

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

RODNEY LARMORE, JR.,  
Plaintiff,

v.

Civil Action  
No.97-5330

RCP/JAS, INC. t/a PORTER  
HONDA; PORTER MANAGEMENT;  
COREY PORTER; RICHARD C.  
PORTER, II; VINCENT  
PETRUZZIELLO; and PETER  
POLLINO,  
Defendants.

Gawthrop, J.

May , 1998

M E M O R A N D U M

Plaintiff Rodney Larmore, Jr. brought this action against the defendants, his former employer and its employees, for alleged incidents occurring during his employment at Porter Honda in Philadelphia. Before the court is a motion by all defendants to dismiss all but one count of the complaint for lack of subject matter jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1), and failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6). The plaintiff opposes this motion. Upon the following reasoning, I shall grant the motion in part and deny it in part.

**I. Background**

Rodney Larmore, Jr., an African-American male and a former employee of the defendant corporations, claims that he was

terminated from his employment and denied other employment benefits because of his race and in retaliation for his uncle's having filed of a complaint with the Equal Employment Opportunity Commission ("EEOC"). Kenneth Larmore, the plaintiff's uncle, filed a complaint with the EEOC on May 23, 1996, alleging that his termination from the defendant companies was racially motivated. Shortly thereafter, on July 23, 1996, the defendants allegedly reported a stolen automobile to the police and named the plaintiff as responsible for the theft. The defendants then terminated the plaintiff from his employment at Porter Honda on July 26, 1996, while he was awaiting his preliminary hearing on criminal charges stemming from defendants' accusations.

In his complaint, the plaintiff alleges that the defendants' accusations that he stole a car were fabricated in order to justify his termination for impermissibly motivated reasons, namely race-based and retaliatory. Alternatively, the plaintiff alleges that he was terminated in retaliation for the EEOC charge filed by his uncle, Kenneth Larmore. Plaintiff asserts claims for violation of Title VII of the Civil Rights Act of 1964 (Counts One and Four), 42 U.S.C. § 1981 (Count One), the Pennsylvania Human Relations Act, 43 Pa. C.S. § 951, et seq., (Count Two), and 42 U.S.C. § 1985(3) and 42 U.S.C. § 1986 (Count Three). The remaining counts, Counts Five through Nine, allege various violations of Pennsylvania common law including

wrongful discharge, defamation, conspiracy to defame, malicious prosecution, and conspiracy to maliciously prosecute. The defendants in this matter move for dismissal of all counts, except Count Six<sup>1</sup> for malicious prosecution, on the grounds that this court lacks federal subject matter jurisdiction and the claims fail to state a claim upon which relief can be granted.

## **II. Standard of Review**

I first must determine the appropriate standard of review for the defendants' motion. The defendants move to dismiss the plaintiff's Title VII claims under Federal Rule of Civil Procedure 12(b)(1); the plaintiff counters that this subsection applies a more stringent standard of review than is warranted here. The defendants assert that this court lacks subject matter jurisdiction over these claims because the plaintiff failed to exhaust the required administrative remedies. "A district court may rule on a Rule 12(b)(1) motion when on the face of the pleadings it is clear that administrative remedies have not been exhausted." Robinson v. Dalton, 107 F.3d 1018, 1022 (3d Cir. 1997). Here, however, the plaintiff has plead that he satisfied the conditions precedent to filing suit. Indeed, he states, and

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<sup>1</sup> Plaintiff erroneously numbered his malicious prosecution claim as Count Seven. Since there exists another Count Seven, I shall refer to the malicious prosecution claim by its sequential number, Count Six.

the defendants concede, that he received a right-to-sue notice from the EEOC and timely filed suit within ninety days. Thus, it is not apparent from his pleadings that the plaintiff has failed to exhaust the required administrative remedies. Accordingly, I must treat the defendants' challenge to the Title VII claims as one for failure to state a claim under Rule 12(b)(6). Id. at 1021 (holding disputes over whether a plaintiff has exhausted the administrative remedies in Title VII actions "are best resolved under Rule 12(b)(6) covering motions to dismiss for failure to state a claim."). The standard of review under Rule 12(b)(6), then, is appropriate for the defendants' entire motion.

