

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

LARRY PAGE and TYRONE WILLIAMS : CIVIL ACTION
v. :
ECC MANAGEMENT SERVICES : NO. 97-2654

MEMORANDUM AND ORDER

BECHTLE, J.

DECEMBER 5, 1997

Presently before the court is defendant ECC of Philadelphia's ("ECC")¹ motion to dismiss and plaintiffs Larry Page and Tyrone Williams' ("Plaintiffs") opposition thereto. For the reasons set forth below, the court will deny the motion.

I. BACKGROUND

The facts, as alleged in the Complaint, are as follows. ECC is a corporation engaged in the business of financial collection services. Plaintiffs are two black males who were employed by ECC as collection supervisors. They allege that during their employment, ECC directed them to participate in a "small pay" practice whereby ECC paid a minimal amount to its clients, the creditors, of the deficiency owed by delinquent debtors to assure that the clients would pay full commission on the accounts. When one client, Chemical Bank, learned of the practice, it demanded that ECC name and remove all of the personnel responsible for the small pay practice from its

1. ECC was incorrectly named as "ECC Management Services" in the Complaint. (Def's. Mot. Dismiss at 1.)

account. ECC named Plaintiffs as the only individuals responsible. ECC then removed Plaintiffs from the Chemical Bank account and reassigned them to lesser, non-supervisory employment positions. Plaintiffs allege that white managers and supervisors involved in implementing the "small pay" practice on the Chemical Bank account were not removed from the account or otherwise treated adversely. On December 2, 1992, Plaintiffs first complained to a supervisor that their reassignments/demotions were due solely to their race. Since that date, Plaintiffs allege that ECC has failed to promote them to positions for which they were equally or more qualified than the white recipients.

On February 1, 1993, Plaintiffs each dual-filed a claim² with the Pennsylvania Human Rights Commission ("PHRC") and the Equal Employment Opportunity Commission ("EEOC"), alleging that ECC discriminated against them on the basis of their race by demoting and reassigning them after Chemical Bank's discovery of its "small pay" practice.³

On September 3, 1993, Plaintiffs each dual-filed a second claim⁴ with the PHRC and the EEOC, alleging that ECC retaliated against them by failing to promote them to managerial or supervisory positions following their complaints of race discrimination. On January 30, 1997, Plaintiffs received right

2. PHRC Docket Nos. E-63110D and E-63111D.

3. Plaintiffs' filings were forwarded to the EEOC, and therefore constitute a dual-filing.

4. PHRC Docket Nos. E-65273D and E-65274D.

to sue letters from the EEOC regarding their retaliation claim.
(Def.'s Mem. Supp. Mot. Dismiss Ex. B.)

Plaintiffs also allege that since ECC learned of their intent to file suit on March 20, 1997, it has retaliated against them by closely scrutinizing their work and asking their co-workers about Plaintiffs' personal conduct and behavior. Plaintiffs have not filed a claim with either the PHRC or the EEOC regarding this second retaliation claim.

On April 17, 1997, Plaintiffs filed a Complaint alleging that ECC discriminated against them and engaged in retaliatory action in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq. ("Title VII") and of the Pennsylvania Human Relations Act, 43 Pa. Con. Stat. Ann. § 951 et seq. ("PHRA"). On May 16, 1997, ECC filed this motion to dismiss Plaintiffs' Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). On June 2, 1997, after suit was filed, Plaintiffs received a right to sue letter from the EEOC covering their race discrimination claim. On June 5, 1997, Plaintiff filed a response to the motion to dismiss. The court has original jurisdiction over matters arising under Title VII. 28 U.S.C. § 1331, 1343(a)(4). The court has supplemental jurisdiction over state law claims which are so related to matters arising under Title VII as to form part of the same case or controversy. 28 U.S.C. § 1367(a).

II. LEGAL STANDARD

For the purposes of a motion to dismiss, the court must "accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom and view them in the light most favorable to the non-moving party." Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989) (citations omitted). However, "[c]onclusory allegations of law, unsupported conclusions and unwarranted inference need not be accepted as true." Flanagan v. Shively, 783 F. Supp. 922, 927 (M.D. Pa. 1992) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)), aff'd, 980 F.2d 722 (3d Cir. 1992), cert. denied, 510 U.S. 829 (1993). The court may dismiss the complaint "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984) (citation omitted).

