

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

WILLIAM C. PYNE : CIVIL ACTION
 :
 v. :
 :
 PROCACCI BROTHERS SALES :
 CORP. AND GARDEN STATE :
 FARMS, INC. : NO. 96-7314

MEMORANDUM ORDER

Plaintiff has asserted claims for sexual harassment and retaliatory discharge under Title VII and the PHRA, as well as state law claims for intentional and negligent infliction of emotional distress.¹

Presently before the court is defendants' motion to dismiss plaintiff's complaint. Defendants contend that the court lacks subject matter jurisdiction to adjudicate the Title VII and PHRA claims and that the pendent state tort claims are facially barred by the two year statute of limitations.

Because defendants previously filed an answer, a motion predicated on Rule 12(b)(1) or Rule 12(b)(6) is untimely. The defense of lack of subject matter jurisdiction, however, may be

¹ Plaintiff's complaint contains five counts. Count I is captioned as a claim for discriminatory discharge but appears in fact to plead a hostile environment claim and is reasonably so construed by defendants. Count II alleges a claim for retaliatory discharge, also under Title VII. Counts III and IV assert claims for intentional and negligent infliction of emotional distress respectively. Count V states a claim for violations of the PHRA.

raised at any time. See Fed. R. Civ. P. 12(h)(3); Berkshire Fashions, Inc. v. M.V. Hakusan II, 954 F.2d 874, 879 n.3 (3d Cir. 1992); 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (1990). The expiration of the limitations period may be asserted by motion to dismiss when it is clear on the face of the complaint that a claim is time barred. See Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.1. (3d Cir. 1994). As defendant first filed an answer, in which it did assert a statute of limitations defense, its motion to dismiss on this ground would more properly be styled as one for judgment on the pleadings pursuant to Rule 12(c). Nevertheless, plaintiff has now had an opportunity fully to address the limitations issue and nothing would be gained by requiring defendant to file another motion with a new caption and having the parties refile their submissions regarding this issue.

Defendant argues that the PHRC lacked jurisdiction to entertain plaintiff's administrative complaint and that the right to sue letter subsequently issued by the EEOC to which the complaint was referred pursuant to a work sharing agreement was thus "void."²

Defendant correctly asserts that Title VII claims are subject to dismissal if a plaintiff has failed to exhaust his

² It is uncontested that plaintiff received a right to sue letter from the EEOC and timely filed his complaint within 90 days thereafter.

administrative remedies with the EEOC. See Robinson v. Dalton, 107 F.3d 1018, 1022 (3d Cir. 1997). The timely filing of a charge with the EEOC and receipt of a right to sue letter, however, are not jurisdictional requirements. See Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982). Thus, even if the EEOC right to sue letter were somehow "void," this would not deprive the court of subject matter jurisdiction over plaintiff's Title VII claims.

Moreover, defendant's argument that the PHRC could not legitimately act on plaintiff's complaint or even refer it to the EEOC is unfounded. Defendant contends that because prior to filing the PHRA charge, plaintiff initiated a criminal complaint against his alleged harasser for sexual assault and sought a court declaration that he was entitled to salary and benefits from defendant as an employee, the PHRC had no jurisdiction to process the charge by virtue of § 12(b).³

³ Section 12(b) of the PHRA provides, in pertinent part, that:

the procedure herein provided shall, when invoked, be exclusive and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the complainant concerned. If the complainant institutes any action based on such grievance without resorting to the procedure provided in this act, such complainant may not subsequently resort to the procedure herein.

43 Pa. C.S.A. § 962(b).

Even if the PHRC lacked jurisdiction to adjudicate plaintiff's complaint, it clearly does not follow that a referral of that complaint to the EEOC is barred or that the EEOC is thereby deprived of jurisdiction. In any event, § 962(b) is not a jurisdictional provision. It does not confer upon or deprive the PHRC of jurisdiction to do anything. It procedurally bars a claimant from taking advantage of PHRA remedies in the specified circumstances. Clearly the PHRC retains jurisdiction to process a complaint to determine, inter alia, if a prior action was in fact based on "the same grievance" as the subsequent PHRA complaint. Indeed, this appears to be a case in which the PHRC did so.