A court should dismiss a complaint pursuant to Fed. R. Civ. P. 12(b)(6) only if it finds that the plaintiff cannot prove any set of facts, consistent with the complaint, which would entitle the plaintiff to relief. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). In making this determination, the court must accept as true all allegations made in the complaint, and all reasonable inferences that may be drawn from those allegations. Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). The court must view these facts and inferences in the light most favorable to the plaintiff. Id. The court may draw these facts and inferences from the complaint, exhibits attached to the complaint, matters of public record, and undisputedly authentic documents if the plaintiff's claims are based upon those

documents. Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993).

### **III. Discussion**

#### **A. Title VII**

The defendants first argue that the Title VII portions of Counts One and Four must be dismissed because the plaintiff does not allege that he filed a formal complaint with the EEOC within the prescribed time period.<sup>2</sup> Plaintiff Larmore did file charges with the Philadelphia Commission, claiming that the defendants wrongfully accused him of auto theft and that they unlawfully terminated him from his employment. Def. Mot. to Dismiss Ex. B. The Philadelphia Commission determined the charges were not substantiated and closed the case on March 27, 1997. Def. Mot. to Dismiss Ex. C. Thereafter, on May 21, 1997, the plaintiff received a right-to-sue letter from the EEOC, explaining that it had accepted the recommendations of the local agency. Def. Mot. to Dismiss Ex. D. Thus, although the plaintiff has not so alleged, one may infer from these documents that the Philadelphia

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<sup>2</sup>In support of this argument, the defendants point to several exhibits to their motion relating to the plaintiff's EEOC complaint. Plaintiff had knowledge of these documents and relied on them in his response to the defendants' motion. Thus, although matters outside the pleadings have been presented to the court, it is not necessary to treat this motion as one for summary judgment. Rajis v. Brown, NO. CIV. A. 96-CV-6889, 1997 WL 535152, at \*4 (E.D. Pa. Aug. 14, 1997).

Commission forwarded the charge filed with it to the EEOC, pursuant to the work-sharing agreement between the two agencies. Further, since the notice from the local EEOC letter is dated May 21, 1997, it falls within the statutory time period for filing. 42 U.S.C. 2000e-5(e)(1). I thus shall not dismiss these claims in their entirety at this time.

The individual defendants move for dismissal of the Title VII counts against them. Plaintiff has sued Richard C. Porter, II, Corey Porter, Vincent Petruzzello, and Peter Pollino, in their individual capacities, for the alleged violations of Title VII. The Third Circuit has held that an individual employee cannot be held liable under Title VII. Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061, 1078 (3d Cir. 1996); Dici v. Comm. of Pennsylvania, 91 F.3d 542, 552 (3d Cir. 1996).

Plaintiff claims that discovery is needed to determine whether any of the individuals were not merely fellow employees, but rather, were his employer. I find, however, that the titles of three of the individual defendants -- Vice President, Chief Financial Officer and General Manager -- show that they were fellow employees or supervisors of the plaintiff, not his employer. Only Richard C. Porter, President and sole shareholder of Porter Honda, has any possibility of being construed as an employer. Even so, other judges in this circuit have rejected liability under Title VII against individual owners of a company,

and I find their reasoning persuasive here. See, e.g., Milliner v. Enck, No. 98-0467, (E.D. Pa. May 7, 1998) (dismissing Title VII claims against individual owners); Manns v. The Leather Shop Inc., 960 F. Supp. 925 (D. Virgin Is. 1997) (holding sole owner not liable in individual capacity under Title VII); see also Clarke v. Whitney, 907 F. Supp. 1529 (E.D. Pa. 1995) (finding principal shareholder and officer not individually liable under similar provisions ADA). Thus, I shall dismiss his Title VII claims, Counts One and Four, as they relate to the individual defendants.

**B. Section 1981**

Defendants also seek dismissal of plaintiff's Section 1981 claim. Section 1981 gives "all persons within the jurisdiction of the United States" the same right "to make and enforce contracts ... as is enjoyed by white citizens." 42 U.S.C. § 1981. The Civil Rights Act of 1991 amended § 1981(b) to include the termination of contracts. See Civil Rights Act of 1866, c.31, 14 Stat. 27 (codified as amended at Pub.L. 102-166, Title I, §101 (1991), 105 Stat. 1071) (adding "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship"). Section 1981, as amended, thus prohibits termination of an employee contract for reasons of racial

