

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

DEAN RUSSELL,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
STRICK CORPORATION,	:	
Defendant.	:	NO. 97-806
	:	
Newcomer, J.	:	July , 1997

M E M O R A N D U M

Plaintiff in the instant action alleges that defendant Strick Corporation ("Strick"), his former employer, retaliated against him, and wrongfully discharged him, after he testified at a worker's compensation hearing on behalf of one of his co-workers at Strick regarding racial discrimination allegedly suffered by the co-worker at the hands of several Strick employees.

Presently before the Court is Defendant Strick Corporation's Motion to Dismiss Plaintiff's [Amended] Complaint, plaintiff's response thereto, and defendant's reply thereto. For the reasons that follow, said Motion will be denied.

A. Background¹

Plaintiff began working at Strick, a warehouser and parts distributor located in Fairless Hills, Pennsylvania, as a warehouse worker in November, 1992. (Am. Compl. ¶¶ 7, 9.) On his second day of work, he met fellow warehouse employee Kirk Johnson, an African-American. (Am. Compl. ¶ 10.) On that day,

1. This factual background is derived from the allegations of the Amended Complaint.

and from that day forward, plaintiff observed Strick employees, including supervisors, routinely directing at Mr. Johnson derogatory racial slurs. (Am. Compl. ¶¶ 10-12.) He also observed employees posting racist signs in the warehouse and, on one occasion, dressing as Ku Klux Klan members. (Am. Compl. ¶¶ 12-13.)

Due to the aforementioned occurrences, Mr. Johnson began to suffer severe depression which rendered him unable to work. (Am. Compl. ¶ 15.) As a result, Mr. Johnson filed, on April 20, 1994, a workers' compensation claim. He further filed, on September 17, 1994, a charge of race discrimination with the Pennsylvania Human Relations Commission and, on October 28, 1994, a charge of race discrimination with the Equal Employment Opportunities Commission. (Am. Compl. ¶ 15.) He subsequently filed, on November 14, 1995, a race discrimination action in federal court. (Am. Compl. ¶ 27.) The federal action eventually settled. (Am. Compl. ¶ 37.)

Throughout the period during which Mr. Johnson was pursuing his legal claims against Strick, plaintiff was experiencing considerable employment success. Between February, 1993, and March, 1994, he received three pay increases. (Am. Compl. ¶ 16.) Further, in March, 1994, he received a promotion, and, in April, 1994, he was described in an evaluation report as creative, organized, and hardworking and was noted to be the leader of the "best section in the warehouse." (Am. Compl. ¶ 16.)

On November 4, 1994, in compliance with a subpoena, plaintiff testified at Mr. Johnson's workers' compensation hearing, before The Honorable Joseph E. McManus, regarding the racial discrimination suffered by Mr. Johnson at Strick. (Am. Compl. ¶ 18.) Specifically, plaintiff "described truthfully how Strick supervisors and employees had tormented Mr. Johnson on the basis of his race." (Am. Compl. ¶ 18.) Judge McManus ultimately found that Strick employees, including at least one supervisor, had actively harassed Mr. Johnson because of his race and had thereby caused him mental injury. (Am. Compl. ¶ 28.)

After plaintiff testified at the hearing, he began to be harassed and threatened by Strick employees, he was passed over for several promotions, he received two "trumped-up" disciplinary charges, and he was reassigned to a different position pursuant to a supposed "widescale" reassignment-of-positions plan, though, in fact, no other employees were reassigned. (Am. Compl. ¶ 19-26.) Further, on April 30, 1996, plaintiff and another friend of Mr. Johnson were ordered by their supervisor, for no apparent reason, to report for an immediate drug test. (Am. Compl. ¶ 29.) Plaintiff informed the supervisor that he could not be tested at that time because he had to go to a dental appointment. (Am. Compl. ¶ 30.) He asked the supervisor if he should cancel the appointment, but the supervisor did not respond. (Am. Compl. ¶ 30.) Plaintiff thus left Strick to go to the appointment. (Am. Compl. ¶ 30.) The following day, plaintiff visited his own physician to have a drug

test performed. (Am. Compl. ¶ 31.) The result of the test was negative. (Am. Compl. ¶ 31.) Later that day, he reported to the drug testing unit at Strick to have the test conducted. (Am. Compl. ¶ 32.) While he was waiting to be tested, he was informed that he was suspended from his job because of his failure to take the test on the previous day, when it was ordered. (Am. Compl. ¶ 32.)

