

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

CATHERINE P. DIEP,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
SOUTHWARK METAL	:	
MANUFACTURING COMPANY, JOHN	:	
LEINHAUSER; RICHARD WINDLE,	:	
FREDERICK D. TWEED, and MARTIN	:	
SIEDMAN,	:	
	:	
Defendants.	:	NO. 00-6136

Reed, S.J.

March 19, 2001

M E M O R A N D U M

Plaintiff claims damages for unlawful employment discrimination. Now before this Court is the partial motion of defendants Southwark Metal Manufacturing Company, John Leinhauser, Richard Windle, Frederick D. Tweed, and Martin Seidman¹ to dismiss for failure to state a claim pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure (Document No. 7). Upon consideration of the motion, plaintiff’s response, defendants’ reply, the pleadings, and the record, the motion will be granted in part and denied in part.

Background

According to the allegations of the complaint, plaintiff was discharged on March 18, 1999, from her job as a billing clerk in the accounting department of defendant Southwark Metal Manufacturing Company (“Southwark”). Plaintiff alleges that she was fired because she was diagnosed with breast cancer.

¹ Apparently, Martin Seidman’s name was misspelled in plaintiff’s complaint and is therefore spelled incorrectly on the docket. I will spell Mr. Seidman’s name correctly in this memorandum.

Plaintiff filed a complaint with the Philadelphia Commission on Human Relations,² which was cross-filed with the Equal Employment Opportunity Commission (“EEOC”), pursuant to a work-sharing agreement between the two organizations. Plaintiff received a right-to-sue letter from the EEOC, and brought the instant action, alleging violations of Title I of the Americans with Disabilities Act, 42 U.S.C. §§ 12101, *et seq.* (“ADA”), Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* (“Title VII”), and the Pennsylvania Human Relations Act, 43 Pa. C.S. §§ 951, *et. seq.* (“PHRA”), as well as state common law claims.

Analysis

1. Standard of Review

Defendants have moved to dismiss a number of plaintiff’s claims under Rule 12 (b) (6) of the Federal Rules of Civil Procedure, which provides that “the following defenses may at the option of the pleader be made by motion: ... (6) failure to state a claim upon which relief can be granted.” The purpose of a motion to dismiss for failure to state a claim is to test the legal sufficiency of the allegations contained in the complaint. See Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). “In a Rule 12 (b) (6) motion, the court evaluates the merits of the claims by accepting all allegations in the complaint as true, viewing them in the light most favorable to the plaintiffs, and determining whether they state a claim as a matter of law.” See Gould Elecs., Inc. v. United States, 220 F.3d 169, 178 (3d Cir. 2000) (citing In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1420 (3d Cir. 1997)); see also Jenkins v. McKeithen, 395 U.S. 411, 89 S. Ct. 1843 (1969).

² The Philadelphia Commission on Human Relations is not to be confused with the separate entity, the Pennsylvania Human Relations Commission. To avoid conflation of the two organizations in this memorandum, I will refer to former as the “Philadelphia Commission,” and the latter by its well-known acronym, “PHRC.”

Because the Federal Rules of Civil Procedure require only notice pleading, the complaint need only contain “a short and plain statement of the claim showing that the pleader is entitled to relief,” Fed. R. Civ. P. 8 (a), and it is the defendant’s burden to show that no claim has been stated. See Kehr Packages v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir.), cert. denied, 501 U.S. 1222, 111 S. Ct. 2839 (1991). A complaint will be dismissed only if, considering the allegations thereof, the plaintiff cannot prove any set of facts that would entitle her to relief. See Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229 (1984) (holding that a motion to dismiss should be granted if “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations”); Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996) (citing Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99 (1957)).

Plaintiff concedes defendants’ motion to dismiss as to Count II for negligent retention, Count III for negligent supervision, and Count IV for intentional infliction of emotional distress, and therefore those claims will be dismissed. I will thus focus my analysis on the remaining claims.