discrimination. The defendants argue that because the plaintiff did not have an express contract, he has not been denied any rights protected by the statute. However, the absence of a formal contract does not necessarily bar Section 1981 claim. "[T]he termination for racially discriminatory reasons even of an otherwise terminable at-will implied-in-fact contract may be actionable under 42 U.S.C. § 1981." Hudson v. Radnor Valley Country Club, No. 95-4777, 1996 WL 172054, \*2 (E.D. Pa. Apr. 11, 1996) (finding, however, that plaintiffs lacked standing to bring claim because they were not parties to the implied contract); see also Hicks v. Arthur, 843 F. Supp. 949, 954-56 (E.D. Pa. 1994) (applying Section 1981 to at-will employees claiming unlawful employment termination based on race); Baker v. American Juice, Inc., 870 F. Supp. 878, 883 (N.D. Ind. 1994) (stating "at-will employees may bring claims under § 1981"). Thus, Larmore's allegations that the defendants falsely accused him of auto theft, denied him unspecified employment benefits given to his white co-workers, and fired him wrongfully on the basis of his race do implicate § 1981 and are sufficient to withstand dismissal.

### **C. Pennsylvania Human Relations Act**

Count Two of the complaint alleges violations of the Pennsylvania Human Relations Act ("PHRA"). The plaintiff alleges

that he filed charges with the Philadelphia Commission on Human Relations ("Philadelphia Commission") and is entitled to bring a claim under the PHRA. Indeed, a filing with the Philadelphia Commission can effectively satisfy a plaintiff's obligation under the PHRA to file a complaint with the Pennsylvania Human Relations Commission ("PHRC"). See Kedra v. Nazareth Hosp., 857 F. Supp. 430 (E.D. Pa. 1994) (holding that an employee who filed her discrimination claim with the Philadelphia Commission sufficiently complied with the PHRA). However, a plaintiff must exhaust all remedies and comply with all procedural requirements under the PHRA prior to seeking redress in court. 43 Pa. C.S. § 955; see, e.g., Clay v. Advanced Computer Applications, 559 A.2d 917, 919 (Pa. 1989) (discussing mandatory administrative procedures under PHRA before resort to court); Bruffett v. Warner Communications, Inc., 692 F.2d 910, 919 (3d Cir. 1982) ("Pennsylvania courts have frequently stated that the procedures legislatively mandated in the PHRA must be strictly followed."). Thus, the Pennsylvania statute requires complainants to file their complaints within a prescribed time frame. 43 Pa. C.S. § 959(g) ("Any complaint filed pursuant to this section must be so filed within one hundred eighty days after the alleged act of discrimination."). Also, a plaintiff must make good faith use of the administrative procedures provided under the PHRA. See, e.g., Ellis v. Mohenis Servs., Inc., No. Civ. A. 96-6307, 1997 WL

364468, at \*2 (E.D. Pa. June 18, 1997).

From his allegations, it is not clear that the plaintiff has met these stringent requirements. See Woodson v. Scott Paper Co., 109 F.3d 913, 926 (3d Cir. 1997). Thus, his PHRA claim, Count Two, will be dismissed with leave to amend to include the particulars concerning his compliance with the administrative prerequisites and the scope of the claim filed with the Philadelphia Commission. Because at this juncture it is unclear whether plaintiff even has a PHRA claim, I need not reach the defendants' other arguments involving the scope of this claim. However, plaintiff would be well advised to peruse the relevant caselaw on punitive damages and individual liability under the PHRA because the court will only countenance so many filings of amended complaints.

**D. Section 1985 and Section 1986**

Defendants argue that Count Three, stating claims under 42 U.S.C. §§ 1985(3) and §1986, should also be dismissed for failure to state a claim. In this count, the plaintiff alleges that Porter Management, and its dealership, Porter Honda, conspired with their corporate officers and employees to deny him employment opportunities in violation of Sections 1985 and 1986. To sustain a claim pursuant to 42 U.S.C. § 1985(3), a plaintiff must allege that the defendants conspired to violate his civil

rights. Specifically, a plaintiff must allege: "(1) a conspiracy; (2) motivated by a racial or class based discriminatory animus designed to deprive . . . any person . . . to the equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to person or property or the deprivation of any right or privilege . . . ." Lake v. Arnold, 112 F.3d 682, 685 (3d Cir. 1997). Here, the plaintiff has alleged that the defendants met and conspired to terminate his employment for racially discriminatory motives in violation of § 1981.