Shortly thereafter, on May 1, 1996, plaintiff suffered a mental breakdown and was admitted to Lower Bucks Hospital's psychiatric ward, where he stayed for seventeen days. (Am. Compl. ¶ 33.) To date, plaintiff remains under the care of a physician, has never returned to work at Strick, and has been unable to secure new employment. (Am. Compl. ¶¶ 33-36.)

Subsequent to the foregoing, plaintiff filed the instant action, asserting three claims against Strick. Count I of the Amended Complaint alleges that Strick retaliated against plaintiff, for testifying truthfully at Mr. Johnson's workers' compensation hearing regarding the racial harassment suffered by Mr. Johnson at Strick, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). Count II asserts that Strick wrongfully discharged plaintiff, an at-will employee, for complying with his legal duty to testify truthfully at Mr. Johnson's workers' compensation hearing in response to a subpoena, in violation of Pennsylvania common law. Finally, Count III avers that Strick retaliated against plaintiff, in the same manner as described in Count I, in violation of the

Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. § 955(d).

Defendant now moves to dismiss plaintiff's Amended Complaint, pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"), for failure to state a claim upon which relief can be granted.

B. Standard Under Rule 12(b)(6)

Pursuant to Rule 12(b)(6), a court should dismiss a claim for failure to state a cause of action only if it appears to a certainty that no relief could be granted under any set of facts which could be proved. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). Because granting such a motion results in a determination on the merits at such an early stage of a plaintiff's case, the district court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 664-65 (3d Cir. 1988), cert. denied, 489 U.S. 1065 (1989). If the facts alleged in the Complaint, even if true, fail to support the plaintiff's claim, dismissal of the claim is appropriate. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

C. Discussion

This Court first discusses jointly Counts I and III and addresses subsequently Count II.

1. Counts I and III

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) ("Title VII" or "section 2000e-3(a)"), pursuant to which Count I is brought, provides, in relevant part, as follows:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a). Similarly, the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. § 955(d) ("PHRA" or "section 955(d)"), pursuant to which Count III is brought, provides, in relevant part, as follows:

It shall be an unlawful discriminatory practice . . . [f]or any . . . employer . . . to discriminate in any manner against any individual because such individual has opposed any practice forbidden by this act, or because such individual has made a charge, testified or assisted, in any manner, in any investigation, proceeding or hearing under this act.

43 Pa. Cons. Stat. Ann. § 955(d). This Court addresses Counts I and III jointly because claims brought under Title VII and the PHRA are analyzed under the same standards. See, Harley v. McCoach, 928 F. Supp. 533, 538 (E.D. Pa. 1996); Doe v. Kohn, Nast & Graf, P.C., 862 F. Supp. 1310, 1323 (E.D. Pa. 1994).

In order to establish a prima facie case of discriminatory retaliation under Title VII and the PHRA, a

plaintiff must establish the following: (1) that he engaged in protected activity; (2) that his employer took adverse action against him; and (3) that a causal link exists between the protected activity and the employer's adverse action. Kachmar v. Sungard Data Sys., Inc., 109 F.3d 173, 177 (3d Cir. 1997).

Defendant contends that plaintiff cannot establish a prima facie case, and thus that this action should be dismissed, because plaintiff cannot establish the first element. That is to say, plaintiff, defendant argues, did not engage in any "protected activity." Id. This Court disagrees.

