

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

LINDA PICKENS	:	CIVIL ACTION
	:	
V.	:	
	:	
INTERCOMMUNITY AGENCY, INC.	:	NO. 96-8415

**M E M O R A N D U M A N D O R D E R**

AND NOW, this                    day of November, 1997, upon consideration of defendant's unopposed<sup>1</sup> Motion for Summary Judgment, it is hereby ORDERED that said Motion is GRANTED. IT IS FURTHER ORDERED that JUDGMENT is ENTERED in favor of defendant Intercommunity Agency, Inc. and against plaintiff Linda Pickens. The Clerk of the Court shall mark this case CLOSED.

Plaintiff Linda Pickens was employed by Intercommunity Action, Inc.<sup>2</sup> ("Interac") from March 1990 through April 1994 when her employment was terminated by Interac. Subsequently, plaintiff filed a race discrimination charge with the Equal Employment Opportunity Commission ("EEOC") on February 17, 1995; and after receiving EEOC's Dismissal and Notice of Rights on or about September 23, 1996, plaintiff filed a Complaint with this Court on December 17, 1996. Plaintiff failed, however, to serve the

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<sup>1</sup>Defendant served a copy of the Motion for Summary Judgment, Memorandum in Support of Motion of Defendant for Summary Judgment, and Proposed Order on Friday, October 10, 1997. Pursuant to Local Rule of Civil Procedure 7.1(c), plaintiff had until Friday, October 24, 1997 to serve a brief in opposition to defendant's Motion; Plaintiff has failed to do so. Thus, the Court treats defendant's motion as unopposed.

<sup>2</sup>In its motion, defendant indicates that plaintiff has improperly identified it as "Intercommunity Agency, Inc.;" defendant states that its proper corporate name is Intercommunity Action, Inc.

Complaint within the 120-day period provided for in Rule 4(m) of the Federal Rules of Civil Procedure. Instead, on April 23, 1997, more than 120 days after filing the Complaint, plaintiff filed an Amended Complaint. Plaintiff served the Amended Complaint on Interac on April 24, 1997.

In her Amended Complaint, plaintiff alleges that she was terminated from her position at Interac, and was otherwise treated disparately while employed at Interac, based on her race and sex in violation of her rights under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et seq., the Civil Rights Act of 1866 ("Section 1981"), 42 U.S.C. § 1981, and the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Stat. § 951. Plaintiff also cites the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623, in her description of the "nature of the action," but does not refer to the ADEA as a basis for this Court's jurisdiction, citing only to Title VII and Section 1981 in that regard. (Pl.'s Am. Compl. ¶¶ 1, 5). Plaintiff does not allege that the PHRA proscription against age discrimination was violated. She alleges only race and sex discrimination under that statute. There is but a single reference to age discrimination in the Amended Complaint, that being in Count IV, "Breach of Written and Implied Contract Claim," where she alludes to "the foregoing age discrimination and breach of policies" as the cause of harm to her. Nowhere in the Amended Complaint, however, is there any factual allegation concerning age discrimination. Indeed, there exist no allegations that plaintiff was within the protected age group under ADEA and

the PHRA at the times relevant to this action, as her age is not averred.

Similarly, plaintiff describes the nature of her action as one including "employment discrimination based on disability".<sup>3</sup> The lone factual allegation in this regard appears in Paragraph 2 of the Amended Complaint, where plaintiff identifies herself as an "African American female . . . who has and who had a disability at all times relevant . . . ." (Pl.'s Am. Compl. ¶ 2). Conspicuously missing from the Amended Complaint are any allegations as to the nature of her disability, that she was a "qualified individual with a disability" within the protection of the ADA, 42 U.S.C. § 12112(a), that Interac knew of her disability, or as to how Interac purportedly discriminated against her on the basis of such disability. Plaintiff has also asserted vaguely that Interac treated her disparately "in retaliation for [her] engaging in statutorily protected activities," without anywhere specifying those activities or Interac's awareness of them. (Pl.'s Am. Compl. ¶¶ 12, 14, 22, 31, 32). Finally, plaintiff also claims that she entered into an oral and/or written contract with Interac, which was subsequently breached by Interac. Plaintiff seeks various forms of relief, including but not limited to back pay, damages for mental suffering, punitive damages, and costs and attorney's fees.