2. Count I – Americans with Disabilities Act

Defendants contend that the ADA does not apply to individuals, and that Count I therefore should be dismissed insofar as it alleges that the individual defendants violated the ADA. While the Court of Appeals for the Third Circuit has not addressed this precise question, it has held that individuals cannot be sued under Title VII, Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1078 (3d Cir. 1996), cert. denied, 521 U.S. 1129, 117 S. Ct. 2532 (1997),

which defines eligible defendants identically to,³ and is interpreted consistently with, the ADA. See Newman v. GHS Osteopathic, Inc., 60 F.3d 153, 157 (3d Cir. 1995) (“[T]he ADA, ADEA, and Title VII all serve the same purpose – to prohibit discrimination in employment against members of certain classes. Therefore, it follows that the methods and manner of proof under one statute should inform the standards under the others as well.”).

The consensus view among district courts in this circuit is that individual liability cannot be imposed under the ADA. See Douris v. Brobst, No. 99-3357, 2000 U.S. Dist. LEXIS 1579, at *6 (E.D. Pa. Feb. 14, 2000); Schumacher v. Souderton Area Sch. Dist., No. 99-1515, 2000 U.S. Dist. LEXIS 563, at *9-11 (E.D. Pa. Jan. 21, 2000); Metzgar v. Lehigh Valley Hous. Auth., No. 98-3304, 1999 U.S. Dist. LEXIS 11908, at *9-10 (E.D. Pa. July 27, 1999); Fullman v. Philadelphia Int’l Airport, 49 F. Supp. 2d 434, 441 (E.D. Pa. 1999); Brann v. Bergey’s, Inc., No. 97-6921, 1998 U.S. Dist. LEXIS 4879, at *4 (E.D. Pa. Mar. 30, 1998); Saylor v. Ridge, 989 F. Supp. 680, 688-89 (E.D. Pa. 1998). Plaintiff cites to the contrary only one case from this circuit, and, given the number of district courts in this circuit that have lined up on the other side of the issue, that case is a rather lonely one. See Doe v. William Shapiro, Esquire, P.C., 852 F. Supp. 1246, 1252 (E.D. Pa. 1994).⁴

In light of the persuasive and rather overwhelming precedent holding that individuals

³ Both Title VII and the ADA define an employer, the only proper defendant under both statutes, as "a person engaged in an industry affecting commerce . . . and any agent of such person." 42 U.S.C. § 2000e (b); 42 U.S.C. § 12111 (5) (A).

⁴ Moreover Doe has been effectively overruled. The court in Doe based its conclusion that individuals could be sued under the ADA on a number of cases outside this circuit that had concluded that individuals could be liable under Title VII. However, since Doe was decided, the Court of Appeals for the Third Circuit has held that individuals cannot be sued under Title VII. See Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1078 (3d Cir. 1996). Therefore, the interpretation of Title VII on which Doe relied is no longer valid in this circuit.

cannot be liable under the ADA, I conclude that the individual defendants in this case cannot be subjected to suit under the ADA.

3. Count V – Title VII

Count V of plaintiff’s complaint is perplexing. It is entitled “Violation of Title VII of the Civil Rights Act of 1964 by Defendant Southmark.” The count alleges, in pertinent part, “Plaintiff’s treatment by defendant and its managerial employees constitutes discrimination based on a perceived *disability*.” (Complaint, at ¶ 69) (emphasis added). Title VII, of course, creates a cause of action for discrimination based on an individual’s “race, color, religion, sex, or national origin.” Disability is not among the enumerated bases for a Title VII suit, and therefore a claim for disability discrimination brought under Title VII cannot survive. The proper avenue for a disability discrimination suit is, of course, the Americans with Disabilities Act, which explicitly provides a legal remedy for discrimination on the basis of disability. See 42 U.S.C. § 12112 (a).⁵ Plaintiff has brought just such a claim in Count I of her complaint.

Undeterred, plaintiff persists in arguing that one can sue under Title VII for disability-based discrimination, suggesting that the issue is “one of first impression.” I suppose that may be so, but only because no other plaintiff’s attorney has been misguided enough to raise the issue before, and thus no federal court has had to rule on this frivolous assertion. And it gets worse; the single case plaintiff points to in support of her quixotic effort to establish a disability claim under Title VII contains the following observation: “Title VII does not provide a right against

⁵ The ADA provides that “no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112 (a).

discrimination on the basis of disability.” Houck v. City of Prairie Village, 912 F. Supp. 1428, 1434 (D. Kan. 1996).

