

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

KIMBERLIE WEBB : CIVIL ACTION
 :
 v. :
 :
 CITY OF PHILADELPHIA : NO. 05-5238

MEMORANDUM

Bartle, C.J.

February 20, 2007

Plaintiff Kimberlie Webb ("Webb") instituted this action alleging four claims against her employer, defendant City of Philadelphia (the "City"): Count I for religious discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §2000(e), et seq.; Count II for retaliation and hostile work environment under Title VII; Count III for sex discrimination under Title VII; and Count IV, for violation of the Pennsylvania Religious Freedom Protection Act ("RFPA"), 71 P.S. § 2402, et seq. These claims emanate from the City's denial of Webb's request to wear a khimar, a Muslim head covering, while she was on duty as a Philadelphia Police Officer. Before the court is the motion of the City to dismiss Counts II, III and IV of Webb's complaint for lack of subject matter jurisdiction or, in the alternative, for summary judgment on those counts.¹ At present, the court will rule on the City's

1. Although the City termed its motion one for partial summary judgment, the City also makes allegations challenging this
(continued...)

motion with respect to Counts III and IV. We will hold the motion in abeyance with respect to Count II. The City has not filed a motion with respect to plaintiff's religious discrimination claim alleged in Count I.

I.

The following facts, for present purposes, are not in dispute.

Webb identifies herself as a practicing adherent of the Al-Islam religion. Her religious beliefs require that she wear a khimar, a Muslim head covering.² In 1995, the same year she converted to the Muslim faith, Webb became a Philadelphia Police Officer and was assigned to the 35th District. In 1998, Webb made an informal oral request that she be allowed to wear a khimar while on duty as a police officer. Police Sergeant Joseph Thomas, in denying Webb's request, informed her that wearing the khimar could be detrimental to her safety as someone could pull it off and choke her. On February 11, 2003, Webb requested in writing that she be allowed to wear a khimar while performing her

1.(...continued)

court's subject matter jurisdiction over Webb's claims due to the failure to file the claims with the EEOC prior to instituting suit. Accordingly, we will treat the City's motion as a request for dismissal under Rule 12(b)(1) of the Federal Rules of Civil Procedure and, in the alternative, a motion for summary judgment. Webb filed her response in opposition to the City's motion but incorrectly denominated it a motion for order to deny defendant's motion for partial summary judgment.

2. Neither the sincerity of Webb's religious beliefs nor her understanding that those beliefs require her to wear a khimar is contested here.

official duties. The request was denied the next day by Captain Michael Murphy.

After receiving word of this denial, Webb filed charges with the Pennsylvania Human Relations Commission ("PHRC") and the Equal Employment Opportunity Commission ("EEOC") on February 28, 2003. On the EEOC form, she checked the box for "religion" as the type of discrimination and did not mark any others. Webb stated that the dates on which discrimination took place were February 11 and 12, 2003 - the date she made her written request to wear a khimar on duty and the date that request was denied.³

While the EEOC complaint was still being investigated, Webb decided to "make a stand" and appeared for work on

3. The full text of Webb's EEOC Charge of Discrimination reads as follows:

- I. In May 1995, Respondent hired me as a Police Officer and assigned me to the 35th District. My religion is Al-Islam. In 1998, I informally requested a reasonable accomodation [sic] to wear a khimar, a Muslim head covering. Sergeant Thomas (Christian) denied my request stating that it would be detrimental to my safety. He stated that someone could pull off the covering and it would choke me. I was willing to fold the covering shorter and have snap buttons so that if it was pulled it would come off easily. On February 11, 2003, I requested in writing permission to wear my khimar as a reasonable religious accomodation [sic]. On February 12, 2003, Captain Michael Murphy (non-Muslim) denied my request without a reason.
- II. I believe that Respondent discriminated against me because of my religion (Muslim) in violation of Title VII of the Civil Rights Act of 1964, as amended (Title VII) when it denied me a reasonable accomodation [sic] to wear my khimar.

August 12, 13, and 14 of 2003 wearing a navy blue khimar with her police uniform. On each of these three dates, Webb's Lieutenant ordered her to remove the khimar. Each day Webb refused, in direct violation of her supervisor's order, and was sent home. On the third day she wore the khimar, August 14, Webb's supervisor informed her that she would be dismissed if she reported to work wearing it again. The next time Webb reported to work she was not wearing a khimar and was allowed to resume her usual duties.

As a result of Webb's refusal to obey her supervisor's orders to remove her khimar, disciplinary charges for insubordination were brought against her on August 25, 2003. After a hearing, a police board of inquiry found Webb guilty and recommended to Police Commissioner Sylvester Johnson that she be suspended for insubordination and neglect of duty. Commissioner Johnson, who is also a Muslim, reviewed the recommendation and in March 2004 upheld the recommended disciplinary action. He issued a 13-day suspension for insubordination. Webb did not grieve this suspension.

II.

The City first argues that the court lacks subject matter jurisdiction over Count III because of Webb's failure to exhaust her administrative remedies before the EEOC.

Our Court of Appeals has drawn a distinction between 12(b)(1) motions that attack allegations on the face of the plaintiff's complaint and 12(b)(1) motions that challenge the

court's subject matter jurisdiction "in fact," independently of any pleading. Mortensen v. First Fed. Sav. and Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). When, as here, a defendant attacks the facts alleged in the complaint which underlie subject matter jurisdiction, the court may consider evidence outside the pleadings. Gould Electrics, Inc. v. U.S., 220 F.3d 169 (3d Cir. 2000) (citing Mortensen, 549 F.2d at 891). "In such a situation, 'no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.'" Carpet Group Int'l v. Oriental Rug Importers Ass'n, 227 F.3d 62, 69 (3d Cir. 2000) (quoting Mortensen 549 F.2d at 891). The burden of showing that the court's subject matter jurisdiction is proper lies with the plaintiff. Id.

