

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

CLINTON D. WILKINS,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 03-6610
	:	
v.	:	
	:	
ABF FREIGHT SYSTEM, INC., et al.,	:	
	:	
Defendants.	:	

MEMORANDUM

Giles, C.J.

September 15, 2005

I. Introduction

On July 5, 2005, Plaintiff, Clinton D. Wilkins (“Wilkins”), filed an Amended Complaint Dated July 4, 2005 alleging: (1) racial discrimination, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1, et seq. (“Title VII”), (2) age discrimination, pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, et seq. (“ADEA”), (3) violation of § 301 of the Labor Management Reform Act of 1947 (“LMRA”), codified at 29 U.S.C. § 185(a), (4) violation of a Whistleblower Statute, and (5) intentional infliction of emotional distress. Before the court is Defendants’ ABF Freight Systems (“ABF”), Donald Finan (“Finan”), and Fred Sorbello’s (“Sorbello”) Motion to Dismiss Amended Complaint Dated July 4, 2005 and for Partial Summary Judgment. For the reasons that follow, Defendants’ motion is granted in part and denied in part.

II. Factual Background

Plaintiff Wilkins is a seventy year old African-American man who worked as a truck driver for ABF from approximately 1989 until March 2002. During his tenure, Wilkins was supervised by Finan from approximately 1994 until 1999.¹ Sorbello replaced Finan as Wilkins' supervisor beginning in 1999 until March 2002.

During his employment with ABF, Wilkins was a member of the International Brotherhood of Teamsters, Local 312 (the "Union"), which had a collective bargaining agreement with ABF, known as the National Master Freight Agreement ("NMFA"). Article V of the NMFA specified that employment opportunities, most notably overtime assignments, were to be distributed according to seniority.

Wilkins alleges that while under Finan's supervision he was subjected to numerous instances of racial animus. On a number of occasions, Finan called Wilkins a "nigger." (Pl.'s Am. Compl. ¶¶ 24, 26). He further alleges that he was routinely denied the opportunity to work overtime due to Finan's racial animosity. (Pl.'s Am. Compl. ¶¶ 27-28). According to Wilkins, Finan would contact junior drivers directly who were out making deliveries to encourage them to return quickly so that they could take another job, and thus the available overtime, before Wilkins returned to the terminal. (Pl.'s Am. Compl. ¶ 28).

¹ In his complaint, plaintiff alleges that Defendant Finan left ABF and was replaced at the end of 1997 with Defendant Sorbello. (Pl.'s Am. Compl. ¶¶ 29-30). Defendant ABF notes that according to its records, Defendant Finan was transferred from the ABF terminal where Wilkins worked on December 31, 1999. (Defs.' Mot. to Dismiss at 8 n.4). This time frame is more consistent with Wilkins' allegation that after a few months of employment, Sorbello discriminated against plaintiff from 2000 until 2002. (Pl.'s Am. Compl. ¶ 32). Given that the court must not only accept plaintiff's allegations as true, but must also draw all reasonable inferences, the court will proceed on the assumption that Finan was transferred at the close of 1999 and Sorbello became plaintiff's supervisor at the beginning of 2000.

In 1999, Sorbello replaced Finan as Wilkins' supervisor. (Pl.'s Am. Compl. ¶ 30). Although Wilkins and Sorbello had "little contact" at first, Wilkins alleges that between 2000 and 2002 Sorbello repeatedly discriminated against him on the basis of race and age. For example, Wilkins would normally shave in the men's room after his shift was over. Sorbello objected to this practice and remarked that "all other Black people shave at home." (Pl.'s Am. Compl. ¶ 35). On another occasion, Sorbello remarked to plaintiff that "you black guys can't get the job done" and "you just want to aggravate me. Nigger, why don't you retire—you have enough time in the union." (Pl.'s Am. Compl. ¶ 59).

Plaintiff asserts that during his time at ABF, Sorbello did not hire any other African Americans and only hired younger, Caucasian workers. (Pl.'s Am. Compl. ¶ 37). Sorbello also allegedly pressed Wilkins to retire by such comments as "why don't you retire. You are old enough. You can get top pension from the Union. You won't get overtime from here. You will lose money." (Pl.'s Am. Compl. ¶ 39). According to Wilkins, Sorbello routinely denied Wilkins the opportunity to work overtime by contacting younger drivers at home and making deals with them to come in early several times each week. (Pl.'s Am. Compl. ¶ 43).