I would be less concerned if this was all attributable to a typographical error or some oversight. But plaintiff’s counsel have consciously defended a simple, legally indefensible proposition in the face of clear statutory language and precedent.⁶ I find this conduct troubling. This kind of litigious bluster taxes the scarce judicial resources of the nation’s courts and undermines the public confidence in lawyers and the judicial system. Rule 11’s signature requirement was designed to deter counsel from making these kinds of arguments; one cannot argue with a straight face that plaintiff’s “legal contention[.]” is “warranted by existing law or by a nonfrivolous argument.” Fed. R. Civ. P. 11 (b) (2). Plaintiff’s counsel should consider themselves warned.

At any rate, it is clear that Count V cannot survive and must be dismissed.

4. Count VI – PHRA

Defendants contend that plaintiff’s PHRA claim under Count VI is problematic in two respects. First, defendants argue that the PHRA claims against individual defendants should be dismissed because plaintiff failed to exhaust her administrative remedies. Second, defendants argue that plaintiff’s PHRA claim must be dismissed because she availed herself of the protections of the Philadelphia Commission on Human Relations.

I note at the outset that individuals cannot be held liable under the PHRA’s employment

⁶ Moreover, plaintiff does not explain why she needs to bring an invalid Title VII claim for discrimination on the basis of disability when she has already brought a legally recognized claim for disability-based discrimination under the ADA. Even if both claims were viable, they would be identical in almost every conceivable way, and therefore wholly duplicative.

discrimination provision, 43 Pa. C.S. § 955 (a). That provision is interpreted consistently with Title VII and the ADA which, as discussed above, do not allow for individual liability. See Dici v. Commonwealth of Pennsylvania, 91 F.3d 542, 552 (3d Cir. 1996). Thus, plaintiff cannot proceed on a claim of discrimination against the individual defendants under § 955 (a).

However, individual defendants may be sued under a different provision of the PHRA that forbids “any person, employer, employment agency, labor organization or employee, to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice” 43 Pa. C.S. § 955 (e); see Dici, 91 F.3d at 552. Defendants counter that plaintiff failed exhaust her administrative remedies on this claim, as required under in such cases, see Robinson v. Dalton, 107 F.3d 1018, 1020 (3d Cir. 1997) (citing McKart v. United States, 395 U.S. 185, 193, 89 S. Ct. 1657 (1969)), because she failed to assert PHRA claims against the individual defendants in the complaint she filed with the Philadelphia Commission on Human Relations.

Defendants are incorrect to the extent that they argue that claims against individual defendants under the PHRA are not exhausted unless each individual defendant is identified as a respondent in the charge filed with the PHRC or its local counterpart. “A suit is not barred against defendants named in the body but not in the caption of plaintiff’s administrative charge: Such defendants have ‘received every indication that their conduct was being formally reviewed.’” Carter v. Philadelphia Stock Exch. & Stock Clearing Co., No. 99-2455, 1999 U.S. Dist. LEXIS 13660, at *11 (E.D. Pa. Aug. 26, 1999) (quoting Dreisbach v. Cummins Diesel Engines, Inc., 848 F. Supp. 593, 596 (E.D. Pa. 1994) (quoting Kinnally v. Bell of Pa., 748 F. Supp. 1136, 1140 (E.D. Pa. 1990))). Two of the four individual defendants, Richard Windle and

John Leinhauser, were named in the “Statement of Particulars” attached to the administrative complaint. I conclude that plaintiff’s administrative remedies were exhausted with respect to those defendants.

Neither of the two remaining defendants, Frederick D. Tweed and Martin Seidman, appears in the administrative complaint filed with the Philadelphia Commission on Human Relations. Under certain circumstances, however, a plaintiff may proceed with suit against a party not named in an administrative complaint. The Court of Appeals for the Third Circuit has recognized such an exception to the exhaustion requirement “when the unnamed party received notice and when there is a shared commonality of interest with the named party.” Davies v. Polyscience, Inc., 126 F. Supp. 2d 391, 393 (E.D. Pa. 2001) (quoting Schafer v. Board of Public Educ. of Sch. Dist., 903 F.2d 243, 252 (3d Cir. 1990)). There is evidence that Frederick D. Tweed was on notice of the filing of the administrative complaint and the charges therein; according to the sign-in sheet for the fact-finding conference conducted by the Philadelphia Commission on Human Relations, Tweed attended and participated in the conference. (Fact-Finding Conference Sign-In Sheet, Plaintiff’s Exh. E.) Furthermore, as the human resources manager for Southwark, Tweed had a commonality of interest with Southwark with respect to plaintiff’s termination. Therefore, I conclude that plaintiff properly exhausted her administrative remedies with respect to Frederick D. Tweed. There is, however, no evidence that defendant Martin Seidman had notice of the charges, and therefore plaintiff has not properly exhausted her administrative remedies against him.

