting outside the scope of his or her employment may be actionable. See Brumfield, 232 F.3d at 382 n.7.

The Court finds plaintiff's contention that Defendant

³The FTCA vests exclusive jurisdiction in the district courts for claims against the United States "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act occurred." Norman v. United States, 111 F.3d 356, 357 (3d Cir. 1997) (quoting 28 U.S.C. § 1346(b)).

Morris' statements were made outside the scope of his employment remarkable. There is no allegation in the Complaint that suggests that Defendant Morris ever acted outside the scope of his employment. Count Three of the Complaint simply avers in Paragraph 38 that "Defendants' conduct as described above has defamed and libeled Plaintiff among his co-workers and the general public." Paragraph 39 states that "[a]s a result of Defendant's [sic] conduct Plaintiff has suffered" More notably, however, plaintiff's contentions are now contrary to the allegations made in the Complaint. In Paragraph 8 of the Complaint, plaintiff clearly alleges that **"At all times relevant hereto, Defendants** were acting by and through their agents, employees, and representatives who **were authorized and acting within the course and scope of their employment"**⁴

(emphasis added).

Because the Complaint fails to allege that any of the

⁴The Court must point out that plaintiff's counsel's misrepresentations are not taken lightly in view of Federal Rule of Civil Procedure 11. Rule 11(b)(3) states in relevant part that "By presenting to the court . . . a pleading . . . or other paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, . . . the allegations and other factual contentions have evidentiary support" Here, counsel's contradictory allegations suggest, at best, that she did not make reasonable inquiry of her factual allegations, and, at worst, that she was attempting to commit a fraud on the Court. While the Court will refrain from assessing any sanctions or reprimanding counsel at this time, it admonishes counsel to be more diligent in making her representations to the Court.

defendants were acting outside the scope of their employment, the Court determines that plaintiff's defamation and libel claims are not cognizable under the FTCA. Accordingly, the Government's Motion to Dismiss Count Three will be granted.

3. COUNT FIVE - INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS

The Government argues that plaintiff's emotional distress claim must be dismissed for lack of jurisdiction. Specifically, the Government contends that plaintiff failed to exhaust his administrative remedies. Plaintiff posits that his emotional distress is directly related to, and part of, plaintiff's discrimination claim and is not barred by the intentional tort exception of the Federal Tort Claims Act.

The Supreme Court has held that Title VII of the Civil Rights Act of 1964 "provides the exclusive judicial remedy for claims of discrimination in federal employment." Brown v. GSA, 425 U.S. 820, 836 (1976). Because plaintiff asserts that his emotional distress claim is directly related to his discrimination claim, the Court determines that plaintiff's claim for intentional infliction of emotional distress is preempted by Title VII and that Count Five is simply a request for compensatory damages in connection with plaintiff's Title VII claims. See Irwin v. Runyon, CIV.A. No. 95-655, 1996 WL 617488, at *8 (W.D.Pa. June 21, 1996) (citations omitted).

Insofar as plaintiff may wish to argue that his claim

for emotional distress is a separate claim available under the FTCA, the Court must conclude that such a claim would be barred as well. As noted in the description of his EEOC Complaint above, plaintiff failed to bring an administrative claim for emotional distress as required to maintain an action under the FTCA. Finally, the Court also finds that plaintiff has failed to allege facts that sufficiently amount to a claim for emotional distress.⁵ Specifically, plaintiff has not alleged conduct "so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be atrocious, and utterly intolerable in a civilized community." Formica v. Galantino, CIV.A. No. 89-935, 1989 WL 100836, at *13 (E.D.Pa. Aug. 29, 1989) (quoting Madreperla v. Williard Co., 606 F.Supp. 874, 880 (E.D.Pa. 1985)).⁶

Accordingly, the Government's Motion to Dismiss Count Five will be granted.

4. CLAIMS AGAINST DEFENDANT ROBERT MORRIS

The Government asserts that all claims against

⁵Section 46 of the Restatement (Second) of Torts, which has been adopted by the Pennsylvania, provides that "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such distress"

⁶In addition, the Court notes that "[c]onduct in the employment context will rarely rise to the level of outrageousness necessary to support an intentional infliction of emotional distress claim." Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988).