In October 2000, Wilkins was told by his doctor that his blood pressure was too high due to work-related stress and that he needed to lower his blood pressure to avoid future heart problems. (Pl.'s Am. Compl. ¶ 44). Wilkins' doctor provided a note for his employer specifying that Wilkins should be permitted to remove his shirt in order to prevent dehydration when the weather was particularly hot. (Pl.'s Am. Compl. ¶ 45). According to Wilkins, Sorbello disregarded the doctor's note and sent reprimand letters on August 7, 8, and 21, 2002 in response to Wilkins having his shirt unbuttoned on the job. (Pl.'s Am. Compl. ¶¶ 51-52).

On June 5, 2001, Wilkins sent a letter to his union representative complaining about his loss of overtime and harassment from Sorbello. (Pl.'s Am. Compl. ¶ 49). He received no response. Wilkins also sent a letter to ABF's Personnel Manager and got no response. (Pl.'s Am. Compl. ¶ 58). In addition, plaintiff filed two formal grievances with the Union, dated April 24, 2001 and December 7, 2001. (Pl.'s Am. Compl. ¶¶ 93, 97). Wilkins was notified by the Union's shop steward that the Union would review his grievance and contact him. (Pl.'s Am. Compl. ¶ 94). The Union did not pursue either grievance and did not officially inform him of any decision. (Pl.'s Am. Compl. ¶ 96). In March 2002, Wilkins took early retirement from ABF.

Wilkins filed timely complaints with the Equal Employment Opportunity Commission ("EEOC") and the Pennsylvania Human Relations Commission ("PHRC"). In his PHRC complaint, Wilkins alleged that ABF discriminated against him on the basis of age, race, and disability by (1) giving overtime to younger, white drivers, (2) requiring Wilkins to button his shirt despite his doctor's orders, (3) singling him out for harassment and denying him the opportunity to work overtime. (Defs.' Mot. to Dismiss Exh. A). He filed this action within ninety-days of receiving his EEOC "right-to-sue" letter and within one year of his PHRC complaint.

Wilkins filed his original complaint on December 8, 2003. Wilkins filed his most recent amended complaint on July 5, 2005. In his complaint, Wilkins alleges: (1) racial discrimination; (2) age discrimination; (3) violation of § 301 of the LMRA; (4) violation of a whistleblower statute, and (5) intentional infliction of emotional distress. Defendants filed a motion to dismiss alleging: (1) all allegations of racial discrimination prior to February 6, 2001 should be dismissed as untimely; (2) the complaint fails to state a claim for constructive discharge on the

basis of age discrimination; (3) the individual claims against Finan and Sorbello should be dismissed for lack of individual liability; (4) plaintiff's claims of (a) constructive discharge based on race and age and (b) racial discrimination by Sorbello, should be dismissed for failure to exhaust administrative remedies; (5) plaintiff fails to state a claim for breach of the duty of fair representation against the Union; (6) plaintiff's cause of action for breach of the collective bargaining agreement is untimely; (7) plaintiff fails to state a claim for a violation of a whistleblower statute; and (8) plaintiff fails to state a claim for intentional infliction of emotional distress.

III. Standard for Motion to Dismiss

Dismissal of a complaint pursuant to Rule 12(b)(6) is proper “only 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 (1984). The court must accept all of plaintiff's allegations as true and draw all reasonable inferences therefrom. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969) (“the material allegations of complaint are taken as admitted”); Holder v. City of Allentown, 987 F.2d 188, 194 (3d Cir. 1993) (“[a]t all times in reviewing a motion to dismiss we must ‘accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom.’” (quoting Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990))).

IV. Discussion

A. Individual Liability for Defendants Finan and Sorbello

Defendants argue that Wilkins' claims against Finan and Sorbello in their individual capacities should be dismissed because there is no individual liability under Title VII or ADEA. In his June 18, 2004 Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Second Complaint, Wilkins concedes that the individual claims against Finan and Sorbello must be dismissed. (Pl.'s Mem. of Law in Opp. to Defs.' Mot. to Dismiss at 7). Accordingly, the individual claims against Finan and Sorbello are dismissed. See also Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061, 1078 (3d Cir. 1996) (holding that Congress did not intend to hold individual employees liable under Title VII); Verdecchia v. Douglas A. Prozan, Inc., 274 F. Supp. 2d 712, 723 (E.D. Pa. 2003) (finding that there is no liability under the ADEA given the identical language of defendants under the ADEA and Title VII).