Presently before the Court is Interac's motion for

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<sup>3</sup>Although plaintiff does not cite the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12101, in her Amended Complaint, the Court assumes that plaintiff proceeds under the ADA.

summary judgment. Interac argues that summary judgment should be entered in its favor on all Counts of plaintiff's Amended Complaint because: (1) plaintiff failed to exhaust her administrative remedies as to all of her claims of discrimination under Title VII, except for her claim that she was discharged because of her race; (2) the original Complaint, not having been served on Interac within 120 days of its filing, should be dismissed, or alternatively, plaintiff is barred from filing an Amended Complaint that relates back to the original Complaint; (3) plaintiff's claims under Section 1981 are barred by the statute of limitations; (4) plaintiff's claims under the PHRA are barred by her failure to exhaust administrative remedies; (5) under applicable Pennsylvania state law, there is no cause of action for wrongful discharge; and (6) the only operative employment contract here was a collective bargaining agreement under the terms of which plaintiff cannot now pursue a claim that she was terminated for other than just cause. Plaintiff has not filed a response to defendant's Motion for Summary Judgment. For the following reasons, the Court grants defendant's Motion.

A reviewing court may enter summary judgment where there are no genuine issues as to any material fact and one party is entitled to judgment as a matter of law. White v. Westinghouse Electric Co., 862 F.2d 56, 59 (3d Cir. 1988). "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v.

Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The evidence presented must be viewed in the light most favorable to the non-moving party. Id. at 59.

The moving party has the initial burden of identifying evidence which it believes shows an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Childers v. Joseph, 842 F.2d 689, 694 (3d Cir. 1988). The moving party's burden may be discharged by demonstrating that there is an absence of evidence to support the non-moving party's case. Celotex, 477 U.S. at 325. Once the moving party satisfies its burden, the burden shifts to the non-moving party, who must go beyond its pleading and designate specific facts by use of affidavits, depositions, admissions, or answers to interrogatories showing there is a genuine issue for trial. Id. at 324. Moreover, when the non-moving party bears the burden of proof, it must "make a showing sufficient to establish the existence of [every] element essential to that party's case." Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp., 812 F.2d 141, 144 (3d Cir. 1987) (quoting Celotex, 477 U.S. at 322).

Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." White, 862 F.2d at 59 (quoting Celotex, 477 U.S. at 322). The non-movant must specifically identify evidence of record, as opposed to general averments, which supports his claim and upon which a reasonable

jury could base a verdict in his favor. Celotex, 477 U.S. at 322. The non-movant cannot avoid summary judgment by substituting "conclusory allegations of the complaint . . . with conclusory allegations of an affidavit." Lujan v. National Wildlife Found., 497 U.S. 871, 888 (1990). Rather, the motion must be denied only when "facts specifically averred by [the non-movant] contradict "facts specifically averred by the movant." Id. Applying these principles to the facts here, the Court finds that defendant is entitled to judgment as a matter of law.

To the extent that plaintiff has stated an ADEA claim, this claim is barred because plaintiff has not complied with the ADEA's charge-filing requirements. Under the ADEA, no civil action can be commenced until 60 days after a charge alleging unlawful age discrimination has been filed with the EEOC. Cline v. General Elec. Credit Auto Lease, Inc., 748 F. Supp. 650, 653 (N.D. Ill. 1990); 29 U.S.C. § 626(d). This requirement promotes three goals: first, the EEOC can notify the complainant's employer; second, the EEOC has an opportunity to investigate the charge; and third, the EEOC can attempt conciliation between the parties. Id. If a plaintiff has failed to first file a charge with the EEOC, then the plaintiff cannot proceed with a civil action because of failure to exhaust administrative remedies.

