

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

<b>LOTT ANTHONY MARSH</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	<b>NO. 06-CV-2856</b>
	:	
<b>SUNOCO, INC.</b>	:	

**MEMORANDUM AND ORDER**

**Kauffman, J.**

**December 6, 2006**

Plaintiff Lott Anthony Marsh (“Plaintiff”) brings this action against Defendant Sunoco, Inc. (“Defendant” or “Sunoco”) alleging race discrimination and retaliation in violation of 42 U.S.C. §§ 2000(e), et seq. (“Title VII”) and 43 Pa. Const. Stat. §§ 951, et seq. (“PHRA”) (Counts I and II), and disability discrimination in violation of the American with Disabilities Act, 42 U.S.C. §§ 12101, et seq. (“ADA”) (Count III). Now before the Court is Sunoco’s Motion to Dismiss the Complaint. For the reasons that follow, the Motion will be granted in part and denied in part.

**I. Background**

Accepting the allegations in the Complaint as true and construing all factual disputes in Plaintiff’s favor, the facts pertinent to this motion are as follows: Plaintiff has been an employee of Sunoco for several years. Complaint ¶ 9. In February 2002, Plaintiff filed a charge of race discrimination with the Equal Employment Opportunity Commission (“EEOC”). Id. As a result, he gained acceptance into Sunoco’s Electrical Apprenticeship Program. Id. Plaintiff now alleges that Sunoco has discriminated against him on the basis of his race and weight and unjustly denied him the opportunity “to do a substantial portion of the work usually performed by electrical apprentices,” including the opportunity to work overtime. Id. at ¶¶ 11-12. He further alleges that

Sunoco has not taken such adverse actions against similarly-situated white employees, and that its unjust actions are the result of (1) racial bias; (2) a perception that Plaintiff is disabled due to his weight; and (3) retaliation for filing a race discrimination complaint with the EEOC. Id. ¶¶ 13-14.

## **II. Legal Standard**

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). The Court must accept as true all well-pleaded allegations of the complaint and view them in the light most favorable to the plaintiff. Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted only when no relief could be granted under any set of facts that could be proved by the plaintiff. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

## **III. Discussion**

### **A. Race Discrimination and Retaliation Claims**

Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2. It also prohibits any form of retaliation based on an employee's opposition to discriminatory practices made unlawful under the statute. 42 U.S.C. § 2000e-3; see also Petruska v. Gannon Univ., 462 F.3d 294, 303 (3d Cir. 2006); Davis v. Glanton, 107 F.3d 1044, 1052 (3d Cir. 1997). Claims arising under the PHRA are governed by the same legal standard. Lepore v. Lanvision Systems, Inc., 113 Fed. Appx. 449, 452 (3d Cir. 2004).

To state a prima facie case for racial discrimination under Title VII or the PHRA, Plaintiff must allege that (1) he is a member of a protected class; (2) he is qualified for the position; (3) he

suffered an adverse employment action; (4) under circumstances that give rise to an inference of unlawful discrimination by showing that similarly-situated individuals who are not in the protected class were treated more favorably. Jones v. School Dist. of Philadelphia, 198 F.3d 403, 410-411 (3d Cir. 1999); Kimble v. Morgan Properties, 2005 WL 2847266, at \*2 (E.D. Pa. Oct. 25, 2005). An adverse employment action within the meaning of the statute means an action by an employer that alters the employee's compensation, terms, conditions, or privileges of employment. See Moore v. City of Philadelphia, 461 F.3d 331, 341 (3d Cir. 2006).

Plaintiff, an African-American, is a member of a protected class. Miller v. Delaware Probation and Parole, 41 Fed. Appx. 581, 583 (3d Cir. 2002). He claims that although he was qualified to perform his duties as an electrical apprentice, he was denied the opportunity to do a "substantial portion of the work usually performed by electrical apprentices" while his similarly-situated white counterparts were not denied such opportunities. Defendant argues that Plaintiff has failed to allege conduct that amounts to an "adverse employment action." Motion to Dismiss, at 12-14. However, by alleging that he was denied the opportunity to perform the work routinely performed by similarly-situated white electrical apprentices, Plaintiff has satisfied the elements of a racial discrimination claim. At this stage of the proceedings, the Court cannot conclude that no relief could be granted under any set of facts that could be proved by Plaintiff. Accordingly, Defendant's motion to dismiss the discrimination claim will be denied.