B. Racial Discrimination under Title VII

Under Title VII, a claim for racial discrimination must be filed, either with the EEOC or the appropriate state agency, here the PHRC, within 300 days after the alleged unlawful employment practice occurred. 42 U.S.C. § 2000e-5(e)(1); Rush v. Scott Specialty Gases, Inc., 113 F.3d 476, 480 (3d Cir. 1997); West v. Philadelphia Elec. Co., 45 F.3d 744, 754 (3d Cir. 1995). The Supreme Court has stated that this requirement is subject to "waiver, estoppel, and equitable tolling." West, 45 F.3d at 754 (quoting Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982)). One such equitable exception is the "continuing violation theory," which holds that "the plaintiff may pursue a Title VII claim for discriminatory conduct that began prior to the filing period if he can demonstrate that the act is part of an ongoing practice or pattern of

discrimination.” Id. To establish a continuing violation, the plaintiff must demonstrate that “at least one discriminatory act occurred within the 300 day period” and that the harassment is part of a continuing pattern of discrimination, meaning that the harassment “is more than the occurrence of isolated or sporadic acts of intentional discrimination.” Rush, 113 F.3d at 481 (quoting West, 45 F.3d at 754-55). In other words, the “preponderance of the evidence must establish that some form of intentional discrimination against the class of which plaintiff was a member was the company’s ‘standard operating procedure.’” Jewett v. Int’l Telephone & Telegraph Corp., 653 F.2d 89, 91-92 (3d Cir. 1981) (quoting Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977)).

Defendants argue that Wilkins’ claims for racial discrimination filed more than 300 days before his administrative complaint should be dismissed as untimely. (Defs.’ Mot. to Dismiss at 7). Defendants argue that the facts here preclude application of the ongoing violation doctrine given that Wilkins’ allegations pertain to two different supervisors, acting independently, during two different time periods. (Id. at 9). Plaintiff maintains, however, that the racial discriminatory acts of Finan and Sorbello evidence a pattern and practice of discrimination necessitating the application of continuing violation doctrine. (Pl.’s Mem. of Law in Opp. to Defs.’ Mot. to Dismiss at 3-4).

Wilkins’ allegations of racial discrimination pertain to two separate managers acting independently during two different time periods. There is no evidence that Finan and Sorbello’s actions were anything but the separate courses of two men, each not responsible for the conduct of the other. Additionally, when Finan was transferred and Sorbello became Wilkins’ supervisor, there was a significant period of time in which Wilkins was not subject to discrimination of any

kind. Therefore, there is no legal connection between the actions of Finan and Sorbello requiring the application of the ongoing violation doctrine. Accordingly, Wilkins' claims for racial discrimination under Title VII are limited to those acts of alleged discrimination, by Sorbello which occurred 300 days prior to December 3, 2001, the date of his filing with the PHRC.

C. Age Discrimination under the ADEA

The ADEA prohibits employers from discriminating against an employee "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). The plaintiff "has the initial burden of offering evidence that is sufficient 'to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.'" Maxfield v. Sinclair Int'l, 766 F.2d 788, 791 (3d Cir. 1985) (quoting Teamsters, 431 U.S. at 324). A plaintiff may satisfy this burden by offering either direct or circumstantial evidence. Fakette v. Aetna, Inc., 308 F.3d 335, 337-38 (3d Cir. 2002); Connors v. Chrysler Fin. Corp., 160 F.3d 971, 972 (3d Cir. 1998); Bhaya v. Westinghouse Elec. Corp., 832 F.2d 258, 260 (3d Cir. 1987); Maxfield, 766 F.2d at 791. Direct evidence demonstrates that age played a significant or substantial role in a particular employment decision. Price Waterhouse v. Hopkins, 490 U.S. 228, 276 (1989) (O'Connor, J., concurring). To meet its burden, a plaintiff must demonstrate that a decisionmaker placed substantial negative reliance on an illegitimate criterion, namely age, in reaching its decision. Id. at 277. However, because direct evidence of discrimination is often difficult to obtain, the plaintiff may raise an inference of age discrimination by using the familiar burden-shifting analysis in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). See Fakette, 308 F.3d at 338. A plaintiff presents a prima facie case of age discrimination if he establishes that: "(1) he is over 40, (2) he is qualified for

