

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

ROBERT A. TURTON,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	
SHARP STEEL RULE DIE, INC., and	:	
YORK STEEL RULE DIES, INC.,	:	
Defendants.	:	NO. 01-2017

ORDER AND MEMORANDUM

ORDER

AND NOW, this 19th day of July, 2001, upon consideration of Defendants’ Motion to Dismiss Plaintiff’s Complaint (Document No. 2, filed May 2, 2001), and Plaintiff’s Memorandum of Law in Opposition to Defendants’ Motion to Dismiss (Document No. 4, filed May 17, 2001), **IT IS ORDERED** that Defendants’ Motion to Dismiss Plaintiff’s Complaint is **DENIED**. Defendants shall file and serve an answer to the complaint within twenty days. A preliminary pretrial conference will be scheduled in due course.

MEMORANDUM

I. INTRODUCTION

This case arises out of defendants’ termination of plaintiff’s employment. Plaintiff Robert A. Turton (“Turton” or plaintiff) states in his complaint that he was hired by defendants Sharp Steel Rule Die, Inc. and York Steel Rule Dies, Inc. on September 1, 1976, and was employed by defendants for twenty-two years. He alleges that, on February 3, 1999, he was

wrongfully discharged by defendants. At the time of his termination, Turton was forty-one years old. He argues that during the course of his employment by defendants, his job performance equaled or exceeded the standards established for his position, and that defendants discharged him in order to hire a younger, untrained person for less money than Turton was earning.

In the complaint plaintiff alleges that he has been discriminated against on the basis of age and that defendants' actions constitute violations of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621, et seq. Plaintiff seeks compensatory damages, reinstatement in his former position, and declaratory judgment declaring defendants' actions unlawful and in violation of the ADEA.

Plaintiff states in the complaint that he filed an administrative charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on March 9, 1999, and that this charge was dual-filed with the Pennsylvania Human Relations Commission ("PHRA"). On April 2, 2001, plaintiff filed a complaint in the Lehigh County Court of Common Pleas. On April 24, 2001, defendants filed a Notice of Removal to this Court.

On May 2, 2001, defendants filed a motion to dismiss plaintiff's complaint. They argue that plaintiff's complaint should be dismissed pursuant to Rule 12(b)(1) or 12(b)(6) because (1) the complaint does not state whether the plaintiff has exhausted his administrative remedies; and (2) a right to sue letter is not attached to the complaint.

II. STANDARD OF REVIEW

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a defense of “failure to state a claim upon which relief can be granted” may be raised by motion in response to a pleading. Fed. R. Civ. P. 12(b)(6). In considering a motion to dismiss under Rule 12(b)(6), a court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S. Ct. 1843, 1849, 23 L. Ed. 2d 404 (1969). The court must only consider those facts alleged in the complaint in considering such a motion. See ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). A complaint should be dismissed if “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 (1984).¹

III. ANALYSIS

The ADEA is a remedial statute that grants employees whose rights were violated by their employers a federal cause of action. See Serendinski v. Clifton Precision Prods. Co., 776 F.2d 56 (3d Cir. 1985). “Under the ADEA, it is ‘unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.’” Fakete v. Aetna, Inc., 2001 WL 541086, at *6 (E.D. Pa. May 14, 2001) (citing 29 U.S.C.

¹ The Court notes that, in the alternative, defendants have moved to dismiss plaintiff’s claim under Rule 12(b)(1), citing Oshiver v. Levin, Fishbein, Sedran & Berman, 818 F. Supp. 104, 107 (E.D. Pa. 1993), which states that a Rule 12(b)(6) motion is appropriate when a plaintiff has not exhausted administrative remedies. However, because the Court concludes that plaintiff has exhausted administrative remedies, it has subject matter jurisdiction over the claim and considers defendants’ motion to dismiss under Rule 12(b)(6).

§ 623(a)(1)). Section 626(d) of the ADEA details what is required of a plaintiff in order to file a civil action, and § 626(e) discusses the receipt and implications of a right to sue notice. 42 U.S.C. § 626(d), (e); see also Kozlowski v. Extencicare Health Servs., Inc., 2000 WL 193502, at *3 (E.D. Pa. Feb. 17, 2000).