Here, the EEOC charge filed by plaintiff does not directly or indirectly accuse the defendant of age discrimination. Plaintiff neglected to check the box on the charge form for age discrimination, and neither the term "age discrimination," nor

words to that effect appear in the charge. While plaintiff could validly bring an ADEA claim if it were "like or reasonably related to the allegations of [her] charge and growing out of such allegations," Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 538 F.2d 164, 167 (7th Cir. 1976) (en banc), this Court is hard-pressed on the facts to find a reasonable relationship between an allegation of race discrimination and one of age discrimination. Indeed, in the Charge of Discrimination that plaintiff filed with the EEOC, plaintiff only complained of her discharge which allegedly was the result of discrimination based on race. Simply stated, plaintiff never complained about age discrimination until the filing of this civil action. Thus, the Court grants summary judgment in favor of defendant on Count I of plaintiff's Amended Complaint to the extent it alleges an ADEA claim.

The Court also grants summary judgment in favor of defendant on Count I to the extent that plaintiff alleges an ADA claim. Like Title VII and the ADEA, the ADA requires a prospective plaintiff to file a charge of discrimination with the EEOC, setting forth the alleged ADA claim, before commencing suit in federal court. 42 U.S.C. § 12117(a). Here, it is clear that plaintiff failed to allege an ADA claim. Nowhere in her Charge of Discrimination does plaintiff allege that she was discriminated against based on a disability. Although a judicial complaint is not limited to the scope of the four corners of the EEOC charge, and "the parameters of the civil action in the district court are defined by the scope of the EEOC investigation which can reasonably

be expected to grow out of the charge of discrimination,'" Doe v. Kohn Nast & Graf, P.C., 866 F. Supp. 190, 196 (E.D Pa. 1994) (citation omitted), plaintiff did not allege any facts in her EEOC charge that would have caused the EEOC to investigate a possible ADA claim. Thus, the Court grants summary judgment in defendant's favor on Count I to the extent that plaintiff alleges an ADA claim.

The Court also grants summary judgment in favor of defendant on Count I to the extent that plaintiff asserts claims of sex discrimination under Title VII. Under Title VII, it is now axiomatic that a complainant must file a charge of discrimination with the EEOC before filing suit in federal court. Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398-99 (3d Cir. 1976). If a plaintiff in federal court has failed to file his or her specific charge of discrimination with the EEOC before filing a lawsuit in federal court, then plaintiff cannot proceed with his or her claim in federal court.

The Third Circuit has stated that: "the parameters of the civil action in the district court are defined by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." Id. (citation omitted). In determining whether the judicial claim is reasonably related to the EEOC charge, the most important consideration is the factual statement. Doe, 866 F. Supp. at 197. Therefore, a plaintiff may file a particular charge of discrimination in federal court if the EEOC's investigation should have covered the charge of discrimination based on the factual statement provided to the EEOC.

In this case, plaintiff simply cannot argue that the scope of the EEOC investigation should have covered a charge of sexual discrimination. Plaintiff filed a Charge of Discrimination with the EEOC, wherein she only alleged that she was discharged because of her race. No other facts were provided to the EEOC which should have prompted the EEOC to investigate claims of sexual discrimination. Indeed, plaintiff does not even argue that the EEOC should have been expected to investigate a claim of sexual discrimination based on the facts provided to the EEOC. Thus, the Court grants summary judgment in favor of defendant on Count I to the extent that plaintiff asserts a sexual discrimination claim under Title VII.

The Court also finds that plaintiff cannot base her racial discrimination claim on any conduct of her employer other than her discharge. As stated previously, a district court may adjudicate only those claims that fall within "the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." Ostapowicz, 541 F.2d at 398-399. A comparison of plaintiff's Charge of Discrimination filed with the EEOC and her Amended Complaint indicates that plaintiff failed to raise, in her EEOC charge, the allegations averred in Paragraphs 12, 13, 15, 16, 17, 18 and 19 of her Amended Complaint. Thus, this Court does not have subject matter jurisdiction over plaintiff's Title VII claims as alleged in Paragraphs 12, 13, 15, 16, 17, 18, and 19 of the Amended Complaint because plaintiff has failed to exhaust administrative remedies. See King v. M.R. Brown, Inc., 911