Defendants’ second argument concerning plaintiff’s PHRA claims is that plaintiff is precluded from bringing a lawsuit under the PHRA because she availed herself of the protections

of the Philadelphia Commission on Human Relations. Defendants explain that a lawsuit is barred under the PHRA if the plaintiff brought the suit “without resorting to the procedure provided in this act ... ,” 43 Pa. C.S. § 962 (b), and argue that filing with the Philadelphia Commission constitutes a separate procedure outside of the PHRA. Thus, according to defendants, a plaintiff who brings a complaint to the Philadelphia Commission therefore cannot resort to remedies outside the PHRA and then be allowed bring a lawsuit based upon the PHRA.

Defendants’ argument has been made before, and has met with little success in courts of this circuit. This is because the argument runs smack into clear language in the PHRA that allows the establishment of local human relations commissions with “powers and duties similar to those exercised by the Pennsylvania Human Relations Commission under the provisions of this Act.” 43 Pa. C.S. § 962.1 (d). The PHRA also provides that such local human relations commissions “shall notify the Pennsylvania Human Relations Commission of complaints received involving discriminatory acts within that commission’s jurisdiction.” 43 Pa. C.S. § 962.1 (e). In light of this unambiguous language in the PHRA contemplating an important administrative role for local human relations commissions in addressing with violations of the PHRA, it is difficult to understand how defendants can argue that “Plaintiff instituted ‘an action’ (here an action with the Philadelphia Commission) without resorting to the procedure provided in the PHRA” I conclude that by filing with the Philadelphia Commission, plaintiff was, by the clear terms of the statute, resorting to the procedure provided in the PHRA.

The Court of Appeals for the Third Circuit reached a similar conclusion more than two decades ago, when it held that filing complaint with the Pittsburgh Human Relations Commission satisfied the administrative prerequisites of filing a claim under the PHRA. See

Davis v. United States Steel Supply, Div. Of United States Steel Corp., 581 F.2d 335, 339 (3d Cir. 1978) (“Thus, when Mrs. Davis filed her complaint with the Pittsburgh Commission, she resorted to the administrative process, the prerequisite to maintaining a subsequent private cause of action for violation of the Pennsylvania Human Relations Act.”). More recently, in Woodson v. Scott Paper Co., 109 F.3d 913, 927 n.15 (3d Cir. 1997), the court of appeals cited with approval the district court’s decision in Kedra v. Nazareth Hosp., 857 F. Supp. 430 (E.D. Pa. 1994), which predicted that the Supreme Court of Pennsylvania “would hold that a filing with the [Philadelphia Commission on Human Relations] constitutes actual and sufficient compliance with the Pennsylvania Human Relations Act.” Kedra, 857 F. Supp. at 433.⁷ That sentiment has resonated with other district courts in this circuit. See Larmore v. RCP/JAS, Inc., No. 97-5330, 1998 U.S. Dist. LEXIS 7403, at *10 (E.D. Pa. May 19, 1998) (“Indeed, a filing with the Philadelphia Commission can effectively satisfy a plaintiff’s obligation under the PHRA to file a

⁷ The cases relied upon by defendants are quite distinguishable. Defendants point to Lukus v. Westinghouse Elec. Corp., 276 Pa. Super. 232, 419 A.2d 431 (Pa. 1980), for its interpretation of the following PHRA language: “If the complainant institutes any *action* based on such grievance without resorting to the procedure provided in this act, such complainant may not subsequently resort to the procedure herein.” 43 Pa. C.S. § 962 (b) (emphasis added). The court in Lukus interpreted the word “action” to mean “[a]ny suit or proceeding in any court of this Commonwealth, i.e., not in any court of the United States.” Id. at 269. According to defendants, plaintiff instituted an “action” with the Philadelphia Commission, and therefore she is barred by § 962 (b) from bringing this action. The problem with this argument is that the Lukus definition of “action” does not encompass the filing of a complaint with the Philadelphia Commission. Lukus defines “action” by reference to “any court of this Commonwealth,” and it is quite clear that the Philadelphia Commission is not a court of the Commonwealth of Pennsylvania. Thus, Lukus is inapposite.