Defendants first argue that because a corporation cannot conspire with itself, the plaintiff has not alleged an actionable conspiracy under this statute. See Jones v. Arbor, Inc., 820 F. Supp. 205, 208 (E.D. Pa. 1993) (citation omitted) ("A corporation and its agents acting on its behalf or employees in the performance of their corporate functions cannot conspire."). However, "a section 1985(3) conspiracy between a corporation and one of its officers may be maintained if the officer is acting in a personal, as opposed to official, capacity, or if independent third parties are alleged to have joined the conspiracy." See Robinson v. Canterbury Village, Inc., 848 F.2d 424, 431 (3d Cir. 1988). Larmore does not claim that the conspiracy involved anyone outside the employer. Nor does he explicitly allege that the corporate officers were acting in a personal capacity.

However, the actions he alleges could be construed as going beyond the corporate decision to terminate him. After drawing all reasonable inferences in the plaintiff's favor, as I must at this stage, I am constrained to deny the motion as to the Section 1985(3) claim.

Section 1986 is a companion to § 1985(3) and provides a cause of action against persons who, knowing that a violation of § 1985(3) is about to be committed and possessing the power to prevent its occurrence, fail to take action to frustrate its execution. Because I am permitting the Section 1985(3) claim to proceed, I shall likewise allow the Section 1986 claim. I thus deny the defendants' motion as to these claims, Count Three.

**E. Wrongful Termination**

In Count Five of his complaint, Larmore alleges that the defendants wrongfully discharged him in retaliation for his uncle's having filed a charge with the EEOC. Although his complaint states that these actions were in violation of public policy, in his response to the defendants' motion, the plaintiff claims that he seeks recovery for wrongful discharge on the ground that defendants specifically intended to harm him. However, the most recent pronouncements of the Pennsylvania Supreme Court implicitly suggest that the only exception to the employment at-will doctrine exists where the discharge violates

clear mandates of public policy. See Clay, 559 A.2d at 918 ("Exceptions to this rule have been recognized in only the most limited of circumstances, where discharges of at-will employees would threaten clear mandates of public policy."); Paul v. Lankenau Hosp., 569 A.2d 346 (Pa. 1990) (quoting Clay with approval). The majority of judges of this court interpreting such claims have also found Pennsylvania does not recognize a wrongful discharge claim arising out of an employer's specific intent to harm. See, e.g., Melendez v. Horizon Cellular Tel. Co., 841 F. Supp. 687 (E.D. Pa. 1994) (analyzing Pennsylvania case law and concluding that, under Pennsylvania law, tort for wrongful discharge with specific intent to harm no longer exists). Thus, to state a claim for wrongful discharge in Pennsylvania, the complaint must establish the violation of a public policy. See Yetter v. Ward Trucking Corp., 585 A.2d 1022, 1025 (Pa. Super. 1991).

At bar, even if Larmore could establish a violation of public policy, he still could not recover under a wrongful-termination claim. The "only Pennsylvania cases applying public policy exceptions have done so where no statutory remedies were available." Bruffett, 692 F.2d at 919; see also Clay, 559 A.2d at 918-19 (citations omitted) ("Nevertheless, inasmuch as appellees failed to pursue their exclusive statutory remedy for sexual harassment and discrimination in the workplace, they are

precluded from relief."). Here, the plaintiff has statutory remedies available, namely under the Pennsylvania Human Relations Act, Section 1981, and Title VII of the Civil Rights Act, and is in fact pursuing these remedies. See Hicks, 843 F. Supp. at 957 (holding plaintiff-employees could not pursue wrongful discharge claim for racial discrimination against employer where they had statutory remedies available to them in form of Pennsylvania Human Relations Act, Section 1981, and Title VII of the Civil Rights Act). Because the statutes protect the same interests and provide relief for the same violations that plaintiff alleges, and he has also brought claims under these statutes, I shall dismiss the wrongful termination claim, Count Five, of the complaint.

**F. Defamation**

In his defamation claim, the plaintiff alleges that he was wrongfully and falsely accused of auto theft by the defendants' statement to the Philadelphia Police, and that he suffered injury as a result of these statements. The defendants argue that this claim is time-barred. Pennsylvania law provides for a one-year statute of limitations on claims of defamation. 42 Pa. C.S. § 5523. "Under the discovery rule, the statute of limitations does not begin to run until the plaintiff has discovered his injury or, in the exercise of reasonable diligence, should have

discovered his injury." Doe v. Kohn Nast & Graf, P.C., 866 F. Supp. 190, 195 (E.D. Pa. 1994) (quoting Pocono Int'l Raceway v. Pocono Produce, Inc., 468 A.2d 468, 471 (Pa. 1983)).