III. DISCUSSION

ECC asks the court to dismiss the Complaint for three reasons. First, ECC asks the court to dismiss Plaintiffs' race discrimination claim because Plaintiffs did not obtain right to sue letters with respect to that claim from the EEOC. (Def's. Mem. Supp. Mot. Dismiss at 1). ECC further argues that Plaintiffs' retaliatory "failure to promote claim" should be dismissed because it is separate and distinct from the allegations covered under the initial EEOC right to sue letters issued to Plaintiffs. (Def's. Mem. Supp. Mot. Dismiss at 1-2).

Finally, ECC argues that this court cannot exercise supplemental jurisdiction over Plaintiffs' claim that ECC has retaliated against them since learning of their intent to file suit because they have not exhausted their administrative remedies with respect to that claim. (Def's. Mem. Supp. Mot. Dismiss at 2). Plaintiffs counter that they have received right to sue letters from the EEOC with respect to their race discrimination claim, that their failure to promote allegations are identical to those underlying their right to sue letters from the EEOC and that the administrative process should be waived with respect to their claim of retaliation following notice of intent to file this suit.

A. Race Discrimination Claim

First, ECC argues that Plaintiffs did not receive right to sue letters from the EEOC for their claim that they were improperly reassigned solely due to their race. (Def's Mem. Supp. Mot. Dismiss at 5-6.) Plaintiffs' Complaint alleges that ECC demoted them in connection with Chemical Bank's discovery of its "small-pay" practice solely because of their race. (Compl. ¶¶ 7-16.) On February 1, 1993, Plaintiffs each dual-filed a race discrimination claim with the PHRC and the EEOC regarding their reassignments. (Def's. Mem. Supp. Mot. Dismiss Exs. D & E: PHRC Compls. E-63110D and E-63111D and EEOC Charge Nos. 17F931422 and 17F931423.) They received right to sue letters from the EEOC on June 2, 1997, two weeks after ECC filed its motion to

dismiss.⁵ Thus, Plaintiffs had not received right to sue letters on this claim prior to filing suit.

Issuance of a right to sue letter from the EEOC is a jurisdictional prerequisite to filing a federal action under Title VII. 42 U.S.C. § 2000e-5(a) and 2000e-5(e); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798-99 (1973). Courts have dismissed cases in which a plaintiff filed suit without first obtaining a notice of right to sue from the EEOC. See, e.g., Kent v. Director, Missouri Dep't Elem. and Secondary Educ., 792 F. Supp. 59, 62 (E.D. Mo. 1992).

However, allegations in the judicial complaint may encompass any kind of discrimination "which can reasonably be expected to grow out of the charge of discrimination . . . including new acts which occurred during the pendency of the proceedings before the Commission." Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398-99 (3d Cir. 1976); see also Doe v. Kohn, Nast & Graf, P.C., 866 F. Supp. 190, 196 (3d Cir. 1994). In addition, the scope of an EEOC complaint is to be liberally construed. See, e.g., Hicks v. ABT Assocs., Inc., 572 F.2d 960, 965 (3d Cir. 1978). In addition, the Third Circuit has held that the administrative process may be waived where a suit is filed prematurely and notice of right to sue is issued by the EEOC prior to trial. Molthan v. Temple University, 778 F.2d 955, 960

5. According to Plaintiffs, they were under the mistaken belief that the right to sue letters received on January 30, 1997 covered both the claims for failure to promote and the improper reassignment claims.

(3d Cir. 1985). Plaintiffs did not receive right to sue letters from the EEOC on this issue prior to filing suit. However, right to sue letters were issued prior to trial. Once the right to sue letters were issued to Plaintiffs by the EEOC, this court obtained jurisdiction over their race discrimination claim. The court will deny ECC's motion as to this claim.

B. Retaliatory Failure to Promote Claim

ECC asks the court to dismiss Plaintiffs' claim that ECC has failed to promote them in retaliation for their complaining to a supervisor, the PHRC and the EEOC that their demotions were due solely to their race. ECC contends that the claim should be dismissed because the specific instances of failure to promote enumerated in Plaintiffs' Complaint are not covered under the right to sue letters issued by the EEOC on January 30, 1997. The court disagrees.