There are two types of protected activity under Title VII and the PHRA, namely, "opposition" and "participation." Robinson v. Southeastern Pennsylvania Trans. Auth., 982 F.2d 892, 896 n.4 (3d Cir. 1993); Morris v. Boston Edison Co., 942 F. Supp. 65, 69 (D. Mass. 1996). A person engages in "opposition" under Title VII when he "oppose[s] any practice made an unlawful employment practice by [Title VII]," and he engages in "opposition" under the PHRA when he "oppose[s] any practice forbidden by [the PHRA]." 42 U.S.C. § 2000e-3(a); 43 Pa. Cons. Stat. Ann. § 955(d). A person engages in "participation" under Title VII when he "ma[kes] a charge, testifie[s], assist[s], or participate[s] in any manner in an investigation, proceeding, or hearing under [Title VII]," and he engages in "participation" under the PHRA when he "ma[kes] a charge, testifie[s] or assist[s], in any manner, in any investigation, proceeding or

hearing under [the PHRA]." 42 U.S.C. § 2000e-3(a); 43 Pa. Cons. Stat. Ann. § 955(d).

Defendant asserts that plaintiff engaged in neither opposition nor participation. While this Court agrees that plaintiff did not engage in participation, it finds that plaintiff did engage in opposition.

Plaintiff did not engage in participation. Plaintiff alleges that he engaged in protected activity of the participation variety when he testified at Mr. Johnson's workers' compensation hearing regarding the racial discrimination suffered by Mr. Johnson at Strick. This does not constitute participation, however, because it does not relate to any "investigation, proceeding, or hearing" under Title VII or the PHRA. 42 U.S.C. § 2000e-3(a); 43 Pa. Cons. Stat. Ann. § 955(d). That is to say, neither Title VII nor the PHRA pertains to workers' compensation hearings. Accordingly, testifying at such a hearing is not participation. See, e.g., Morris, 942 F. Supp. at 71 (testifying during employer's internal investigation is not participation); Vasconcelos v. Meese, 907 F.2d 111, 113 (9th Cir. 1990) (testifying during U.S. Marshal's Service's Internal Affairs investigation is not participation); Raspanti v. Runyon, 1996 WL 506203, at *3 (E.E.O.C. Aug. 29, 1996) (filing workers' compensation claim is not participation).

Plaintiff did, on the other hand, engage in opposition. As stated previously, plaintiff alleges that he engaged in protected activity of the opposition variety when he testified at

Mr. Johnson's workers' compensation hearing regarding the racial discrimination suffered by Mr. Johnson at Strick. To determine whether this conduct constitutes opposition, that is, whether, by testifying at the hearing, plaintiff "opposed any practice" made unlawful by Title VII or the PHRA, this Court must look closely at the facts of this particular case. Porta v. Rollins Envtl. Servs., Inc., 654 F. Supp. 1275, 1284 (D. N.J. 1987), aff'd without op., 845 F.2d 1014 (3d Cir. 1988); 42 U.S.C. § 2000e-3(a); 43 Pa. Cons. Stat. Ann. § 955(d). A case-specific inquiry is required because the Third Circuit Court of Appeals has found it to be "neither necessary, nor appropriate to [] attempt to define with precision the type of conduct [that constitutes opposition, thereby] [] giv[ing] rise to a retaliation claim" Barber v. CSX Distribution Servs., 68 F.3d 694, 702 (3d Cir. 1995). The Third Circuit has made clear, however, that to make this determination, a court must "analyze the message that [the plaintiff] conveyed," "not the medium of conveyance." Id. The Third Circuit thus has recognized that both formal charges of discrimination and informal protests of discriminatory practices--"including making complaints to management, writing critical letters to customers, protesting against discrimination by industry or society in general, and expressing support of co-workers who have filed formal charges"--constitute opposition.

Id. (quoting Sumner v. United States Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990)).²

In the instant case, defendant makes much of the fact that plaintiff presented his testimony at Mr. Johnson's workers' compensation hearing, the purpose of which, of course, was to determine whether Mr. Johnson was injured and entitled to workers' compensation, not whether Strick discriminated against