F. Supp. 161, 164-66 (E.D. Pa. 1995).

In her Amended Complaint, plaintiff alleges differential terms and conditions of employment because of her race and sex and in retaliation for engaging in statutorily protected activities; plaintiff claims that such differential terms and conditions consisted of racial and sexual harassment, excessive criticism, and a hostile work environment. (Pl.'s Am. Compl. ¶¶ 12, 13, 15). Plaintiff also alleges that she was denied job training for a "better job" because of her race and sex and in retaliation for statutorily protected activities. (Pl.'s Am. Compl. ¶¶ 15, 16). Finally, plaintiff claims that she was given improper evaluations and severe criticism of her job performance and disparate discipline prior to her discharge based on her race and sex. (Pl.'s Am. Compl. ¶¶ 17-19).

All of these allegations are not properly part of this action. These allegations, which state different claims of racial discrimination not previously raised with the EEOC, are neither related to plaintiff's charge of racial discrimination in her discharge, nor likely to have been included in the EEOC's investigation of plaintiff's charge because they are in no way related to her claim of racial discrimination in her discharge. To find otherwise would frustrate Title VII's preference for investigation and conciliation by the EEOC over formal adjudication, as well as deprive the charged party of notice of the allegations raised against it. See EEOC v. E.I. duPont de Nemours & Co., 516 F.2d 1297 (3d Cir. 1975). Thus, the Court grants

summary judgment in favor of defendant and against plaintiff as to Paragraphs 12, 13, 15, 16, 17, 18, and 19 of the Amended Complaint.

The Court also must dismiss plaintiff's remaining Title VII claim - that she was dismissed from her employment with Interac because of her race - because she failed to timely file her Title VII claim.

Under Title VII, an individual has ninety days from receipt of an EEOC right-to-sue letter to bring a Title VII claim in federal court. 42 U.S.C. § 2000e-5(f)(1). In this case, plaintiff received her right-to-sue letter on or about September 23, 1996 and commenced this action on or about December 17, 1996 by the filing of the original Complaint. Thus, it appears superficially that plaintiff properly commenced this action within ninety days from receipt of her right-to-sue letter. However, a review of the docket indicates that plaintiff never served the original Complaint on defendant. Instead, plaintiff filed an Amended Complaint on April 23, 1997, more than 120 days from the filing of the original Complaint, and served this Amended Complaint on April 24, 1997. Despite the filing and service of her Amended Complaint, plaintiff's Title VII action is timed-barred because it was never properly commenced within ninety days from receipt of her right-to-sue letter.

Rule 4(m) of the Federal Rules of Civil Procedure states:

If service of the summons and the complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within

a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

Fed. R. Civ. P. 4(m). In Petrucci v. Bohringer and Ratzinger, 46 F.3d 1298, 1305 (3d Cir. 1995), the Third Circuit found that Rule 4(m) establishes a two-stage test: "[f]irst, the district court should determine whether good cause exists for an extension of time [to serve the complaint]. If good cause is present, the district court must extend time for service and the inquiry is ended. If, however, good cause does not exist, the court may in its discretion decide whether to dismiss the case without prejudice or extend time for service." Id.

Regarding guidance for a district court's exercise of discretion under this Rule, the Petrucci court discussed the Advisory Committee's explanation that "'[r]elief may be justified, for example, if the applicable statute of limitations would bar the refiled action, or if the defendant is evading service or conceals a defect in attempted service.'" Id. at 1305-06. The Third Circuit, however, took great pains to explain that it did not interpret the Advisory Committee's comment regarding a statute of limitations problem as designating such to constitute good cause requiring an extension of time for service, or as mandating the district court to reach that result in the exercise of its discretion. Id. at 1306 n.7. Indeed, the Court recognized that "holding that good cause exists any time the statute of limitations has run would effectively eviscerate Rule 4(m) and defeat the purpose and bar of statutes of repose." Id. And in its holding,

the Circuit explained:

We emphasize that the running of the statute of limitations does not require the district court to extend time for service of process. Rather, absent finding of good cause, a district court may in its discretion still dismiss the case, even after considering that the statute of limitations has run and the refiling of an action is barred.

Id. at 1306.