Defendants also cite the case of Fye v. Central Transp., Inc., 487 Pa. 137, 409 A.2d 2 (Pa. 1979), in which the Supreme Court of Pennsylvania concluded that an investigation by the EEOC did not constitute substantial compliance with the PHRA’s exhaustion requirements. However, as the district court in Kedra correctly noted, “A filing with the Philadelphia Commission is distinguishable from a filing with the EEOC because the Pennsylvania General Assembly explicitly contemplated that complainants could file with local commissions and that the local commissions would, in turn, notify [the PHRC] of those filings.” Kedra, 857 F. Supp. at 433 n.6.

Therefore, I conclude that the cases cited by defendants are not applicable to the instant case.

complaint with the Pennsylvania Human Relations Commission.”); Jackson v. Good Lad Co., Inc., No. 93-2362, 1994 U.S. Dist. LEXIS 5344, at *12 n.4 (E.D. Pa. Apr. 28, 1994) (holding that plaintiffs had exhausted their remedies under the PHRA by filing with the Philadelphia Commission on Human Relations). I conclude, therefore, that plaintiff here properly exhausted her PHRA claims by filing a complaint with the Philadelphia Commission.

Accordingly, plaintiff’s PHRA claims against Southwark under § 955 (a) and against individual defendants John Leinhauser, Richard Windle, and Frederick D. Tweed under § 955 (e) will survive the motion to dismiss.

Conclusion

For the foregoing reasons, plaintiff may proceed with her Count I ADA claim against defendant Southwark, her Count VI PHRA claim against defendant Southwark under 43 Pa. C.S. § 955 (a), and against the remaining individual defendants under 43 Pa. C.S. § 955 (e). All other claims will be dismissed.

An appropriate Order follows.

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

CATHERINE P. DIEP,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
SOUTHWARK METAL	:	
MANUFACTURING COMPANY, JOHN	:	
LEINHAUSER; RICHARD WINDLE,	:	
FREDERICK D. TWEED, and MARTIN	:	
SIEDMAN,	:	
	:	
Defendants.	:	NO. 00-6136

ORDER

AND NOW, this 19th day of March, 2001, upon consideration of the motion of defendants Southwark Metal Manufacturing Company, John Leinhauser, Richard Windle, Frederick D. Tweed, and Martin Seidman to dismiss for failure to state a claim pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure (Document No. 7), and the motion of defendant for leave to file a reply brief (Document No. 10), and having carefully reviewed the pleadings and the record, and plaintiff having conceded the motion to dismiss as to Counts II, III, and IV, and having concluded, for the reasons set forth in the foregoing memorandum, that plaintiff has stated a claim upon which relief may be granted against Southwark under the ADA and the PHRA, and against defendants Leinhauser, Windle, and Tweed under the PHRA, **IT IS HEREBY**

ORDERED that the motion to file a reply brief is **GRANTED** and the motion to dismiss is

- (1) **GRANTED** on Count I of the complaint as to defendants Leinhauser, Windle, Tweed, and Seidman, and **DENIED** as to defendant Southwark, and Count I is **DISMISSED** as to defendants Leinhauser, Windle, Tweed, and Seidman;

- (2) **GRANTED** on Counts II, III, IV, and V of the complaint as to all defendants, and Counts II, III, IV, and V are all **DISMISSED**; and
- (3) **GRANTED** on Count VI of the complaint as to defendant Seidman only and **DENIED** as to all other defendants, and Count VI against defendant Seidman is **DISMISSED**.

IT IS FURTHER ORDERED that the remaining defendants shall answer the surviving counts of the complaint no later than April 23, 2001.

LOWELL A. REED, JR., S.J.