

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

TROY TUCKER,	:	
	:	
Plaintiffs,	:	CIVIL ACTION
v.	:	
	:	NO. 03-5015
MERCK & CO., INC.,	:	
	:	
Defendant.	:	

MEMORANDUM

Giles, C.J.

February 18th, 2004

I. Introduction

Troy Tucker has brought this action against Merck & Co., Inc. (“Merck”) seeking damages based on alleged retaliation for his participation in earlier litigation, racial discrimination, and hostile work environment pursuant to 42 U.S.C. § 1981 and the Civil Rights Act of 1991.

Now before the court is Merck’s Motion to Dismiss pursuant to Fed. R. Civ. Proc. 12(b)(6). For the reasons that follow, the motion is denied.

II. Factual Background

Consistent with the review standards applicable to a motion to dismiss under Fed. R. Civ. Proc. 12(b)(6), the alleged facts, viewed in the light most favorable to the plaintiff, follow.

Mr. Tucker and his wife were previously involved in litigation against Merck surrounding his wife’s termination and related events. See Donna M. Tucker and Troy Tucker v. Merck & Co., Inc., E.D. Pa., Civil Action No. 02-2421. That action was before this court and was

terminated on May 2, 2003.¹ Mr. Tucker alleges that none of the events now related in support of his present claims were involved in the prior litigation.

Mr. Tucker is an employee of Merck, and has been so since September 1989. (Compl. ¶ 5.) He is currently employed as a Contract Analyst in defendant's United States Human Health division. (Id.) Plaintiff asserts that since May 2002, he has been experiencing racial discrimination at Merck.

Mr. Tucker first alleges that his request for education assistance was handled improperly. On May 21, 2002, plaintiff submitted a request for such assistance, but his request was denied by Reagan Hull, defendant's Executive Director of Customer Contract Management. (Compl. ¶¶ 10-11.) Mr. Hull refused to meet with Mr. Tucker to explain the basis of his denial. (Compl. ¶ 11.) Subsequently, on August 26, 2002, Harry Rieck, defendant's Senior Customer Contract Management, approved Mr. Tucker's request for educational assistance. (Compl. ¶ 12.) On September 6, 2002, Randall Mattison, defendant's Manager of Customer Contract Management, sent Mr. Tucker an e-mail requesting that Mr. Tucker sign an Alternative Work Arrangement relating to the approval of his educational assistance request. (Compl. ¶ 13.) Plaintiff avers that white employees receiving educational assistance were not required to sign any like document as a condition of receiving such assistance. (Compl. ¶ 14.) Mr. Tucker does not indicate what the Alternative Work Arrangement agreement requires, or how signing it could be negatively impact his employment or career opportunities.

On September 17, 2002, Mr. Tucker went out on short-term disability. (Compl. ¶ 15.)

¹ An appeal was filed in this case and is currently pending. See Donna M. Tucker and Troy Tucker v. Merck & Co., Inc., U.S. Ct. App., 3d Cir., No. 03-2616.

Mr. Tucker's physician provided defendant's health care department with a diagnosis within the requisite time period. (Compl. ¶ 16.) Mr. Tucker alleges that while he was on short-term disability, Maria Becker, RN, of defendant's Health Services, called Mr. Tucker's home and harassed him and his wife. (Compl. ¶ 17.) Further, on October 25, 2002, Mr. Tucker received a letter from Mr. Reick that threatened his continued employment related to his short-term disability status. (Compl. ¶ 18.) On November 11 and 14, 2002, Linda Mastropaolo, a case manager with defendant's Health Services, contacted Mr. Tucker's therapist and inquired regarding his ability to function in his job and to attend school. (Compl. ¶ 19.)

Mr. Tucker further alleges that Mr. Reick threatened to fire him on two separate occasions, though no details surrounding these incidents are included in the complaint. (Compl. ¶ 20.) Mr. Tucker avers that these events were a result of a racially hostile work environment and retaliation based upon his prior law suit against Merck. (Compl. ¶¶ 20-21.) Additionally, in March 2003, Mr. Tucker received a Performance Evaluation that he believes does not accurately reflect his performance during 2002. (Compl. ¶ 22.)

Mr. Tucker also lists several other events that allegedly support his claims. He states that he has been denied the right to speak with upper management regarding his concerns. (Compl. ¶¶ 23a, 25.) He has been denied his rights an employee under a variety of Merck policies, including Workplace Harassment, Discrimination Complaints, Absence from Work, and Holidays. (Compl. ¶ 23.) Mr. Tucker claims that these policies have been strictly enforced against him, while they have been relaxed for similarly situated white employees. (Compl. ¶ 24.) Mr. Tucker also claims that Merck employees enforced non-existent policies against him, to his detriment. (Id.)

Mr. Tucker claims that as a result of these acts by Merck and its employees, he suffered loss of income, loss of professional opportunities, embarrassment, humiliation, anxiety, and anguish. (Compl. ¶ 27.)