Defendant Robert Morris should be dismissed for failure to state a claim. The Government argues that under Title VII, the only proper defendant is the head of the agency in his official capacity.

According to 42 U.S.C. § 2000e-16(c), a defendant in a civil action brought under Title VII shall be the "head of the department, agency, or unit" 42 U.S.C. § 2000e-16(c). See also Newbold v. U.S. Postal Svc., 614 F.2d 46, 47 (5th Cir. 1980). As a result, plaintiff cannot sustain his action against Defendant Morris, individually, under Title VII. Therefore, this Court will dismiss those counts concerning Title VII as to Defendant Morris: Count Two as to Defendant Morris, and Count Four altogether (the Court has already decided to dismiss Count One).

III. PLAINTIFF'S MOTION TO AMEND COMPLAINT

Plaintiff has filed a Motion to Amend Complaint seeking to add his wife's claim for loss of consortium, which allegedly resulted from the defendants' actions. Since the Government already filed an Answer on October 16, 2000, Fed.R.Civ.P. 15(a) provides that the Complaint may only be amended by leave of this Court.

A. LEGAL STANDARD

Federal Rule of Civil Procedure 15(a) provides that "leave [to amend] shall be freely given when justice so

requires." However, the grant or denial of an opportunity to amend is within the discretion of the district court, and among the grounds that can justify a denial of leave to amend are undue delay, bad faith, dilatory motive, prejudice, and futility. In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1434 (3d Cir. 1997). An amendment should also be denied if the proposed amendment is futile. See Foman v. Davis, 371 U.S. 178, 182 (1962); In re Burlington Coat Factory, 114 F.3d at 1434. "Futility" means that the amended complaint would fail to state a claim upon which relief can be granted. See In re Burlington Coat Factory, 114 F.3d at 1434.

B. DISCUSSION

Plaintiff contends that amending the Complaint would not prejudice the defendant, and would not delay the litigation. Further, Plaintiff asserts that if the Complaint is not amended, Shirley Sharpless will be denied her only opportunity to recover for the losses she sustained as a result of the defendants' actions.

The Government argues that an amendment of the Complaint would be futile because the amendment would fail to state a claim and because this Court would not have subject matter jurisdiction over Mrs. Sharpless' claim. Since loss of consortium is a tort claim, defendants assert that in order for Mrs. Sharpless to maintain the action, she must comply with the

FTCA provisions, including the exhaustion of administrative remedies. Although it does not appear that the EEOC was on notice of a lack of consortium claim, plaintiff asserts that the claim arises from or is derivative of plaintiff's own claim.

The weight of authority in this Circuit is against allowing plaintiff to amend his Complaint. Plaintiff's failure to pursue administrative remedies for his wife's loss of consortium claim prior to commencing this action deprives this Court of jurisdiction over such a claim. See Dugan v. Coastal Industries, Inc. 96 F.Supp.2d 481 (E.D.Pa. 2000); Ferguson v. United States, 793 U.S. 107 (E.D.Pa. 1992); Rode v. United States, 812 F.Supp. 45 (M.D.Pa. 1992). Therefore, the Plaintiff's Motion to Amend will be denied.

AN APPROPRIATE ORDER FOLLOWS.

Clarence C. Newcomer, S.J.

IN THE UNITED STATES DISTRICT COURT
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JOHN SHARPLESS, JR.,	:	CIVIL ACTION
Plaintiff	:	
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v.	:	
	:	
LAWRENCE A. SUMMERS,	:	
Secretary, Department of the	:	
Treasury, and	:	
ROBERT MORRIS, Chief U.S. Mint	:	
Police,	:	
Defendants	:	NO. 00-3260

O R D E R

AND NOW, this day of February 2001, upon
consideration of the following motions, it is hereby ORDERED as
follows:

- (1) Government's Motion to Dismiss is GRANTED.
- (2) Counts One, Count Three, Count Four, and Count
Five are DISMISSED as against the United States.
- (3) All claims against Defendant Robert Morris are
DISMISSED.
- (2) Plaintiff's Motion to Amend Complaint pursuant to
Federal Rule of Civil Procedure 15 is DENIED.

AND IT IS SO ORDERED.

Clarence C. Newcomer, S.J.