Plaintiffs each dual-filed this claim with the PHRC and EEOC on September 3, 1993. (Def's. Mem. Supp. Mot. Dismiss Ex. C: PHRC Compls. E-65273D and E-65274D Dated 9/3/93; EEOC Charge Nos. 17F933204 and 17F933205.) In their PHRC claim, Plaintiffs alleged that ECC failed to promote them to positions for which they were equally or more qualified than those individuals actually hired. Plaintiffs allege that ECC did not promote them for two reasons: they complained to a supervisor that their demotions in connection with the Chemical Bank incident were due solely to their race, and they filed PHRC and EEOC complaints regarding their demotions. Contrary to ECC's contentions, the

initial right to sue letters issued by the EEOC on January 30, 1997 do cover the instances of failure to promote alleged in the Complaint. Therefore, the court will deny ECC's motion as to this claim.⁶

C. Continued Retaliatory Action Claim

ECC also argues that Plaintiffs' claim of ongoing retaliation following the filing of this action has not been presented to the EEOC and therefore must be dismissed. The court disagrees. While it is true that Plaintiffs have not presented a specific claim of continuing retaliation to the EEOC, they did present a claim of retaliation to the EEOC and received a right to sue letter on that claim. (Def's Mem. Supp. Mot. Dismiss Ex. B: PHRC Docket Nos. E-65273D and E-65274D, EEOC Charge Nos. 17F933204 and 17F933205). The retaliation that Plaintiffs allege is ongoing and can reasonably be expected to "grow out of" the allegations contained in the EEOC complaint during the pendency of the case before the Commission. See, e.g., Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398-99 (3d Cir. 1994). ECC is on notice of that allegation. The court will not force Plaintiffs to return to the EEOC because "[t]o force an employee

6. Even if the failure to promote allegations set out in Plaintiffs' Complaint were not specifically enumerated in the underlying charges to the EEOC, it appears that they would still withstand Defendant's motion to dismiss, because they could be "reasonably expected to grow out of" the allegations of retaliatory failure to promote contained in the charge to the EEOC. See, e.g., Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398-99 (3d Cir. 1976); Doe v. Kohn, Nast & Graf, 866 F. Supp. 190, 196 (E.D. Pa. 1994).

to return to the EEOC every time he claims a new instance of discrimination in order to have the EEOC and the courts consider the subsequent incident along with the original ones would erect a needless procedural barrier." Gamble v. Birmingham Southern Railroad Co., 514 F.2d 678, 689 n.6 (5th Cir. 1975.)

Plaintiffs ask the court to permit them to proceed on their retaliation claim without exhausting their administrative remedies with either the PHRA or the EEOC. In support, they cite Robinson v. Dalton, 107 F.3d 1018 (3d Cir. 1997) and Walters v. Parsons, 729 F.2d 233 (3d Cir. 1984). After consideration of the facts before it, the court agrees that Plaintiffs should be able to proceed without further administrative filings. See Robinson v. Dalton, 107 F.3d 1018, 1024 (3d Cir. 1997)(stating that court must examine prior pending EEOC complaints and determine on a case by case basis whether a second complaint should have been filed).

D. Exhaustion of Remedies Under the PHRA

Finally, ECC argues that Plaintiffs have failed to exhaust their remedies under the PHRA with respect to their ongoing retaliation claims and that the court should dismiss the state law claims. In order to exhaust administrative remedies under the PHRA, a claimant must file a claim with the PHRC and then await the PHRC's determination whether the complaint should be dismissed or a conciliation agreement should be entered. 43 Pa. Con. Stat. Ann. § 962(c). However, if after one year the PHRC has either dismissed the claim or has not yet entered into a

conciliation agreement, then notice must be given to the claimant that he has exhausted his administrative remedies and is permitted to seek redress from the courts. Id.

There is no question that Plaintiffs have not exhausted their administrative remedies under state law with respect to their ongoing retaliation claim. However, the same reasoning that was applied to Plaintiffs' failure to exhaust their administrative remedies under federal law with respect to their claim of ongoing retaliation is equally applicable to the corresponding PHRA claims. The claim of ongoing retaliation, as alleged, could reasonably be found to "grow out of" Plaintiffs' prior PHRA complaint. The court will deny the motion to dismiss on this ground.

IV. CONCLUSION

For the reasons set forth above, the court will deny ECC's motion to dismiss. An appropriate Order follows.

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

LARRY PAGE and TYRONE WILLIAMS : CIVIL ACTION
v. :
ECC MANAGEMENT SERVICES : NO. 97-2654

ORDER

AND NOW, TO WIT, this day of December, 1997, upon consideration of defendant ECC Management Services' motion to dismiss, and plaintiffs Larry Page and Tyrone Williams' opposition thereto, IT IS ORDERED that said motion is DENIED.

LOUIS C. BECHTLE, J.