III. Discussion

A. Legal Standard for 12(b)(6) Motion to Dismiss

When considering a motion to dismiss a complaint for failure to state a claim under Federal Rules of Civil Procedure 12(b)(6), this court must “accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them.” Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990). The court will only dismiss the complaint 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 & Spaulding, 467 U.S. 69, 73 (1984).

B. Section 1981

Section 1981, which prohibits racial discrimination in the making and enforcement of property transactions provides that:

All persons within the jurisdiction of the United States shall have the same rights in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a), as amended by the Civil Rights Act of 1991. Claims alleged under § 1981 are analyzed under the same framework as those raised under Title VII. See Pamintuan v. Nanticoke Mem. Hosp., 192 F.3d 378, 385 (3d Cir. 1999) (same standard for § 1981 as Title VII for discrimination claim).

B. Retaliation

A plaintiff alleging that an unfavorable job action is based upon an illegal retaliatory motive must first establish that “(1) he was engaged in a protected activity; (2) he was [subject to an adverse job action] subsequent or contemporaneously with such activity; and (3) there is a causal link between the protected job activity and the [subsequent adverse job action].” Sarullo v. United States Postal Service, 352 F.3d 789, 800 (3d Cir. 2003) (quoting Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir. 1997)). A protected activity is one where an individual opposed, in any manner including supporting others raising opposition, a practice by the employer because it was discriminatory. See, e.g., Wilson v. Supreme Color Card, Inc., 703 F. Supp. 289, 297 (S.D.N.Y. 1989) (requiring that, under § 1981, prior complaint must have involved racial discrimination); Cox v. Consol. Rail Corp., 557 F. Supp. 1261, 1266 (D.D.C. 1983) (“In instances where the underlying claim has nothing to do with race discrimination, a retaliation claim brought under § 1981 would not be sustainable.”).

Here, Mr. Tucker asserts that he was retaliated against as a result of his prior lawsuit with Merck. However, his prior suit raised only state law claims: intentional interference with a contract, defamation, civil conspiracy, and invasion of privacy. None of these claims was raised to address behavior alleged to be based upon racial discrimination. Thus, as defined under § 1981 caselaw, Mr. Tucker’s litigation does not qualify as a “protected activity” and cannot be used as a basis for a retaliation claim. Plaintiff has asked for leave to amend his complaint, either to incorporate additional information clarifying the retaliation claim or to remove it entirely. While the court is doubtful that, alleged on any conduct herein raised, plaintiff will be able to successfully plead retaliation under § 1981, the court grants leave for plaintiff to amend his

complaint.

C. Race Discrimination

Claims alleging disparate treatment, whether § 1981 or Title VII, must be analyzed under the burden shifting framework articulated by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and later crystallized in Texas Dep't. of Comty. Affairs v. Burdine, 450 U.S. 248 (1981). Under these cases, a plaintiff initially must allege a prima facie case of discrimination; if that is done, defendant must then articulate a legitimate, non-discriminatory reason for its action; the plaintiff must then show that the proffered reason is false and that race was the real motivation for defendant's actions. Texas Dep't of Comty. Affairs, 450 U.S. at 252-53; McDonnell Douglas Corp., 411 U.S. at 802. To defeat a motion to dismiss Mr. Tucker is only required to allege a prima facie case of discrimination. Under § 1981 this requires that plaintiff: (1) is a member of a racial minority; (2) there was intent by defendant to discriminate against him on the basis of race; and (3) the discrimination concerned on or more of the protected activities enumerated in the statute including the right to make and enforce contracts. Brown v. Philip Morris, Inc., 250 F.3d 789, 797 (3d Cir. 2001).

As an African-American, plaintiff satisfies the first prong. (Compl. ¶ 3.) The complaint explicitly alleges that defendant intentionally discriminated against him on the basis of race, thus satisfying the second prong. (Compl. ¶¶ 26, 28.) With regard to the third prong, Mr. Tucker does not allege that he was terminated, that he was constructively discharged, or that he would have been promoted but for the discrimination. At best, Mr. Tucker alleges that he was required to sign an Alternative Work Arrangement document, that company policies were improperly applied to him, and he suffered a loss of income and professional responsibilities. These claims

involve the enforcement of contracts and, thus, satisfy plaintiff's burden against the motion to dismiss.

D. Hostile Work Environment

The Civil Rights Act of 1991, Pub. L. No. 102-166 § 2, amended 42 U.S.C. § 1981 to provide a cause of action for racial harassment. To establish a hostile work environment claim a plaintiff must allege, under the totality of the circumstances, that (1) he suffered intentional discrimination because of his or her membership in a protected class; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would have detrimentally affected a reasonable person of the same protected class in that position; and (5) the existence of respondeat superior liability. Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990). “In determining whether an environment is hostile or abusive, we must look at numerous factors, including ‘the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; whether it unreasonably interferes with an employee’s work performance.’” Weston v. Pennsylvania, 251 F.3d 420, 426 (3d Cir. 2001) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993)). To fulfill his burden under the pervasiveness standard “requires the plaintiff to show that his work environment was so pervaded by racial harassment as to alter the terms and conditions of his employment.” Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 768 (1998). “[T]o constitute a hostile work environment, there must be more than a few isolated incidents of racial enmity, meaning that instead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments.” Al-Salem v. Bucks County Water & Sewer Auth., No. 97-6843, 1999 WL 167729, *5 (E.D. Pa. March 25, 1999) (quoting Schwapp v. Town of Avon,

