



equipment, including a cellular telephone, so that he could communicate with the defendants. (Id. at ¶ 17.) Furthermore, the plaintiff asserts that on September 8, 1994, the defendants "by virtue of their exercise of supervision, employment and control of [the] [p]laintiff, terminated [his] employment." (Id. at ¶ 13.)

Following his termination, the plaintiff, on October 8, 1994, filed a discrimination claim with the Pennsylvania Human Relations Commission ("PHRC") and the Equal Employment Opportunity Commission ("EEOC"). (Id. at ¶ 18.) On October 23, 1996, the plaintiff filed the instant complaint with this Court, alleging that Defendants Ore, ATO, and FHP violated the Equal Employment Opportunity Act ("EEOA"), Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. (Count I), and the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Cons. Stat. Ann. § 951, et seq. (Count II). Additionally he alleges claims against Defendants Ore and ATO for breach of contract (Count III) and breach of implied covenant of good faith and fair dealing (Count IV).

## **II. DISCUSSION**

The defendants seek to dismiss the instant complaint on the following grounds. First, defendant FHP argues that the Court must dismiss the complaint because the plaintiff did not comply with the service requirements of Federal Rule of Civil Procedure 4. Next, all three defendants argue that the plaintiff fails to meet the minimum pleading requirements required to state a Title VII

claim, and thus the Court must dismiss Count I for lack of subject matter jurisdiction. Finally, all three defendants argue that once the Court dismisses the Title VII claim, it must dismiss the remaining state law claims (Counts II, III and IV) for lack of subject matter jurisdiction.

**A. Motion to Dismiss for Insufficiency of Process**<sup>1</sup>

The Federal Rules of Civil Procedure allows a Court to dismiss an action for "insufficiency of service of process." Fed. R. Civ. P. 12(b)(5). "In addressing such motions, '[t]he courts have broad discretion to dismiss the action or to retain the case but quash the service that has been made on defendant[s].'" Grand Entertainment Group, Ltd. v. Star Media Sales, Inc., No. CIV.A.86-5763, 1993 WL 437699, at \*2 (quoting 5A Charles A. Wright & Arthur R. Miller, Federal Practice Procedure § 1354 at 288 (2d ed. 1990)). Nevertheless, the United States Court of Appeals for the Third Circuit has held that "dismissal of a complaint is inappropriate when there exists a reasonable prospect that service may yet be obtained. In such instances, the district court should at most, quash service, leaving the plaintiff[] free to effect proper service." Umbenhauer v. Woog, 969 F.2d 25, 30 (3d Cir. 1992).

The Federal Rules of Civil Procedure draw a distinction between service of process for individuals and for corporations. Rule 4(e) governs the service of process for individuals, and

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<sup>1/</sup> Although defendant FHP does not explicitly state a statutory basis for its motion, it is apparent that the motion is made pursuant to Rule 12(b)(5) of the Federal Rule of Civil Procedure.

provides two methods for a plaintiff to effect service of process. First, a plaintiff may "deliver[] a copy of the summons of the complaint to the individual personally." Fed. R. Civ. P. 4(e)(2). Second, a plaintiff may effect service "pursuant to the law of the state in which the district court is located." Fed. R. Civ. P. 4(e)(1). Similarly, Rule 4(h) which governs the service of process for corporations, provides that:

Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected:

(1) in the judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by state to receive service and the statute so requires, by also mailing a copy to the defendant . . . .

Fed. R. Civ. P. 4(h)(1). Therefore, a plaintiff may serve a summons and complaint to a corporation by mail if state law permits service of process in that manner.

In its motion, defendant FHP argues that the plaintiff failed to comply with the federal and state service requirements. (Def. FHP's Mem. at 2-3.) The defendant asserts that under Federal Rule 4(h)(1) and its state law equivalent, Pennsylvania Rule of

Civil Procedure 424,<sup>2</sup> a Pennsylvania plaintiff may only serve a foreign corporation by delivering a copy of the summons and the complaint to an officer or a managing or general agent. (Id. at 2.) Defendant FHP argues that because it did not request waiver of service and the plaintiff effected service by mail, the Court lacks personal jurisdiction over the defendant, and thus the complaint must be dismissed. (Id. at 2-3.)