the position in question, (3) he suffered an adverse employment decision, and (4) he was replaced by a sufficiently younger person to create an inference of age discrimination.” Sempier v. Johnson & Higgins, 45 F.3d 724, 728 (3d Cir. 1995). Once the plaintiff has met its burden, either directly or through indirect evidence, the burden shifts to the defendant to proffer a legitimate, nondiscriminatory reason for the adverse employment decision. Armbruster v. Unisys Corp., 32 F.3d 768, 777-78 (3d Cir. 1994). Finally, it is only after all the evidence has been received that a court determines whether the direct or indirect framework applies to the evidence before it. Price Waterhouse, 490 U.S. at 278.

Here, Wilkins challenges two adverse employment actions. First, he claims that he was denied overtime because of his age. Defendants have not moved to dismiss this allegation. They do challenge his second claim, which is that he was forced to retire, or was constructively discharged, due to numerous instances of age discrimination. Whether an employee has been constructively discharged is an objective standard, requiring a finding that “an employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign.” Goss v. Exxon Office Sys. Co., 747 F.2d 885, 888 (3d Cir. 1984). A plaintiff-employee may prevail on a claim for constructive discharge by establishing that “the conduct complained of would have the foreseeable result that working conditions would be so unpleasant or difficult that a reasonable person in the employee’s shoes would resign.” Id. at 887-88.

Defendants argue that Wilkins’ claim for constructive discharge should be dismissed because he has failed to establish a prima facie case for age discrimination. (Defs.’ Mot. to Dismiss at 9). Specifically, Defendants argue that he has failed to allege that a younger person

was hired to replace him. (Id. at 10). This position is incorrect. In paragraph 37 of his Amended Complaint, Wilkins alleges that Sorbello hired younger workers to replace him after he retired. He also alleges the other three requirements for a prima facie case of age discrimination, namely that he is over 40 years of age, was qualified for the position, and that he suffered an adverse employment action. (Pl.'s Am. Compl. ¶¶ 79-84). Given Wilkins' allegations that Sorbello repeatedly urged him to retire, and at times threatened him with discharge if he did not retire, it cannot be said as a matter of law that Wilkins' decision to leave ABF was unreasonable. See Clowes v. Allegheny Valley Hosp., 991 F.2d 1159, 1161 (3d Cir. 1993) (noting that being threatened with discharge or having an employer urge or suggest that an employee retire are situations that may be indicative of constructive discharge).

Furthermore, Wilkins' has pled sufficient allegations to proceed directly against ABF for age discrimination. In his complaint, Wilkins alleges that Sorbello pressured him to retire, stating, for example, "why don't you retire, you are old enough" and to "hurry up and retire before [you] are fired." (Pl.'s Am. Compl. ¶¶ 39-40). Such statements, if true, could show that age was a substantial factor in Sorbello's harassment of Wilkins and his eventual retirement. Therefore, Wilkins may proceed on his claims for constructive discharge based on age discrimination.

D. Administrative Exhaustion before the PHRC

It is a "basic tenet of administrative law that a plaintiff must first exhaust all required administrative remedies before bringing a claim for judicial relief." Robinson v. Dalton, 107 F.3d 1018, 1020 (3d Cir. 1997) (citing McKart v. United States, 395 U.S. 185, 193 (1969)). Defendants argue that Wilkins failed to exhaust his administrative remedies because his

allegations that he was constructively discharged and that he was subjected to racial discrimination were not submitted to the requisite administrative bodies for review. (Defs.' Mot. to Dismiss at 11-12). Specifically, Defendants argue that Wilkins did not assert that he was constructively discharged because of his race or age and that he did not allege that Sorbello directed racial epithets and racially hostile comments to him. (Id.)