The incidents at issue occurred in the time period between July 23 to July 26, 1996. The defendants reported the automobile theft to the police on July 23, 1996. The police arrested Larmore for the theft of the automobile on July 24, 1996, and he was terminated on July 26, 1996. Larmore does not state specifically when he first discovered the defendants' conduct resulting in his arrest, but does say that he did not learn of the defamatory statements until after his release from jail, on July 25, 1996. There are no allegations of any defamatory statements by any of the defendants after July 23, 1996. The plaintiff did not file this suit until August 19, 1997. The latest possible time at which he knew, or, with the exercise of reasonable diligence, should have known, of the facts underlying his defamation claim was the date of his termination: July 26, 1996. He delayed starting suit until the following August, a date too late, the statute of limitations having run. For these reasons, I conclude that this claim is time-barred; the defendants' motion to dismiss is granted as to plaintiff's defamation claim, Count Eight.

Plaintiff also brings a claim for conspiracy to defame. "It is well-settled that the statute of limitations for conspiracy is

the same as that for the underlying action which forms the basis of the conspiracy." Kingston Coal Co. v. Felton Mining Co., Inc., 690 A.2d 284, 287 n.1 (Pa. Super. 1997) (citing Ammlung v. City of Chester, 494 F.2d 811, 814-815 (3d. Cir. 1974)). Because the Pennsylvania statute of limitations bars the plaintiff's claim for defamation, it likewise bars his claim for conspiracy to defame. Thus, plaintiff's claim for conspiracy to commit defamation, Count Nine, must be dismissed.

**G. Conspiracy to Maliciously Prosecute**

Finally, the defendants move to dismiss the civil conspiracy claim, Count Seven, on the ground that the allegations "are based on the fact that the corporation and its officers and employees, acting in their corporate capacity, conspired to take action . . . ." Def. Mot. to Dismiss at 16. "Under Pennsylvania law, a corporation cannot conspire with itself, nor with its officers and agents, unless those individuals are acting for personal reasons, . . . as opposed to acting in the best interests of the corporation." Doe v. Kohn Nast & Graf, P.C., NO. CIV. A. 93-4510, 1994 WL 517989, at \*4 (E.D. Pa. Sept. 20, 1994). Defendants argue that the complaint does not allege sufficient facts to support the inference that when they allegedly conspired to terminate the plaintiff, they were acting outside of their roles as officers and employees of the corporation. I disagree.

According to the complaint, the defendants orchestrated a scheme to have the plaintiff arrested for theft and to terminate him from employment based solely upon the race of the plaintiff. These allegations, if true, would support an inference that the defendants acted "out of ill will or for some other purpose unconnected to their interest" in the corporation, namely, race-based animus. See O'Neill v. ARA Servs., Inc., 457 F. Supp. 182, 188 (E.D. Pa. 1978) (describing type of allegations that indicate employee not acting as agent of corporation and therefore capable of conspiring with it). Accordingly, I shall not dismiss the civil conspiracy claim, Count Seven, at this juncture.

An order follows.

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RCP/JAS, INC. t/a PORTER  
HONDA; PORTER MANAGEMENT;  
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PETRUZZIELLO; and PETER  
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Defendants.

O R D E R

AND NOW, this 15th day of May, 1998, upon the reasoning in the attached Memorandum, Defendants' Motion to Dismiss (Doc. No. 3) is GRANTED IN PART AND DENIED IN PART, as follows:

1. Counts One and Four of Plaintiff's Complaint, i.e., the claims pursuant to Title VII, are DISMISSED WITH PREJUDICE insofar as they are directed toward individual Defendants Richard C. Porter, II, Corey Porter, Vincent Petruzziello, and Peter Pollino.
2. Count Two of the Complaint is DISMISSED WITH LEAVE TO AMEND THE COMPLAINT. The plaintiff shall be given the opportunity to correct the above-referenced deficiencies by filing a final amended complaint within twenty days of the entry date of this Memorandum and Order;

3. Counts Five, Eight, and Nine of the Plaintiff's  
Complaint are DISMISSED WITH PREJUDICE.

4. As to all other Counts, the Motion is DENIED.

BY THE COURT:

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Robert S. Gawthrop, III J.