The plaintiff, on the other hand, argues that service was appropriate and that defendant FHP simply misinterprets the Federal Rules of Civil Procedure and the Pennsylvania Rules of Civil Procedure. (Pl.'s Resp. to FHP Mot. at 7-9.) Specifically, the plaintiff asserts that Rules 403 and 404 of the Pennsylvania Rules of Civil Procedure allow a defendant to serve a foreign corporation by mail.<sup>3</sup> (Id.) Furthermore, he notes that the Pennsylvania

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<sup>2/</sup> Rule 424 of the Pennsylvania Rules of Civil Procedure provides as follows:

Service of original process upon a corporation or similar entity shall be made by handing a copy to any of the following persons provided the person served is not a plaintiff in the action:

- (1) an executive officer, partner or trustee of the corporation or similar entity, or
- (2) the manager, clerk or other person for the time being in charge of any regular place of business or activity of the corporation or similar entity, or
- (3) an agent authorized by the corporation or similar entity in writing to receive service of process for it.

Pa. R. Civ. P. 424.

<sup>3/</sup> Rule 403 of the Pennsylvania Rules of Civil Procedure provides in relevant part as follows:

If a rule of civil procedure authorizes original process to be served by mail, a copy of the process shall be mailed to the defendant by any form of mail

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Superior Court has explicitly held that a plaintiff may serve a foreign corporation by mail. See Reichert v. TRW, Inc. Cutting Tools Div., 561 A.2d 745, 753 (Pa. Super. Ct. 1989) ("[S]ervice by regular mail continues to be a viable method of service upon corporations pursuant to [R]ule 404(2)."), rev'd on other grounds, 611 A.2d 1191 (Pa. 1992). Therefore, because service was effected in the appropriate manner, he argues that the Court should not dismiss his complaint for insufficient service of process. (Pl.'s Resp. to FHP Mot. at 9.)

A review of the relevant case law reveals that few courts have addressed the issue of whether a Pennsylvania plaintiff may

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requiring a receipt signed by the defendant or his authorized agent. Service is complete upon delivery of the mail.

Pa. R. Civ. P. 403. Rule 404 provides that:

Original process shall be served outside the Commonwealth within ninety days of the issuance of the writ or the filing of the complaint or the reissuance or the reinstatement thereof:

(1) by a competent adult who is not a party in the manner provided by Rule 402(a);

(2) by any competent adult by mail in the manner provided by Rule 403;

(3) in any manner provided by the law of the jurisdiction in which the service is made for service in an action in any of its courts of general jurisdiction;

(4) in the manner provided by treaty; or

(5) as directed by the foreign authority in response to a letter rogatory or request.

Pa. R. Civ. P. 404.

serve a foreign corporation by mail.\<sup>4</sup> See City of Allentown v. O'Brien & Gere Eng'r, No. CIV.A.94-2384, 1995 WL 380019 (E.D. Pa. June 26, 1995); Trzcinski v. Prudential Property & Casualty Insurance Co., 597 A.2d 687 (Pa. Super. Ct. 1991); Reichert, 561 A.2d at 753. Although the Supreme Court of Pennsylvania has not examined this particular issue, the Honorable E. Mac Troutman, Senior Judge of the United States District Court for the Eastern District of Pennsylvania, has predicted how that court may decide the issue. City of Allentown, 1995 WL 380019, at \*6. In City of Allentown, a similar case, a defendant attempted to dismiss a plaintiff's complaint by arguing that the plaintiff could only effect service of the complaint and summons by hand delivery. Id. Relying on the decisions of the Pennsylvania Superior Court, Judge Troutman declined to dismiss the complaint, concluding that "the Pennsylvania Supreme Court would . . . reach the same result if it were to consider whether Rule 404(2) permits service of process by

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<sup>4</sup>/ One commentator has observed that:

Rule 424 does not abolish the option of serving original process on foreign corporations by certified mail. The benefit to be obtained from limiting service of original process upon foreign corporations to only hand delivery, that is, fewer disputes over whether service was achieved, would be substantially outweighed by the burden it would place on the residents of the Commonwealth, since such a restriction would impeded the ability of such residents to commence actions against corporations that are residents of other states. Moreover, placing such a narrow restriction on service of original process on foreign corporations would adversely affect the legislature's efforts to facilitate actions by Pennsylvania residents to recover for harm caused to them by foreign corporations.