The relevant inquiry to determine whether plaintiff exhausted his administrative remedies is “whether the acts alleged in the subsequent [] suit are fairly within the scope of the prior EEOC complaint, or the investigation arising therefrom.” Walters v. J.L.G. Parsons, 729 F.2d 233, 237 (3d Cir. 1984). In his EEOC complaint, Wilkins alleged that ABF “discriminated against him on the basis of his age, race and disability.” He also alleged that he was singled out for discrimination, in addition to, being denied overtime. These allegations were sufficient to put the administrative agency “on notice” that Wilkins was alleging both race and age discrimination. Antol v. Perry, 82 F.3d 1291, 1298 (3d Cir. 1996). Wilkins’ specific claims for constructive discharge and the particulars of his treatment by Sorbello are fairly within the scope of the prior complaint. A plaintiff is not required to specifically plead each instance of discrimination to meet the exhaustion requirement. See Walters, 729 F.2d at 237-38 (finding that plaintiff was not required to allege the specific incidents of retaliation, given that he generally alleged “retaliation” in his EEOC complaint). Therefore, Wilkins claims are not barred for failure to exhaust administrative remedies.

E. Hybrid Claims: Violation of § 301 of the Labor Management Relations Act & Breach of Duty of Fair Representation

Ordinarily, suits against an employer for violation of the collective bargaining agreement, pursuant to § 301 of the LMRA are brought together with an allegation against the representing union for breach of the duty of fair representation. Felice v. Sever, 985 F.2d 1221, 1226 (3d Cir. 1993). Such “hybrid” suits, are “inextricably interdependent” requiring the employee-plaintiff to show both that the employer breached the collective bargaining agreement and that the union breached its duty of fair representation. DelCostello v. Int’l Bhd. of Teamsters, 462 U.S. 151, 164-65 (1983). Although the employee may bring suit against one of the defendants, “the case he must prove is the same whether he sues one, the other, or both.” Id. at 165.

It is well established that federal labor policy dictates that an employee must exhaust the exclusive grievance and arbitration procedures established by the collective bargaining agreement. Breiner v. Sheet Metal Workers Int’l Ass’n, 493 U.S. 67, 80 (1989); DelCostello, 462 U.S. at 163; Vaca v. Sipes, 386 U.S. 171, 184 (1967). However, the Supreme Court has held that “where the union has control of the grievance and arbitration system, the employee-plaintiff’s failure to exhaust his contractual remedies may be excused if the union has wrongfully refused to process his claim and thus breached its duty of fair representation.” Breiner, 493 U.S. at 80. A union breaches this duty when its conduct toward a member is “arbitrary, discriminatory, or in bad faith.” Vaca, 386 U.S. at 190. This includes a showing that “the union as a bargaining agent breached its duty of fair representation in its handling of the employee’s grievance.” Id. at 914.

Here, Wilkins asserts that the Union breached its duty of fair representation by failing to

pursue his grievances. (Pl.'s Am. Compl. ¶¶ 95-98). Defendants argue that this allegation is not sufficient, in itself, to state a claim for breach of the duty of fair representation. (Defs.' Mot. to Dismiss at 14). Wilkins responds that he is entitled to discovery to ascertain the Union's reason for not pursuing his grievance. (Pl.'s Mem. of Law in Opp. to Defs.' Mot. to Dismiss at 8). The court agrees with Defendants.

The Supreme Court has held that a "wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953). For this reason, a union has "broad discretion in its decision whether and how to pursue an employee's grievance against an employer." Chauffeurs, Teamsters & Helpers v. Terry, 494 U.S. 558, 567-68 (1990). A union "is not required to press every contractual dispute to arbitration," Sebrowski v. Pittsburgh Press Co., 188 F.3d 163, 168-69 (3d Cir. 1999), and in fact has an obligation as the bargaining agent to "not assert or press grievances which it believes in good faith do not warrant such action." Bazarte v. United Transp. Union, 429 F.2d 868, 872 (3d Cir. 1970). "An employee, therefore, is subject to the union's discretionary power to settle or even to abandon a grievance, so long as it does not act arbitrarily, and this is true even if it can later be demonstrated that the employee's claim was meritorious." Id. Therefore, it is essential to the employee's claim that he can prove that the union's failure to pursue his grievance was arbitrary, meaning, that the union's actions were "far outside a 'wide range of reasonableness' as to be irrational." Air Line Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65, 67 (1991) (quoting Huffman, 345 U.S. at 338).