Satisfying the first step in the Petruccelli test, the Court finds that plaintiff cannot establish the "good cause" required to warrant an extension of the 120 days to serve the original Complaint. To begin, the Court first notes that plaintiff has completely failed to file any response to defendant's instant Motion;<sup>4</sup> thus, plaintiff does not even present this Court with a "good cause" argument. Even if plaintiff had responded to defendant's Motion, she would be hard-pressed to establish good cause in light of the following facts. Plaintiff was represented by counsel throughout this proceeding. Interac's offices have been at the same address in Philadelphia for years, so there can be no question where it could be found for service. Indeed, plaintiff effected service of the Amended Complaint the day after filing it. In addition, the Court notes that plaintiff's counsel should be well aware of Rule 4(m)'s requirements. In Momah v. Albert

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<sup>4</sup>The Court recognizes that plaintiff, by way of letter correspondence, asked this Court for an extension of time to respond to defendant's Motion. However, this Court, by way of letter, informed plaintiff that it does not entertain matters that should properly be the subject of motion practice. Despite this letter, plaintiff has not, as of the date of this opinion, filed a response to defendant's Motion, or for that matter, even filed a formal motion for extension of time to respond.

Einstein Medical Center, 158 F.R.D. 66 (E.D. Pa. 1994) (Joyner, J.), the court dismissed the complaint for failure of timely service when Mr. Marshall Williams had it served one day after the expiration of the 120-day period. Judge Joyner found the failure of service to have been caused by Mr. Williams' lack of diligence, as well as his professional neglect. Id. at 69. Likewise, here, there has been no timely effort whatsoever to serve the original Complaint filed on December 17, 1996 and the summons issued the following day. Indeed, the original Complaint and summons have never been served. Based on these facts, it is clear that plaintiff cannot demonstrate good cause for failure to timely serve the original Complaint.

Under the Petrucelli test, the Court must now determine whether to exercise its discretion to permit plaintiff additional time to serve the original Complaint. Although the Third Circuit did not enumerate the factors that are relevant to a district court's exercise of discretion under Rule 4(m) in Petrucelli, it recently, in Boley v. Kaymark, 123 F.3d 756, 759-60 (3d Cir. 1997), cited United States v. Monaco, 23 F.3d 793 (3d Cir. 1994) and Lieb v. Topstone Indus., Inc., 788 F.2d 151 (3d Cir. 1986) for the purpose of highlighting the factors that a district court should consider when it exercises its discretion. In this regard, the Lieb court has enumerated the following factors: (i) frivolousness; (ii) motivation; (iii) objective unreasonableness (both in the factual and the legal components of the case); and (iv) the need in particular circumstances to advance consideration of compensation

and deterrence. Lieb, 788 F.2d at 156.

To the extent that these factors can be applied here, the Court finds that these factors militate against granting plaintiff an extension of time to file her original Complaint. First, as is apparent from this Court's discussion, plaintiff's claims appear to be frivolous. Second, as to plaintiff's motivation in prosecuting this action, she has been less than diligent in prosecuting her claim. Until this suit, plaintiff had never raised any claim of discrimination or other breach by Interac associated with her employment other than with respect to her discharge. And, with respect to plaintiff's discharge claim, she has prosecuted this claim with less than alacrity. Third, as to the objective reasonableness of her claims, the EEOC after a full investigation has found no cause to believe that Interac discharged plaintiff because of her race; plaintiff's union did not pursue her claim in arbitration, and the National Labor Relations Board's Regional Director and General Counsel found that the union acted properly in this regard. Plaintiff has also failed to produce any evidence in this action that she was the subject of racial discrimination; indeed, plaintiff has not even responded to defendant's Motion. Finally, plaintiff has failed to advance any argument as to why she should be given more time to file her original Complaint; plaintiff has demonstrated complete disregard for her case.