It appears that PHRC considered whether plaintiff's complaint should be dismissed pursuant to § 962(b) because of his prior declaratory judgment action. Ultimately, however, it advised plaintiff that after investigating his charge, the agency found insufficient evidence to show unlawful discrimination and issued a right to sue letter. It thus fairly appears that the PHRC did not ultimately find plaintiff's prior civil suit or criminal complaint, of which it was also aware, constituted an "action ... based on the same grievance." This would be entirely logical. Plaintiff merely filed a report of a crime with a police officer. Neither plaintiff nor anyone at his behest "institute[d] any action" based on the reported assault prior to

the PHRC filing. A request for a declaration that one is entitled to certain benefits as an employee is not patently the same as a claim that one has been sexually harassed or terminated for retaliatory reasons.

Defendant also argues that plaintiff's PHRC filing was untimely. To bring suit under the PHRA, a plaintiff must have filed his administrative complaint with the PHRC within 180 days of the alleged act of discrimination. See 43 Pa. C.S.A. §§ 959(a), 962; Woodson v. Scott Paper Co., 109 F.3d 913, 926 (3d Cir. 1997). Defendant contends that because plaintiff's "last day of work" was May 13, 1994 and his PHRC charge was filed on February 6, 1995, it was untimely. According to plaintiff's complaint, however, he was fired on October 5, 1994 and filed his PHRC charge on November 3, 1994. Thus, on the face of plaintiff's complaint, his PHRC filing was timely.

Moreover, one's last day of work is not necessarily the date on which one was unlawfully terminated and if, as he avers, plaintiff was terminated on October 5th, a PHRC filing on the following February 6th would still be timely. Plaintiff dated his PHRC complaint "November 3, 1994" and there is no claim that the clerk's office at the PHRC stamped the original as received or filed on a different date. In any event, if defendant has conclusive evidence that plaintiff falsified the date of his PHRC filing and that it was in fact untimely, it is properly presented

with a motion for summary judgment. If there is conflicting evidence regarding timeliness, the question may ultimately have to be determined by a jury.

Plaintiff's claims for negligent and intentional infliction of emotional distress are time-barred. The statute of limitations for both claims is two years from the date of accrual. See 42 Pa. C.S.A. § 5524(2),(7) (Purdon Supp. 1997); Osei-Afriyie v. Medical College of Pennsylvania, 937 F.2d 876, 884 (3d Cir. 1991). Plaintiff acknowledges that more than two years elapsed between the last event giving rise to these claims and the filing of this action. Plaintiff contends that these claims nevertheless are timely because they "relate back to" the date he filed his PHRC complaint. Plaintiff provides absolutely no support or explanation in his brief for this remarkable assertion.

Perhaps plaintiff means to suggest that the filing of his PHRC complaint tolled the limitations period for his emotional distress claims. In any event, it did not. See Mincin v. Shaw Packing Co., 989 F. Supp. 710,719 (W.D. Pa. 1997) (statute of limitations for negligent and intentional infliction of emotional distress claims not tolled by filing of related EEOC and PHRC complaint). See also Johnson v. Railway Express Agency Inc., 421 U.S. 454, 466 (1975) (pendency of Title VII claim with EEOC does not toll limitations period for related § 1981 claim);

Juarez v. Ameritech Mobile Comms., Inc., 957 F.2d 317, 322-23 (7th Cir. 1992) (statute of limitations for state tort claim not tolled by filing of related EEOC charge); Arnold v. United States, 816 F.2d 1306, 1313 (9th Cir. 1987)(limitations period for state tort claims including intentional infliction of emotional distress not tolled by filing of related Title VII charge).

ACCORDINGLY, this day of June, 1998, upon consideration of defendant's Motion to Dismiss (Doc. #40) and plaintiff's response thereto, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** in part in that Counts III and IV are **DISMISSED** and said Motion is otherwise **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.