118 F.3d 106, 110-11 (2d Cir. 1997)).

The details provided by plaintiff's complaint are limited. While he asserts instances of mistreatment, he does not allege any specific comments or conduct that demonstrate such treatment was a result of his race. Generally claims raised under a hostile work environment involve explicit conduct that is addressed at a plaintiff's protected class status. Absent further clarification, this court questions the merits of Mr. Tucker's claim under a hostile work environment. However, in Weston v. Pennsylvania, 251 F.3d 420, 429-30 (3d Cir. 2001), the third circuit reiterated liberal notice pleading standards applicable under Federal Rule of Civil Procedure 8, noting specifically that "[c]omplaints 'need not plead law or match facts to every element of a legal theory.'" Id. at 429 (quoting Kreiger v. Fadely, 211 F.3d 134, 136 (D.C.Cir. 2000) (internal citations omitted)). Accordingly, as Mr. Tucker has explicitly alleged a hostile work environment claim, he has satisfied the requirements of notice pleading and will be permitted to proceed with his claim.

E. Claim Preclusion

Defendant argues that plaintiff is barred from asserting his claims because he should have raised them in his prior litigation. Claim preclusion requires: 1) a judgment on the merits in a prior suit involving; 2) the same parties; and 3) a subsequent suit based on the same causes of action. See Eastern Minerals & Chemicals Co. v. Mahan, 225 F.3d 330, 336 (3d Cir. 2000). "Courts should not apply this conceptual test mechanically, but should focus on the central purpose of the doctrine, to require a plaintiff to present all claims arising out of the same occurrence in a single suit." Bd. of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc. v. Centra, 983 F.2d 495, 504 (3d Cir. 1992). It is only where both cases actually result

from the same transaction and involve the same issues of fact that claim preclusion applies. See Churchill v. Star Enters., 183 F.3d 184, 187 (3d Cir. 1999).

Here, it is undisputed that there was a prior judgment on the merits between the parties. However, the two parties disagree regarding whether the new claims are based upon the previously raised allegations. Defendant's argument that plaintiff's claims are precluded relies on the fact that all of the alleged events occurred before the court's final order in the case. Relying on Churchill, defendant argues that third circuit law requires a plaintiff to amend its complaint to include all claims in a single action. See id. at 190-92. Further, defendant cites tenth circuit authority that holds any allegations arising out of the same employment relationship, even if not factually identical, arise out of the same cause of action for claim preclusion purposes. (See Def.'s Sur-Reply at 5 (citing Wilkes v. Wyoming Dep't of Employment Div. of Labor Standards, 314 F.3d 501, 503 (10th Cir. 2003)).

Plaintiff responds that the claims are wholly unrelated to any issues raised in the prior litigation. (Pl.'s Ans. to Def.'s Mot. to Dismiss at 7.) Without such relation, plaintiff argues that he had no duty to amend his prior action to include these issues. (Id. at 8.) Further, plaintiff argues that because the events do not stem from the same factual predicate, they are not subject to the claim preclusion doctrine. (Id. at 5.)

The purpose of the claim preclusion doctrine is to prevent litigants who have already been to court concerning certain conduct from using legal strategy to attack the same conduct. See Venuto v. Witco Corp., 117 F.3d 754, 762 (3d Cir. 1997). The interests of efficiency and fairness prohibit such repeat litigation. See id. Here, though the parties to the litigation are the same, the conduct at issue is not; the previous litigation involved Ms. Tucker's discharge and the

related investigation, this complaint involves alleged racial discrimination based on separate events. The third circuit has clearly stated that two actions must involve an “essential similarity of the underlying events” to be subject to claim preclusion. CoreStates Bank, N.A. v. Huls America, Inc., 176 F.3d 187, 202 (3d Cir. 1999); see also Facchiano Constr. Co., Inc. v. United States Dept. of Labor, 987 F.2d 206, 212-13 (3d Cir. 1993) (claim preclusion does not apply where the two claim rested on different evidence). The fact that the parties have been continuously involved in an employment relationship is alone insufficient to demonstrate that two raised actions arise from the same factual set of facts. While the tenth circuit may have reached such a conclusion, this court does not find such reasoning persuasive. An employment relationship between two parties may last for years or decades and may involve numerous incidents of varying distance in time and similarity. Such a relationship alone is not adequate to support the defendant’s entire burden under the claim preclusion doctrine. Accordingly, the claim preclusion doctrine is inapplicable and defendant’s Motion to Dismiss cannot successfully rely upon this argument.

F. Conclusion

For the foregoing reasons, the Partial Motion to Dismiss is denied. Plaintiff has fourteen days from the date of this order to file an amended complaint. An appropriate order follows.