2. See, e.g., Hicks v. ABT Assocs., Inc., 572 F.2d 960, 969 (3d Cir. 1978) (finding that an employee's complaint to the Department of Housing and Urban Development, which provided funding to his employer, regarding his employer's discriminatory practices towards him, constituted opposition); Robinson v. Southeastern Pennsylvania Transp. Auth., 982 F.2d 892, 896 (3d Cir. 1993) (finding that an employee's letter to his Congressman regarding his employer's racially discriminatory practices towards him and some of his fellow employees constituted opposition); Van Horn v. Elbeco Incorporates, No. 94-2720, 1996 WL 385630, at *11 (E.D. Pa. July 10, 1996) (acknowledging that plaintiff engaged in protected activity when she filed a grievance with her employer alleging sexual harassment); Linson v. Trustees of Univ. of Pennsylvania, No. 95-3681, 1996 WL 479532, at *5 (E.D. Pa. Aug. 21, 1996) (finding that plaintiff student engaged in protected activity when he filed a complaint with university alleging sexual harassment by a fellow student); Martin v. General Elec. Co., 891 F. Supp. 1052, 1060 (E.D. Pa. 1995) (finding that employee engaged in opposition when he sought legal advice regarding his employer's alleged age discrimination practices and had his attorney notify his employer that he intended to pursue an age discrimination claim); Hochstadt v. Worcester Found. for Experimental Biology, Inc., 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976) (stating that opposition includes using an employer's internal grievance mechanisms); Equal Employment Opportunity Comm'n v. Crown Zellerbach Corp., 720 F.2d 1008, 1014 (9th Cir. 1983) (stating that opposition includes the writing by employees of a letter to a school board protesting their employer's receipt of an affirmative action award for its funding of a career guidance program for minorities); Williams v. Eckerd Family Youth Alternative, 908 F. Supp. 908, 912-913 (M.D. Fla. 1995) (implicitly finding that employees' report to the police regarding their employer's racial discrimination against them and their participation in police department's investigation could constitute opposition).

Mr. Johnson on the basis of his race. That being the case, defendant argues, plaintiff, in testifying at the hearing, was not opposing Strick's discriminatory practices, but, rather, was merely presenting his perception of the events which caused Mr. Johnson's alleged mental injury. This argument fails, however, under Barber, which, again, states that courts must "analyze the message that [plaintiff] conveyed," "not the medium of conveyance." 68 F.3d at 702. Plaintiff, at the hearing, effectively testified against Strick, and the message conveyed by plaintiff through that testimony was that Strick had discriminated against Mr. Johnson on the basis of his race and, in doing so, had caused him mental harm. That being the case, plaintiff did, in fact, engage in opposition, that is, in protected activity under Title VII and the PHRA. Accordingly, to the extent that Defendant Strick Corporation's Motion to Dismiss Plaintiff's [Amended] Complaint pertains to Counts I and III, it will be denied.

2. Count II

This Court next discusses Count II, which alleges that Strick wrongfully discharged plaintiff, an at-will employee, for complying with his legal duty to testify truthfully at Mr. Johnson's workers' compensation hearing in response to a subpoena, in violation of Pennsylvania common law.

As a general rule, there is no common law cause of action against an employer for termination of an at-will employment relationship. Krajsa v. Keypunch, Inc., 622 A.2d 355,

358 (Pa. Super. 1993); Shick v. Shirey, 691 A.2d 511, 513 (Pa. Super. 1997); Frankel v. Warwick Hotel, 881 F. Supp. 183, 186 (E.D. Pa. 1995). An at-will employee may be terminated "for good reason, bad reason, or no reason at all." Clark v. Modern Group Ltd., 9 F.3d 321, 327 (3d Cir. 1993) (quoting Nix v. Temple Univ., 596 A.2d 1132, 1135 (Pa. Super. 1991)); see also, Krajsa, 622 A.2d at 358; Shick, 691 A.2d at 513. However, an exception to this rule exists where the discharge of an at-will employee would offend a "clear mandate of public policy." Geary v. United States Steel Corp., 319 A.2d 174, 185 (Pa. 1974); see also, Frankel, 881 F. Supp. at 186.

This public policy exception has been interpreted narrowly. Frankel, 881 F. Supp. at 186. To maintain a cause of action under this exception, the employee must establish a violation of a clearly mandated public policy that "strikes at the heart of a citizen's social rights, duties and responsibilities." Turner v. Letterkenny Fed. Credit Union, 505 A.2d 259, 261 (Pa. Super. 1985) (quoting Novosel v. Nationwide Ins. Co., 721 F.2d 894, 899 (3d Cir. 1983)); see also, Shick, 691 A.2d at 513. This is because the public policy exception does not exist to protect the employee, but, rather, to protect society from public harm. Green v. Bryant, 887 F. Supp. 798, 801 (E.D. Pa. 1995) (citing Clark, 9 F.3d at 331-32). The extent to which the public policy exception applies must be determined on a case-by-case basis. Turner, 505 A.2d at 260 (citing Yaindl v. Ingersoll-Rand Co., 422 A.2d 611, 617 (Pa. Super. 1980)).

