

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

MARY E. GARRETT, : CIVIL ACTION
: :
PLAINTIFF : :
: :
v. : :
: :
KUTZTOWN AREA SCHOOL : :
DISTRICT, WILLIAM LUPINI AND : :
BRENT FENSTERMACHER : :
: :
DEFENDANTS : NO. 98-0966

ORDER and MEMORANDUM

AND NOW, this day of August, 1998, upon
consideration of Defendant Kutztown Area School District's
("Kutztown") Motion to Dismiss (Doc. No. 7), Plaintiff's Response
(Doc. No. 9), Defendant's Reply (Doc. No. 14) and Plaintiff's
Sur-Reply (Doc. No. 17), it is **HEREBY ORDERED** that Defendant's
Motion is **GRANTED IN PART AND DENIED IN PART**. Specifically the
Motion is **GRANTED** in that:

- (1) Counts I, II, III, and V of Plaintiff's Complaint
are **DISMISSED**.
- (2) The due process claims in Count IV are **DISMISSED**
with respect to Defendant Kutztown.
- (3) Counts VII and VIII are **WITHDRAWN** at the request
of Plaintiff.¹

The Motion is **DENIED** in that:

- (1) The Equal Protection claim in Count IV brought
under 42 U.S.C.A. § 1983 will go forward with respect
to Defendant Kutztown.

¹ (Plaintiff's Motion in Opposition to Defendant Kutztown's
Motion to Dismiss at 6.)

(2) Count VI, construed herein as a breach of contract claim, will go forward against Defendant Kutztown.

BY THE COURT:

JOHN R. PADOVA, J.

I. Counts I, II, III and V

By Plaintiff's own admission in her Motion in Opposition to Defendant's Motion to Dismiss, it is undisputed that before filing the instant lawsuit, Plaintiff failed to file a complaint with both the E.E.O.C. and the P.H.R.C. (Pl.'s Mot. in Opp. at 5 "Plaintiff has not filed either a Charge or a Complaint with the E.E.O.C. or P.H.R.C.") No "right to sue" letter was ever issued. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973). Because Plaintiff has failed to exhaust her administrative remedies under Title VII, 42 U.S.C.A. § 2000(e)-5(e)(1) (West 1994) and 43 Pa. Cons. Stat. Ann § 959(h) (West 1991 & Supp. 1997), the Court cannot entertain her claims pursuant to these statutes. See Martinez v. Capital Cities/ABC-WPVI, 909 F.Supp. 283, 284 (E.D.Pa. 1995) ("Title VII . . . establish[es] that a civil action for employment discrimination can proceed only after the plaintiff has first filed a timely claim with E.E.O.C. or the relevant state body, in this case the P.H.R.C."); Woodson v. Scott Paper Co., 109 F.3d 913, 925 (3d Cir. 1997) ("To bring suit under the P.H.R.A., a plaintiff must first have filed an

administrative complaint with the P.H.R.C. within 180 days of the alleged act of discrimination. If a plaintiff fails to file a timely complaint with the P.H.R.C., then he or she is precluded from judicial remedies under the P.H.R.A." (internal citation omitted).

Plaintiff's argument that her claims should be equitably tolled because her prior counsel failed to file a timely Complaint with the E.E.O.C and the P.H.R.C. cannot succeed. The United States Court of Appeals for the Third Circuit ("Third Circuit") has held that there are three circumstances, though not exclusive, in which equitable tolling is appropriate: (1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum. Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1387 (3d Cir. 1994).

Plaintiff's Complaint is devoid of allegations that support the presence of any of the circumstances listed above. Plaintiff may wish to pursue her allegations regarding the actions of her former counsel in another forum. However, such allegations do not justify equitable tolling in the instant case.

Based on the allegations set forth in Plaintiff's Complaint, it is apparent that her claim is time-barred. Because Plaintiff

has not alleged sufficient facts to justify equitable tolling of her claims under Title VII and the P.H.R.C., those claims must be dismissed. Arizmendi v. Lawson, 914 F.Supp. 1157, 1160 (E.D.Pa. 1996) ("Compliance with Title VII administrative requirements, if not equitably excused, is a prerequisite to suit").