Plaintiff also brings a retaliation claim under Title VII and the PHRA, alleging that Sunoco retaliated against him for filing a complaint with the EEOC. Defendant argues that the retaliation claim must be dismissed because Plaintiff has failed to exhaust his administrative remedies. It is well-settled that before a plaintiff may bring suit under Title VII or the PHRA, he must file a

charge with the EEOC and obtain a notice of his right to sue in federal court. 42 U.S.C. § 2000e-5; Burgh v. Borough Council of Borough of Montrose, 251 F.3d 465, 470 (3d Cir. 2001).

Plaintiff, who has previously lodged two complaints with the EEOC alleging discrimination, claims to have exhausted his administrative remedies. Complaint ¶ 6. The first EEOC complaint, which charged racial discrimination, was filed in February 2002, and led to Plaintiff's acceptance into the Electrical Apprenticeship Program. Id. at 9. His second complaint, filed in May 2005, charged racial discrimination and weight discrimination, but did not charge retaliation. Defendant argues that since Plaintiff failed to complain of retaliation in the May 2005 charge, he is precluded from raising it in this federal action.

In order to determine whether administrative remedies have been exhausted, the Court must inquire "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." Antol v. Perry, 82 F.3d 1291, 1295 (3d Cir. 1996). If the Court concludes that the current claim falls within the scope of the prior investigation, and that Plaintiff would be entitled to sue on the complaint that led to that investigation, Plaintiff need not further pursue administrative remedies before bringing his retaliation lawsuit. See Waiters v. Parsons, 729 F.2d 233, 235 (3d Cir. 1984); Antol, 82 F.3d at 1295. However, Plaintiff's May 2005 charge stated, in pertinent part:

A charge of discrimination ... was filed with [the EEOC and] PHRC on February 12, 2002 and was resolved on August 28, 2003 with me being awarded placement into the [apprenticeship] program. When I began the program, I did not experience any problems. However, my supervisor retired and was replaced by Jake Scutlas in or around January 2004. Since Mr. Scutlas became my supervisor, he has subjected me to various forms of harassment." See May 12, 2005 EEOC

Complaint.<sup>1</sup> (Emphasis supplied).

Plaintiff neither refers to retaliation in his May 2005 EEOC charge nor does he set forth any facts that would put the EEOC on notice that it should investigate a retaliation claim.<sup>2</sup> He acknowledges that when he began the apprenticeship program, he “did not experience any problems.” It was only later, in January 2004, that a new supervisor allegedly subjected him to “various forms of harassment” because of his race and weight. Accordingly, because Plaintiff has failed to exhaust his administrative remedies, his retaliation claim will be dismissed without prejudice.

B. Disability Discrimination Claim

In Count III of his complaint, Plaintiff alleges that Sunoco regarded him as disabled on account of his weight and discriminated against him on that basis in violation of the ADA. Complaint ¶¶ 5-6. In order to state a claim under the ADA, a plaintiff must establish that he or she has a “disability” within the meaning of the statute, is an otherwise qualified individual, and has suffered an adverse employment action by a covered employer because of that disability. See

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<sup>1</sup> In deciding a motion to dismiss, a court may consider documents attached to the complaint, matters of public record, as well as “an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff’s claims are based on the document.” Pension Ben. Guar. Corp. v. White Consol. Industries, Inc., 998 F.2d 1192, 1196 (3d Cir. 1993). The EEOC Charge of Discrimination attached to Sunoco’s motion is both a public record and a document central to Plaintiff’s allegation that he exhausted his administrative remedies. Accordingly, the Court may consider it in determining whether the exhaustion requirement has been met. See Dixon v. Philadelphia Housing Authority, 43 F. Supp.2d 543, 545 (E.D. Pa.1999); Smith-Cook v. National Railroad Passenger Corp., 2005 WL 3021101, at \*2 (E.D. Pa. Nov. 10, 2005).