The third circuit has held that "[t]he mere refusal of a union to take a complaint to

arbitration does not establish a breach” of the union’s duty of fair representation. Findley v. Jones Motor Freight, 639 F.2d 953, 958 (3d Cir. 1981). Therefore, the allegations in the complaint “must contain more than conclusory statements charging discrimination in order to be actionable.” Hubicki v. ACF Indus., Inc., 484 F.2d 519, 526 (3d Cir. 1973). Here, Wilkins has offered no more than a conclusory statement that the Union’s failure to pursue his grievance breached the duty of fair representation. This is insufficient to support his claim, even through discovery.

Defendants also argue that Wilkins’ hybrid § 301/fair representation claim should be dismissed as untimely. (Defs.’ Mot. to Dismiss at 15). It is well settled that hybrid § 301/fair representation claims are subject to a six month statute of limitations. DeCostello, 462 U.S. at 169. The six month period commences “when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation.” Vadino v. A. Valey Eng’r, 903 F.2d 253, 260 (3d Cir. 1990) (quoting Hersh v. Allen Prod. Co., 789 F.2d 230, 232 (3d Cir. 1986)). In this context, the limitations period commences when “the futility of further union appeals became apparent or should have become apparent.” Scott v. Local 863, Int’l Bhd. of Teamsters, 725 F.2d 226, 229 (3d Cir. 1984). The employee’s claim is tolled “until it was or should have been clear to the employee that the union would not pursue the grievance.” Vadino, 903 F.2d at 261.

Wilkins’ responds that his claims are not untimely because he never received formal notice from the Union that they were not going to pursue his grievance. (Pl.’s Mem. of Law in Opp. to Defs.’ Mot. to Dismiss at 9-10). Whether or not Wilkins received formal notice of the Union’s decision is not controlling. Instead, the issue is when it should have been clear to

Wilkins that the Union would no longer pursue his grievance. Wilkins should have been aware, at the very latest, when he retired from ABF. Wilkins retired in March 2002 and from his own admission “[o]nce retired, the union refused to provide any assistance” (Pl.’s Mem. of Law in Opp. to Defs.’ Mot. to Dismiss at 11). The present action was filed on December 8, 2003, far outside the six month limitation period. Therefore, Wilkins claims against ABF under § 301 of the LMRA are untimely.

Wilkins also argues that his claims against ABF are timely because the statute of limitations should be tolled during the pendency of his administrative filings with the PHRC and the EEOC. (Pl.’s Mem. of Law in Opp. to Defs.’ Mot. to Dismiss at 9-10). Wilkins analogizes his hybrid § 301/fair representation claims to claims for intentional infliction of emotional distress. There is no controlling authority for plaintiff’s position. The claims are not analogous.

Wilkins further argues that the applicable limitations period should be four years, instead of six months, because he should be classified as a “retiree,” rather than an “employee” under the LMRA. (Pl.’s Mem. of Law in Opp. to Defs.’ Mot. to Dismiss at 12-13). This claim is also without merit. He claims that ABF breached the collective bargaining agreement by failing to follow seniority when distributing overtime during his employment. Plaintiff’s claim against the Union for failing to pursue his grievance relates to issues arising while Wilkins was employed with ABF. His reliance on Wallitsch v. Corona Court, No. CIV.A.87-2239, 1988 WL 30037 (E.D. Pa. Sept. 29, 1988) is misplaced. In Wallitsch, the plaintiff challenged application to him of a new collective bargaining agreement, negotiated nine years after he had retired. Wilkins’ facts are inapposite. He challenges employment place conduct while an employee with ABF. Therefore, he is properly characterized as an “employee” under the statute.

F. Whistleblower Statute

Count IV of Plaintiff's Complaint alleges violation of a "Whistleblower Statute."

Wilkins argues that his truck equipment was unsafe and regularly in disrepair, and when he complained to "other individuals and entities" he suffered "retaliation from his supervisors and employer." (Pl.'s Am. Compl. ¶¶ 105-07). Defendants argue that this count should be dismissed, given that the plaintiff has failed to specify any applicable whistleblower statute. (Defs.' Mot. to Dismiss at 16-17). Speculation as to the nature of his claims does not substitute for pleading sufficiency. The claim is dismissed.