II. Count IV

A. Due Process

A plaintiff claiming due process violations pursuant to 42 U.S.C.A. § 1983 (West Supp. 1997) must allege inter alia that he or she "was deprived of a protected liberty or property interest." Sample v. Diecks, 885 F.2d 1099, 1113 (3d Cir. 1989). In her Complaint, Plaintiff alleges that she has both a "property interest and a liberty interest in pursuing her profession as educator under her contract with District and to do so without being subject to discrimination or harassment" (Comp. at ¶ 65.)² Specifically, Plaintiff alleges, "Plaintiff intended to

² Defendant Kutztown argues at length that Plaintiff should be precluded from pursuing a claim under § 1983 because such a claim is subsumed under her claim pursuant to Title VII. Although the Court recognizes that the Supreme Court of the United States has held that when a federal statute has its own comprehensive enforcement and remedial scheme, the scheme is the exclusive remedy for violations of the statute, Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1, 20 (1981), the § 1983 claim in this case can proceed because it rests on a basis separate from that of the Title VII claim. "Because sexual harassment has been determined to be sex discrimination that can violate the Fourteenth Amendment right to equal protection, . . . , there is a separate constitutional

apply for permanent teaching positions at the District as they became available during the school year, but because of Defendant's actions as described herein, [she] was forced to relinquish any opportunity to pursue a permanent teaching position with the District." (Comp. at ¶ 50.)

Plaintiff first claims a liberty interest in her particular job with the District. However, "[i]t is the liberty to pursue a calling or occupation, and not the right to a specific job that is secured by the Fourteenth Amendment." Piecknick v. Commonwealth of Pennsylvania, 36 F.3d 1250, 1259 (3d Cir. 1994) (citation omitted). "State actions that exclude a person from one particular job are not actionable in suits ... brought directly under the due process clause." Id. (citing Bernard v. United Township High Sch. Dist. No. 30, 5 F.3d 1090, 1092 (7th Cir. 1993)). Plaintiff has not alleged that she has been denied the opportunity to pursue her profession in a job other than the one she held for a one year term at Kutztown. Her allegations relate to an opportunity to pursue a specific job in a specific place. Assuming that Plaintiff has been denied that opportunity, this does not constitute a due process deprivation. See

right -- equal protection -- which serves as the basis for [the] § 1983 claim." McLaughlin v. Rose Tree Media School District, No. CIV.A. 97-5088, 1998 WL 196394, at *3 (E.D.Pa. April 22, 1998) (internal citations omitted). Accordingly, Plaintiff's § 1983 claim is not subsumed under her Title VII claims.

Lyznicki v. Board of Education, 707 F.2d 949, 951 (7th Cir. 1983).

Furthermore, in order to establish a due process claim based on a property interest, Plaintiff must first show that she had a protected property interest in her job. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). In order to demonstrate such an interest, she must establish a legitimate claim of entitlement to it. Id. Plaintiff's Complaint however, contains no such allegations. In fact, Plaintiff alleges the opposite: that she had a one year employment contract and that she served and completed that term. A decision not to reemploy, standing alone, does not constitute a deprivation of a protected property interest. Id., 408 U.S. at 575. Thus, reading the Complaint in the light most favorable to Plaintiff and accepting as true all of the factual allegations made therein, Plaintiff has not alleged a set of facts sufficient to support her procedural due process claim.³ See ALA, Inc. v. CCAIR, Inc., 29 F.3d 855 (3d Cir. 1994); Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989).

³ In her Motion in Opposition to Defendant Kutztown's Motion to Dismiss, Plaintiff also appears to argue, despite the lack of any allegations in her Complaint to this effect, that her liberty interest is an interest in her reputation. To the extent that Plaintiff is arguing that her reputation has been damaged in violation of her due process rights, this claim has not been alleged adequately in her Complaint.