<sup>2</sup> The summary of the allegedly wrongful conduct Plaintiff provided on the EEOC form is devoid of any mention of retaliation.

Gaul v. Lucent Techs., Inc., 134 F.3d 576, 580 (3d Cir. 1998). The ADA defines “disability” as (1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment. Buskirk v. Apollo Metals, 307 F.3d 160, 166 (citing 42 U.S.C. § 12102(2)); Goodman v. L.A. Weight Loss Ctrs., Inc., 2005 WL 241180, at \*2 (E.D. Pa. Feb. 1, 2005). Plaintiff bases his claim on the third, or “regarded as,” prong.

In order to state a claim under the “regarded as” prong, Plaintiff must allege that he (1) has a physical or mental impairment that does not substantially limit major life activities, but is treated by a covered entity as constituting such a limitation; (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of others toward such impairment; or (3) has no such impairment, but is treated by the covered entity as having a substantially limiting impairment. See Sutton v. United Air Lines, Inc., 527 U.S. 471, 489 (1999); Buskirk, 307 F.3d at 166. To be covered under this prong, “the employer must regard the employee to be suffering from an impairment *within the meaning of the statutes*, not just that the employer believed the employee to be somehow disabled.” Rinehimer v. Cemcolift, Inc., 292 F.3d 375, 381 (3d Cir. 2002) (internal quotations omitted) (emphasis added); Zarek v. Argonne Nat. Laboratory, 1998 WL 547288, at \*3 (N.D. Ill. Aug. 27, 1998) (“to state a claim under the “regarded as” prong of the ADA, an employee cannot simply allege that the employer believes that some physical condition, such as weight, renders him disabled.”). “Plaintiff must allege that the employer believed, however erroneously, that the plaintiff suffered from an ‘impairment’ that, if it truly existed, would be covered under the statutes and that the employer discriminated against the plaintiff on that basis.” Francis v. City of Meriden, 129 F.3d 281, 285 (2d Cir. 1997).

It repeatedly has been held that excess weight or obesity, except in special instances where they relate to a physiological disorder, are not “physical impairments” within the meaning of the statutes. “Physical characteristics that are not the result of a physiological disorder are not considered impairments for the purposes of determining either actual or *perceived* disability.” Francis, 129 F.3d at 286 (citing Andrews v. State of Ohio, 104 F.3d 803 (6th Cir. 1997)). In the present case, a finding that Plaintiff is overweight – unless it is the result of a physiological disorder – would not bring him under the protection of the ADA. Since Plaintiff does not claim that Sunoco regarded him as suffering from a physiological weight-related disorder, his ADA claim must fail. See Francis, 129 F.3d at 285 .

#### **IV. Conclusion**

For the foregoing reasons, Defendant’s Motion to Dismiss will be denied with respect to the race discrimination claim. Plaintiff’s retaliation and disability discrimination claims will be dismissed without prejudice. An appropriate Order follows.

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<b>v.</b>	<b>:</b>	<b>NO. 06-CV-2856</b>
	<b>:</b>	
<b>SUNOCO, INC.</b>	<b>:</b>	

**ORDER**

**AND NOW**, this 6<sup>th</sup> day of December, 2006, upon consideration of Defendant's Motion to Dismiss (docket no. 2) and all responses thereto, and for the reasons stated in the accompanying Memorandum, it is **ORDERED** that the Motion is **GRANTED** in part and **DENIED** in part. It is **FURTHER ORDERED** that Counts II and III of Plaintiff's Complaint are **DISMISSED** without prejudice.

**BY THE COURT:**

/s/ Bruce W. Kauffman  
**BRUCE W. KAUFFMAN, J.**