G. Intentional Infliction of Emotional Distress

Wilkins' last claim against Defendants is intentional infliction of emotional distress. He argues that Defendants intentionally caused him distress through written and oral statements to others regarding him and by removing necessary lift assist equipment. (Pl.'s Am. Compl. ¶ 111). These actions allegedly caused him significant stress, resulting in at least elevated blood pressure. (Pl.'s Am. Compl. ¶ 114). Defendants argue that this claim should be dismissed because it fails to state a claim for relief and is barred by Pennsylvania's workers' compensation statute. (Defs.' Mot. to Dismiss at 17-19).

In order to sustain a claim for intentional infliction of emotional distress, a plaintiff must establish that defendants' conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, as to be regarded as atrocious, and utterly intolerable in a civilized society." Hoy v. Dominick Angelone, 720 A.2d 745, 754 (Pa. 1998) (quoting Buczek v. First Nat'l Bank of Mifflintown, 531 A.2d 1122, 1125 (Pa. Super. Ct. 1987)).

It is not enough that defendants “acted with intent which is tortious or even criminal, or that [they] [] intended to inflict emotional distress.” Id. Rather, liability only attaches when the court is presented with “the most egregious conduct.” Id. Finding such outrageous conduct in the employment conduct “is extremely rare.” Id. In fact, “the only instances in which courts applying Pennsylvania law have found conduct outrageous in the employment context is where an employer engaged in both sexual harassment and other retaliatory behavior against an employee.” Id. (quoting Cox v. Keystone Carbon, 861 F.2d 390, 395-96 (3d Cir. 1988)).

Plaintiff’s allegations that Defendants directed racial epithets toward him, spoke ill of him to others, and removed lift assist equipment do not amount to extreme and outrageous conduct as a matter of law. While Defendants’ conduct, if true, is inappropriate and unacceptable, it does not amount to the kind of utterly deplorable actions cognizable under Pennsylvania law.

In addition, such claims are barred by the exclusivity provision of Pennsylvania’s Worker’s Compensation Act (“WCA”), 77 Pa. Stat. Ann. Worker’s Compensation, § 1, et seq. The WCA provides the “sole remedy ‘for injuries allegedly sustained during the course of employment.’” Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 940 (3d Cir. 1997) (quoting Dugan v. Bell Tel. of Pennsylvania, 876 F. Supp. 713, 723 (W.D. Pa. 1994)). This exclusive remedy includes claims for IIED arising out of the employment relationship. Id.; Synder v. Specialty Glass Prod., Inc., 658 A.2d 366, 371 (Pa. Super. Ct. 1995).

Wilkins urges that his claims are not barred, because the discrimination he faced was motivated by personal animus. (Pl.’s Mem. of Law in Opp. to Defs.’ Mot. to Dismiss at 19). An

exception to the exclusivity provision of the WCA exists if the injury in question was “caused by the act of a third person intended to injure the employee because of reasons personal to him, and not directed against him as an employee or because of his employment.” 77 Pa. Stat. Ann.

Worker’s Compensation, § 411(1). To set forth a valid cause of action triggering this exception, “an employee must assert that his injuries are not work-related because he was injured by a co-worker for purely personal reasons.” Kohler v. McCrory Stores, 532 Pa. 130, 137-38 (Pa. 1992).

Here, Wilkins has not satisfied this burden. The alleged conduct was entirely work-related and arose solely from the employment relationship.

V. Conclusion

For the foregoing reasons, the Defendants’ Motion to Dismiss is granted in part and denied in part.

An appropriate Order follows.

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

CLINTON D. WILKINS,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 03-6610
	:	
v.	:	
	:	
ABF FREIGHT SYSTEM, INC., et al.,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 15th day of September, 2005, upon consideration of Defendants' Motion to Dismiss Amended Complaint Dated July 4, 2005 and for Partial Summary Judgment, it is hereby ORDERED that the motion is GRANTED as to Counts Three (III), Four (IV), and Five (IV) and DENIED as to Counts One (I) and Two (II).

BY THE COURT:

S/ James T. Giles

C.J.