Goodrich-Amram, Standard Pennsylvania Practice 2d § 424:4 (1991).

mail on foreign corporations despite the apparently conflicting provisions of [R]ule 424." Id.

This Court adopts the reasoning set forth in City of Allentown and concludes that a Pennsylvania plaintiff may serve a foreign corporation by mail. Accordingly, this Court will not dismiss the instant complaint for insufficient service of process.

**B. Motion to Dismiss for Lack of Subject Matter Jurisdiction**

Upon reviewing a motion to dismiss for lack of subject matter jurisdiction, courts apply a different standard than when reviewing a motion to dismiss for failure to state a claim. Thus, in Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884 (3d Cir. 1977), the United States Court of Appeals for the Third Circuit stated:

Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction--its very power to hear the case--there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, 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. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.

Id. at 891.

Pursuant to Federal Rule of Civil Procedure 12(b)(1), a district court may grant a dismissal based on the legal insufficiency of a claim. Dismissal is proper only when the claim clearly appears to be either immaterial and solely for the purpose

of obtaining jurisdiction, or is wholly insubstantial and frivolous. Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1408-09 (3d Cir.), cert. denied, 501 U.S. 1222 (1991). When the subject matter jurisdiction of the court is challenged, the party that invokes the court's jurisdiction bears the burden of persuasion. Kehr Packages, 926 F.2d at 1409 (citing Mortensen, 549 F.2d 884, 891 (3d Cir.1977)). Moreover, the district court is not restricted to the face of the pleadings, but may review any evidence to resolve factual disputes concerning the existence of jurisdiction. McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988) (citations omitted), cert. denied, 489 U.S. 1052 (1989).

In this case, the defendants argue that the Court lacks subject matter jurisdiction over the plaintiff's Title VII claim. (Def. FHP's Mem. at 3-9; Defs. ATO & Ore's Mem. at 4-9.) The defendants claim that the plaintiff does not explicitly state in the complaint that he instituted his lawsuit within ninety (90) days after receiving the Right to Sue notice from the EEOC. (Def. FHP's Mem. at 4-5; Defs. ATO & Ore's Mem. at 4.) The defendants maintain that the plaintiff fails to allege that they were "employers" as defined by the EEOA. (Def. FHP's Mem. at 5-6; Defs. ATO & Ore's Mem. at 6-7.) Specifically, the defendants argue that the plaintiff failed to use the statutory definition of "employer" in his complaint. (Def. FHP's Mem. at 5-6; Defs. ATO & Ore's Mem. at 6-7.) They note that in his complaint, the plaintiff alleges that "Defendants employed more than fifty (50) employees for each working day in each of the twenty (20) or more calendar weeks in

the current or proceeding calendar year." (Def. FHP's Mem. at 6; Defs. ATO & Ore's Mem. at 6-7; Compl. at ¶ 33.) The defendants argue that this language is insufficient because Title VII explicitly defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ." <sup>5</sup> 42 U.S.C. § 2000e(a) (1994) (emphasis added). (Def. FHP's Mem. at 5; Defs. ATO & Ore's Mem. at 6.) They further assert that because the plaintiff pleads that the defendants are separate entities, and fails to state that they functioned as a "single entity" during his employment, they are not "employers" under Title VII. (Def. FHP's Mem. at 6-9; Defs. ATO & Ore's Mem. at 7-10.) Therefore, they maintain that the plaintiff's allegations are insufficient to establish subject matter jurisdiction. (Def. FHP's Mem. at 6-9; Defs. ATO & Ore's Mem. at 7-10.)