The only factor that weighs in favor of granting an extension of time in which plaintiff could serve her original Complaint is that the statute of limitations has run for her Title

VII claim. However, district courts "retain[] discretion to refuse to extend time, even if the statute of limitations has run." Boley, 123 F.3d at 759. In this case, plaintiff surely is not entitled to any extension of time. Plaintiff has not requested an extension of time, nor has she even filed a response to defendant's motion for summary judgment. Plaintiff has shown utter disregard for her claim. Consequently, the Court will not extend the time in which plaintiff can serve the original Complaint. As a result, plaintiff has not properly commenced her Title VII action within ninety days from receipt of the EEOC right-to-sue letter. Thus, her action is time-barred.

The filing of the Amended Complaint does not save plaintiff's Title VII claim. First, although some courts have held that service of an amended complaint within 120 days of filing suit is sufficient to satisfy Rule 4(m) when the original complaint has not been filed, Crossen v. Bernstein, 1994 WL 281881, at \*8 (S.D.N.Y. June 23, 1994); White v. Steak & Ale of Little Rock, Inc., 839 F. Supp. 23, 25 (E.D. Ark. 1993), the filing of the amended complaint outside the original 120-day period will not satisfy the requirements of Rule 4(m). See Bakal v. Ambassador Construction, 1995 WL 447784, at \*2 (S.D.N.Y. July 28, 1995). In this case, plaintiff filed and served the Amended Complaint without the 120-day period from the filing of the original Complaint; thus, the filing of the Amended Complaint does not satisfy the requirements of Rule 4(m).

In addition, the relation back doctrine of Rule 15 of the

Federal Rules of Civil Procedure does not save plaintiff's Title VII claim from the bar of the statute of limitations. Rule 15(c) governs the circumstances under which an amended complaint relates back to the original pleading. The rationale for Rule 15(c) has been described as "allow[ing] an amendment to relate back to the filing of the original complaint where the defendant has been put on notice, through the pleadings or other sources, of the entire scope of the transaction or occurrence out of which the amended claims arise." Barcume v. City of Flint, 819 F. Supp. 631, 636 (E.D. Mich. 1993). The critical element under Rule 15(c) is notice to the opposing party. Williams v. United States, 405 F.2d 234, 236 (5th Cir. 1968). In this case, Interac did not receive notice of the conduct, transactions or occurrences concerning which plaintiff seeks to proceed because it was never served with the original Complaint. Without such notice, there can be no relation back of Plaintiff's Amended Complaint under Rule 15(c). Thus, the relation back doctrine of Rule 15(c) does not operate to save plaintiff's otherwise time-barred Title VII claim.

The Court also finds that plaintiff's Section 1981 claim in Count II of the Amended Complaint is time-barred. Under Pennsylvania law, a plaintiff must file her Section 1981 claim within two years of the allegedly discriminatory conduct of defendant. See Goodman v. Lukens Steel Co., 482 U.S. 656 (1987). In this case, the most recent date of discrimination alleged in the Amended Complaint is April 26, 1994, the date of plaintiff's discharge by Interac. Plaintiff's original Complaint was filed on

December 17, 1996. Clearly, all of plaintiff's claims of racial discrimination that are conceivably covered by Section 1981 were filed well beyond the two-year statute of limitations. Thus, summary judgment is entered in favor of defendant and against plaintiff on Count II.

Plaintiff's PHRA claim, in Count III of her Amended Complaint, is barred by her failure to file a complaint of discrimination with the Pennsylvania Human Rights Commission. In Woodson v. Scott Paper Co., 109 F.3d 913 (3d Cir. 1997), Judge Becker explained that to bring suit under the PHRA, a plaintiff must first file a complaint with the PHRC within 180 days of the alleged act of discrimination. Id. at 925 (citing 43 Pa. S. §§ 959(a), 962). In this case, plaintiff never filed a charge of discrimination with the PHRC, nor did she request the EEOC to cross-file her Charge of Discrimination with the PHRC. As a result, plaintiff is barred from pursuing her PHRA claim in this judicial forum. Thus, summary judgment is entered in favor of defendant and against plaintiff on Count III of plaintiff's Amended Complaint.

The Court also finds that defendant is entitled to summary judgment on Counts IV and V of plaintiff's Amended Complaint. In Count IV, plaintiff claims that defendant breached an express and implied employment contract. In Count V, plaintiff asserts a wrongful discharge claim against defendant. The Court finds that both Counts are without merit.