The public policy exception is most frequently applied when a discharge results from conduct on the part of an employee that is required by law. Clark, 9 F.3d at 328; see also, Smith v. Calgon Carbon Corp., 917 F.2d 1338, 1344 (3d Cir. 1990), cert. denied, 499 U.S. 966 (1991); Green, 887 F. Supp. at 800-01. Thus, the exception has been held to apply when (1) an employee was fired for serving jury duty, Reuther v. Fowler & Williams, Inc., 386 A.2d 119, 120 (Pa. Super. 1978), (2) an employee was fired for reporting violations of federal regulations to the Nuclear Regulatory Commission, Field v. Philadelphia Elec. Co., 565 A.2d 1170, 1180 (Pa. Super. 1989), and (3) an employee was fired for producing work documents in response to a subpoena, Keiser v. North Am. Life Assurance Co., No. 85-0266, 1986 WL 4829, at *1-2 (E.D. Pa. April 18, 1986).

The public policy exception likewise applies in the instant case. Plaintiff alleges that he was fired for testifying truthfully at Mr. Johnson's workers' compensation hearing in response to a subpoena. As testifying truthfully in response to a subpoena is a duty that is required by law, plaintiff is protected by the public policy exception. See, Pro v. Donatucci, 81 F.3d 1283, 1290 (3d Cir. 1996) (quoting Pro v. Donatucci, No. 94-6001, 1995 WL 552980, at *13-14 (E.D. Pa. Sept. 18, 1995)) (stating that "[a] subpoenaed witness has no choice but to appear at a trial, unless he is willing to risk a finding of contempt" and that "[r]etaliation in these circumstances inflicts a punishment on a[n] [] employee for performing an act that he

could not choose to avoid").³ Accordingly, to the extent that Defendant Strick Corporation's Motion to Dismiss Plaintiff's [Amended] Complaint pertains to Count II of the Amended Complaint, it will be denied.

D. Conclusion

In conclusion, Defendant Strick Corporation's Motion to Dismiss Plaintiff's [Amended] Complaint will be denied.

An appropriate Order follows.

3. While the Pennsylvania courts have not yet addressed the issue of whether the public policy exception protects an employee who testifies truthfully in response to a subpoena, The Honorable Jane R. Roth of the Third Circuit predicts that they would hold that it does. In this regard, Judge Roth states as follows:

Pennsylvania's public policy exception . . . prevents employers from using an employee's compliance with legal requirements as a basis for termination. The seminal case in this area recognized an action for wrongful termination grounded in the public policy exception where an employee was terminated for complying with a statutory duty to serve on a jury. Reuther v. Fowler & Williams, Inc., 386 A.2d 119 (Pa. Super. 1978).

The duty to comply with a subpoena is directly analogous to the duty to serve on a jury. Indeed, the basis for the Pennsylvania Superior court's decision in Reuther was its recognition that under Pennsylvania law, a "[s]ummons for jury service . . . shall be deemed summonses of the court . . ." 386 A.2d at 120. Reuther's rule therefore logically applies to a subpoena, which by definition is a summons of the court.

Pro, 81 F.3d at 1300 (Roth, J., dissenting).

Clarence C. Newcomer, J.

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	:	
v.	:	
	:	
STRICK CORPORATION,	:	
Defendant.	:	NO. 97-806

O R D E R

AND NOW, this day of July, 1997, upon consideration of Defendant Strick Corporation's Motion to Dismiss Plaintiff's [Amended] Complaint, plaintiff's response thereto, and defendant's reply thereto, and in accordance with the foregoing Memorandum, it is hereby ORDERED that said Motion is DENIED.

AND IT IS SO ORDERED.

Clarence C. Newcomer, J.