The plaintiff attempts to rebut these jurisdictional arguments by asserting that he is not required to plead in his complaint that he received an EEOC Right to Sue letter. (Pl.'s Resp. to FHP Mot. at 9; Pl.'s Resp. to ATO & Ore Mot. at 4-5.) To support his position, he relies on Gooding v. Warner-Lambert Co., 744 F.2d 354, 355 (3d Cir. 1984), in which the United States Court of Appeals for the Third Circuit held that the Right to Sue letter

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<sup>5</sup>/ The defendants assert that paragraph 33 of the complaint should read as follows: "Defendants employed more than fifteen (15) employees for each working day in each of the twenty (20) or more calendar weeks in the current or proceeding calendar year." (Def. FHP's Mem. at 6; Def. ATO & Ore's Mem. at 6-7.)

is not a jurisdictional prerequisite to filing a Title VII action. (Pl.'s Resp. to FHP Mot. at 9; Pl.'s Resp. to ATO & Ore Mot. at 4.) The plaintiff also argues that his complaint is not flawed merely because it does not contain factual allegations that prove that the defendants are employers within the meaning of Title VII. (Pl.'s Resp. to FHP Mot. at 11; Pl.'s Resp. to ATO & Ore Mot. at 7-8.) Specifically, he maintains that because he pleads that the defendants meet the minimum requirements of an employer as defined by Title VII, his complaint should not be dismissed. (Pl.'s Resp. to FHP Mot. at 12; Pl.'s Resp. to ATO & Ore Mot. at 7-8.) He asserts that under the liberal pleading requirements set forth in Federal Rule of Civil Procedure 8(a)\<sup>6</sup>, the defendants have fair notice that he is attempting to hold them liable as Title VII employers. (Pl.'s Resp. to FHP Mot., at 12; Pl.'s Resp. to ATO & Ore Mot. at 7-8.) Furthermore, the plaintiff maintains that because discovery is not yet complete, he cannot sufficiently factually address whether the defendants are "employers" or explain their supervisory or contractual relationship. (Pl.'s Resp. to FHP Mot. at 12-14; Pl.'s Resp. to ATO & Ore Mot. at 8-9.) Therefore, the plaintiff requests that this Court refrain from ruling on the Title VII claim at this juncture, and allow him to amend his

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<sup>6</sup>/ Federal Rule of Civil Procedure 8(a) requires that a plaintiff's complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2). Accordingly, the plaintiff does not have to "set out in detail the facts upon which he bases his claim." Conley v. Gibson, 355 U.S. 41, 47 (1957) (emphasis added). In other words, the plaintiff need only to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Id. (emphasis added).

complaint. (Pl.'s Resp. to FHP Mot. at 10; Pl.'s Resp. to ATO & Ore Mot. at 7.)

After reviewing the complaint and the relevant case law, this Court finds that failure to allege that the plaintiff received a Right to Sue letter is not fatal. See Gooding, 744 F.2d at 355, 358-59. Those courts confronted with this situation have allowed the plaintiffs to amend their complaints. See id. (requiring district court to allow plaintiff to amend complaint); Blessing v. County of Lancaster, 609 F. Supp. 485, 486 (E.D. Pa. 1985) (denying motion to dismiss because plaintiff amended complaint). In addition, this Court finds that the plaintiff's allegations complied with the liberal pleading requirements of Rule 8(a), because the defendants have fair notice that they are being sued as Title VII employers. Therefore, even though the complaint does not conform with the exact language of the statute, this Court finds that dismissal of the plaintiff's complaint is not warranted. Furthermore, the plaintiff has requested that he amend his complaint pursuant to Federal Rule of Civil Procedure 15(a),<sup>7</sup> so

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<sup>7</sup>/ Federal Rule of Civil Procedure 15(a) allows a plaintiff to amend its complaint after it has already been filed:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading whichever period may be

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that his complaint sets forth his Title VII claim with greater specificity. Therefore, the Court will allow plaintiff twenty (20) days from the date of the Court's Order to amend his complaint.\<sup>8</sup> Accordingly, this Court will deny defendants' motions with leave to renew.

An appropriate Order follows.

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<sup>7</sup>/ (...continued)  
the longer, unless the court otherwise orders.

Fed. R. Civ. P. 15(a) (emphasis added).

<sup>8</sup>/ The defendants have not yet filed their answers, and thus this Court finds that they will not be sufficiently prejudiced if it allows the plaintiff to amend his complaint. Furthermore, because the Court is allowing the plaintiff to amend his complaint, it will not address the remaining claims.