Plaintiff also contends that Defendant Fenstermacher's allegedly harassing behavior throughout her time at Kutztown "shocked the conscience" so as to constitute a substantive due process claim.

The substantive component of due process protects against "certain government actions regardless of the fairness of the procedures used to implement them." Daniels v. Williams, 474 U.S. 327, 331 (1986). A plaintiff states a claim for substantive due process when she shows that the government has interfered with "certain constitutionally recognized fundamental rights." Phillips v. Borough of Keyport, 107 F.3d 164, 179-180 (3d Cir. 1997). Such status "for the most part [has] been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." Albright v. Oliver, 510 U.S. 266, 271-272 (1994). "The judiciary has to this point limited its expansion of substantive due process rights to those clear situations involving physically abusive conduct towards minor children in public schools, prisoners and state hospital patients." Bouger v. University of Pittsburgh, 713 F.Supp. 139, 145 (W.D.Pa. 1989), aff'd, 882 F.2d 74 (3d Cir. 1989). There is no substantive due process right to be free from unwanted sexual advances such as those Plaintiff alleges.⁴ Id. Furthermore, although Plaintiff

⁴ The allegations that appear to comprise Plaintiff's sexual harassment claim are located in the Complaint at ¶¶ 21, 22, 29, 36, 41, and 44. The substance of those allegations are as

may have cause to be offended personally by the allegedly offensive conduct, such allegations, accepting all of them as true and giving Plaintiff the benefit of every reasonable inference, do not "shock the conscience" to the degree necessary to sustain a substantive due process claim. See Rochin v. California, 342 U.S. 165, 172 (1952) (finding that "the forcible extraction of [one's] stomach contents" is the type of behavior that "shocks the conscience" and constitutes a deprivation of due process).

B. Equal Protection

In her Complaint, Plaintiff also alleges that she was denied "equal protection of the laws in that she was subjected to discrimination and harassment because of her sex, female." (Comp. at ¶ 69.) In addition, she asserts that the District has a policy or custom of discriminating against and harassing females. (Id.) In order to sustain a claim under § 1983 based on the Equal Protection Clause of the Fourteenth Amendment, Plaintiff must show "the existence of purposeful discrimination"; that she "receiv[ed] different treatment from that received by other individuals similarly situated"; and "[s]pecifically to

follows:

"Did your boyfriend tell you how beautiful you look today?" "You look beautiful today." "Can I sleep over?" "So let's talk dinner. When and where?" "If I give blood [at a blood drive] does that mean you will take me out to dinner as well?" "Dear Sweet Beautiful Mary."

prove sexual discrimination, . . . that any disparate treatment was based upon her gender." Andrews v. City of Philadelphia, 895 F.2d 1469, 1478 (3d Cir. 1990) (internal citations omitted).

Section 1983 liability attaches to a municipality only when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury" Monell v. Dept. of Social Services, 436 U.S. 658, 694 (1978); see Collins v. Chichester School District, Civ.A.No. 96-6039, 1997 WL 411205, at *2 (E.D.Pa. July 22, 1997) ("For purposes of § 1983, school districts, school boards, superintendents, and principals are considered to be local governments or government employees and are therefore subject to the similar liability as local governments under the Monell rule."). The Third Circuit explained:

A government policy or custom can be established in two ways. Policy is made when a decisionmaker possessing final authority to establish municipal policy with respect to the action issues an official proclamation, policy, or edict. A course of conduct is considered to be a custom when, though not authorized by law, such practices of state officials are so permanent and well settled as to virtually constitute law. In either of these cases, it is incumbent upon a plaintiff to show that a policymaker is responsible either for the policy or, through acquiescence, for the custom.

Andrews, 895 F.2d at 1480 (internal citations and quotations omitted).