The Court will address defendants' arguments in turn—that the complaint should be dismissed because plaintiff (1) failed to allege that he exhausted administrative remedies and (2) failed to attached a copy of a right to sue letter. For the reasons that follow, the Court concludes that plaintiff has exhausted his administrative remedies as required under the ADEA and that his failure to attach a right to sue letter to the complaint does not require dismissal.

A. Exhaustion of Remedies

Exhaustion of administrative remedies is required under the ADEA. See Searcy v. Southeastern Pa. Transp. Auth., 1997 WL 152791, at *5 (E.D. Pa. Mar. 27, 1997) (dismissing plaintiff's complaint because of failure to allege exhaustion of remedies) (citing Serendinski, 776 F. Supp. 2d at 63); 29 U.S.C. § 626(d). Section 626(d) states: "No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the [EEOC]." 42 U.S.C. § 626(d). This section has been construed to require exhaustion of remedies—a complainant must file a timely charge with the EEOC and wait at least sixty days before filing a civil action. See, e.g., Whalen v. W.R. Grace & Co., 56 F.3d 504, 506 (3d Cir. 1995); Brown v. International Bus. Machs. Corp., 1996 WL 411650, at *2 (E.D. Pa. July 16, 1996); see also Bihler v. Singer, 710 F.2d 96, 99 n.7 (3d Cir. 1983) (holding that a district court's jurisdiction does not depend upon the EEOC having actually taken some action in response to the plaintiff's charge). A complainant who has filed a charge

with the EEOC, and has waited sixty days prior to filing an ADEA claim in federal court, has exhausted his administrative remedies.

Plaintiff's complaint states that he filed a charge of age discrimination with the EEOC on or about March 9, 1999. See Complaint ¶ 21. He did not file his ADEA claim in court² until April 2, 2001, well after the sixty day period set forth in § 626(d). Therefore, plaintiff has exhausted his administrative remedies under the ADEA and defendants' motion to dismiss with respect to this issue is denied.

B. Right to Sue Letter

Defendants also claim that plaintiff has failed to attach a right to sue letter to his complaint. The Court concludes that is not required in an ADEA claim.

Section 626(e) sets forth the circumstances under which an injured employee may bring suit under the ADEA as follows:

If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

29 U.S.C. § 626(e). That section provides only that, when a charge filed with the EEOC is dismissed or otherwise terminated, a complainant must file any civil action with ninety days after the date she or he receives such notice. However, the ADEA does not require that a right to sue letter be obtained before filing suit. See, e.g., Kozlowski, 2000 WL 193502, at *3 (distinguishing the ADEA from Title VII) (citing Serendinski, 776 F.2d at 63).

² Suit was initiated in the Court of Common Pleas of Lehigh County and thereafter removed to this Court.

The Second Circuit has distinguished between the ADEA and Title VII with respect to whether a right to sue letter is required in order to file a claim. It stated: “Whereas Title VII plaintiffs must receive a ‘right-to-sue’ letter from the EEOC before filing suit in federal court, . . . ADEA plaintiffs need only wait 60 days after filing the EEOC charge. Thus, the ADEA plaintiff can sue in court even if the EEOC has not yet completed its investigation or attempts at conciliation.” Hodge v. N.Y. College of Podiatric Med., 157 F.3d 164, 168 (2d Cir. 1998) (citations omitted); but see Farahmand v. Cohen, 1999 WL 80262, at *2 (E.D. Pa. Feb. 11, 1999) (citing cases discussing only Title VII and holding that both Title VII and the ADEA require that a plaintiff file charges with the EEOC and receive a right to sue letter before filing a complaint in federal court).

This Court agrees with the Second Circuit’s analysis in Hodge. Defendants’ reliance on Title VII cases in support of their motion to dismiss based on the fact that plaintiff did not attach a right to sue letter to his complaint is misplaced, and defendants’ motion to dismiss with respect to this issue is denied.

IV. CONCLUSION

For the foregoing reasons, Defendants’ Motion to Dismiss Plaintiff’s Complaint is denied.

BY THE COURT:

JAN E. DUBOIS, J.