In Count III of her complaint, plaintiff brings a claim under Title VII for sex discrimination. To sustain a Title VII claim, a plaintiff must meet two jurisdictional prerequisites: (1) filing timely charges of employment discrimination with the EEOC; and (2) receiving the EEOC's statutory notice of the right to sue. 42 U.S.C. §§ 2000(e)-5(b), (e) and (f); McDonnell Douglass Corp. v. Green, 411 U.S. 792, 798 (1973); Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398 (3d Cir. 1976). The inclusion of these preliminary requirements in the statutory scheme reflects a desire to correct discrimination by administrative conciliation rather than formal court proceedings.

Id. Here, the City asserts that this court lacks subject matter jurisdiction over the claims because Webb has failed to file certain of her charges with the EEOC.

The Court of Appeals has defined broadly what can be considered a "charge filed with the EEOC." Generally, "if the allegations in the administrative complaint could be 'reasonably expected to grow out of' those made in the EEOC charge ... the administrative remedies available to plaintiff will have been exhausted." Schouten v. CSX Transp., Inc., 58 F. Supp. 2d 614, 616 (E.D. Pa. 1999) (quoting Ostapowicz, 541 F.2d at 399; see also Anjelino v. New York Times Co., 200 F.3d 73, 93-96 (3d Cir. 1999)). Thus, "a district court may assume jurisdiction over additional charges if they are reasonably within the scope of the complainant's original charges and if a reasonable investigation by the EEOC would have encompassed the new claims." Howze v. Jones & Laughlin Steel Corp., 750 F.2d 1208, 1212 (3d Cir. 1984). Although this standard is generous to plaintiffs, the Court of Appeals has made it clear that "federal courts lack jurisdiction to hear a Title VII claim, unless the plaintiff has filed a charge with the EEOC." Woodson v. Scott Paper Co., 109 F.3d 913, 926 (3d Cir. 1997) (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974)).

In Count III of her complaint, Webb alleges that the City engaged in sexual discrimination against her when it accommodated the religious needs of its male employees and failed to accommodate the religious needs of Webb, a female employee, in

violation of Title VII. Specifically, Webb references a policy of the City Police Department allowing a religious exception to its general ban on beards. She contends that the Police Department has therefore accommodated the religious needs of Muslim males but has failed to do the same for Muslim females. Webb did not check the box on her EEOC charge indicating that she considered the Department's actions sexually discriminatory, nor do any of her subsequent submissions to the EEOC include allegations of sex discrimination.

Webb's present sex discrimination claim, set forth in her complaint, is not reasonably within the scope of the allegations actually contained in any EEOC charge. Howze, 750 F.2d at 1212. Nothing presented to the EEOC in the February 28, 2003 complaint or thereafter contains any reference that would have caused the EEOC to investigate a possible sex discrimination claim. Consequently, we will dismiss Count III of Webb's complaint for lack of subject matter jurisdiction. See Hicks v. ABT Assocs., Inc., 572 F.2d 960 (3d Cir. 1978).

Webb's supplemental state law claim under the RFPA, set forth in Count IV of her complaint, alleges that the City intentionally discriminated against her by refusing to accommodate her religious beliefs and failing to remedy the situation after being notified of the problem. The RFPA provides that a local government agency may not substantially burden a person's free exercise of religion, including any burden which results from a rule of general applicability, unless the burden

is both in furtherance of a compelling interest of the agency and the least restrictive means of furthering that interest. 71 P.S. §§ 2404(a) and (b). The RFPA contains a notification provision requiring that, at least thirty days before bringing an action in court under the statute, a plaintiff must give written notice to the governmental entity by certified mail, informing that agency of all of the following:

(1) The person's free exercise of religion has been or is about to be substantially burdened by an exercise of the agency's governmental authority.

(2) A description of the act or refusal to act which has burdened or which will burden the person's free exercise of religion.

(3) The manner in which the exercise of the governmental authority burdens the person's free exercise of religion.

Id. at § 2405(b); see also Nichol v. ARIN Intermediate Unit 28, 268 F. Supp. 2d 536, 561, n.1 (W.D. Pa. 2003).

Here, there is no evidence that Webb provided the City with the required statutory notice.⁴ Although the statute also provides four exceptions to the notice requirement, none of them is applicable to the present action. See 71 P.S. § 2405(c). Because compliance with a statutory notice provision is a prerequisite to jurisdiction, the failure to comply with such a provision renders the court unable to hear the claim. Noxon

4. In her response to the motion of the City for partial dismissal, Webb does not address this claim at all. She makes no attempt to show that she complied with the statutory notice provision, and does not contend that she should be excused from providing notice in accordance with the statute's directives.

Chem. Prods. Co. v. Leckie, 39 F.2d 318, 320 (3d Cir. 1930); see also Alexander, 415 U.S. at 47. Accordingly, Webb's claim under that statute, set forth in Count IV of her complaint, will also be dismissed for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3).

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

KIMBERLIE WEBB	:	CIVIL ACTION
	:	
v.	:	
	:	
CITY OF PHILADELPHIA	:	NO. 05-5238

ORDER

AND NOW, this 20th day of February, 2007, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the motion of defendant City of Philadelphia to dismiss Counts III and IV of plaintiff's complaint (incorrectly denominated as a motion for partial summary judgment) is GRANTED for lack of subject matter jurisdiction; and

(2) the motion of plaintiff Kimberlie Webb for order to deny defendant's motion for partial summary judgment is DENIED as moot.

BY THE COURT:

/s/ Harvey Bartle III

C.J.