Under Pennsylvania law, employees are assumed to be

employees at-will. Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974). This means that any employer may at any time and for any reason dismiss an employee. Hershberger v. Jersey Shore Steel Co., 394 Pa. Super. 363, 575 A.2d 944 (1990). There exist, however, a limited number of statutory and common law exceptions to employment at will. The three exceptions are: (1) wrongful discharge based on discrimination, 43 Pa. Stat. § 951 et seq.; (2) wrongful discharge based on a public policy tort, Turner v. Letterkenny Federal Credit Union, 351 Pa. Super. 51, 55, 505 A.2d 259, 261 (1985); and (3) wrongful discharge based on actual or implied contract. Banas v. Matthews International Corp., 348 Pa. Super. 464, 502 A.2d 637 (1985). None of these exceptions apply in this case. Thus, the Court enters summary judgment in favor of defendant and against plaintiff on Counts IV and V of plaintiff's Amended Complaint.

To the extent plaintiff seeks to fall within the first exception - wrongful discharge based on discrimination, the exclusive remedy is set forth in the PHRA and requires that a complaint be filed first with the PHRC. See supra. Similarly, there is no common law action for wrongful discharge based on a violation of public policy where specific statutory remedies are available. The only state public policy plaintiff claims to have been breached is the PHRA. However, the Pennsylvania Supreme Court has held that the PHRA and its remedial provisions preempt common law claims for wrongful discharge based on a violation of the public policy embodied in its provisions. Clay v. Advanced

Computer Applications, Inc., 522 Pa. 86, 89, 559 A.2d 917, 918 (1989). Thus, Count V of plaintiff's Amended Complaint is barred.

The final exception - wrongful discharge based on an actual or implied contract - is also inapplicable under the facts of this case. Plaintiff was a member of a collective bargaining unit of Interac employees who are covered by a collective bargaining agreement ("CBA") between Interac and the Pennsylvania Social Service Union ("PSSU"). As a result of PSSU being plaintiff's exclusive bargaining representative, federal law precluded Interac from having any contractual agreement with plaintiff regarding wages, hours and working conditions other than as negotiated by PSSU. 29 U.S.C. § 159(a). The sole contractual terms between Interac and plaintiff, then, were set forth in the CBA. That agreement contains a final and binding grievance and arbitration procedure for adjudicating alleged breaches of it. (Def.'s Ex. 11).

PSSU filed a grievance on plaintiff's behalf challenging her discharge. The grievance was ultimately processed through the grievance procedure and ultimately dropped by PSSU prior to the arbitration hearing. Plaintiff filed a charge with the National Labor Relations Board ("NLRB") accusing PSSU of breaching the duty of fair representation to her. (Def.'s Ex. 8). The NLRB dismissed that charge as being without merit, (Def.'s Ex. 9), and the NLRB General Counsel's Office rejected plaintiff's appeal of that action.

Federal law is decidedly clear that an individual

employee cannot bring suit against her employer under a labor agreement, unless she has exhausted her contractual remedies or if her failure to do so was due to her union failing to meet its duty of fair representation. Vaca v. Sipes, 386 U.S. 171, 186 (1967). Plaintiff failed to prove such failure by the PSSU to the NLRB's satisfaction and has not attempted to do so in this action by joining PSSU as a defendant. Hence, she cannot maintain a breach of contract claim against Interac.

Beyond her failure to establish PSSU's breach of its duty of fair representation or to join it as a party herein, plaintiff is barred from doing so now and prosecuting a breach of contract claim against Interac by the six-month statute of limitations. DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983). Even if the pendency of her charge before the NLRB tolled the period, it began to run no later than January 29, 1996, more than ten months before the initial Complaint was filed in this action, when her appeal was rejected by the NLRB's Office of General Counsel. Thus, Interac is entitled to summary judgment in its favor on Count IV of plaintiff's Amended Complaint.

Accordingly, for the foregoing reasons, the Court grants defendant's Motion for Summary Judgment.

AND IT IS SO ORDERED.

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Clarence C. Newcomer, J.