The question of who is a "policymaker" is a question of state law. City of St. Louis v. Praprotnik, 485 U.S. 112, 142 (1988). In Pennsylvania, the Superintendent of Schools "shall be responsible for the execution of all actions of the Board, the administration and operation of the Board public school system subject to the policies of the Board, and the supervision of all matters pertaining to instruction in all the schools under the direction of the Board." 351 Pa.Code § 12.12-400. Plaintiff does not allege specifically that the Superintendent, independent of the Board, is a policymaker, and at this stage, the Court is not prepared to make such a determination. However, because Plaintiff has alleged that Defendant Lupini, Superintendent of Schools, acquiesced in Defendant Fenstermacher's harassment of Plaintiff and failed to take timely, appropriate, steps to stop the alleged harassment, it is conceivable that Lupini's actions, as a possible policymaker, are attributable to the School District. See Praprotnik, 485 U.S. at 127 ("If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final."). Therefore, with respect to the equal protection component of Count IV, "[i]t cannot be said at this juncture that Plaintiff can prove no set of facts that would entitle [her] to relief." In re Westinghouse Securities Litigation, 90 F.3d 696, 717 (3d Cir. 1996) (citing In re

Craftmatic Securities Litigation, 890 F.2d 628, 637 (3d Cir. 1989)). In light of the 12(b)(6) standard requiring the Court to read the Complaint liberally and to construe it favorably to the pleader, this claim will go forward.

III. Count VI

In Count VI of her Complaint, Plaintiff alleges a breach of an implied covenant of good faith and fair dealing. However, in the context of employment contracts, Pennsylvania law does not recognize a cause of action for breach of an implied covenant of good faith and fair dealing separate from a breach of contract action. McGrenaghan v. St. Denis School, 979 F.Supp. 323, 328 (E.D.Pa. 1997); Engstrom v. John Nuveen and Co., Inc., 668 F.Supp. 953, 958 (E.D.Pa. 1987) (holding that where there may be a breach of an implied covenant of good faith in an employment contract, it constitutes a breach of contract action, not an independent action for breach of a duty of good faith and fair dealing).

There is no dispute that Plaintiff was employed pursuant to a contract for a one-year term, the 1995-96 school year. Plaintiff alleges in Count VI that the District breached the terms of that contract. Thus, although Plaintiff captions her claim as one for "breach of implied covenant of good faith and fair dealing," the Court, reading the Complaint in the light most

favorable to Plaintiff, will construe the claim as one for breach of contract.

Defendant, apparently anticipating the Court's decision to construe Count VI as a breach of contract claim, argues that the Political Subdivision Tort Claims Act, 42 Pa. Cons. Stat. Ann. §§ 8541-8542 (West 1982 & Supp. 1997) ("PSTCA") shields the School District from liability in a breach of contract action and thus the claim must still be dismissed. Defendant Kutztown contends that the PSTCA acts to protect a school district, as a local agency, from liability in all instances except the eight exceptions delineated in § 8542 of the PSTCA.⁵ Because, Defendant continues, there is no exception for a breach of contract action, the breach of contract claim is barred.

The analysis under the PSTCA is not as clear as Defendant posits. In fact, there is case law that supports the view that breach of contract actions are not within the scope of the PSTCA. See Lynch v Borough of Ambler, No.CIV.A. 94-cv-6401, 1996 WL 283643, at *3 (E.D.Pa. May 29, 1996) ("Defendants have not identified authority, and the Court has found none, to support the proposition that this "Tort Claims" Act provides

⁵ Section 8542 of the PSTCA permits recovery against a local agency for negligent acts if the act falls into one of the following eight categories: (1) vehicle liability; (2) care, custody or control of personal property; (3) real property; (4) trees, traffic controls and street lighting; (5) utility service facilities; (6) streets; (7) sidewalks; (8) care, custody or control of animals. 42 Pa. Cons.Stat. Ann. § 8542(b).

municipalities free reign to rescind or breach unilaterally the contracts into which they knowingly and voluntarily enter. Although no Pennsylvania court has directly ruled on the issue of whether breach of contract claims are within the scope of the PSTCA, the Court finds, implicitly in the language of the Act and the case law, that they are not."). Thus, at this stage, in which all reasonable inferences must be made in Plaintiff's favor, the Court will not dismiss the breach of contract claim. Count VI will go forward against Defendant Kutztown.