

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

DALTON DOW,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
EDWARDS AND KELCEY, INC. and DOES 1-10,	:	
	:	
Defendants.	:	NO. 97-8078

MEMORANDUM

Reed, J.

August 20, 1998

Presently before the Court is the motion of defendant Edwards and Kelcey, Inc. (“E&K”) to strike the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and (f) (Document No. 4), and the response of the plaintiff Dalton Dow (“Dow”) (Document No. 6). Based on the following analysis, the motion will be denied in part and granted in part.

I. The Arguments of the Defendant

E&K argues that Dow did not plead facts sufficient to establish a prima facie case on his claims of age discrimination under the Age Discrimination in Employment Act (“ADEA”) and the Pennsylvania Human Relations Act (“PHRA”). E&K requests that this Court dismiss these claims, Count I and II of the complaint respectively, and then not to retain jurisdiction of Dow’s pendant state law claims. Alternatively, the defendant asks that Dow be required to amend his complaint under Federal Rule of Civil Procedure 12(e) to include the dates of the alleged remarks

of his coworkers in ¶ 9 of the complaint, the basis for Dow's belief that he was replaced by someone under forty years old, the date that he was hired in his current job, and specific details for his claim for special damages pursuant Federal Rule of Civil Procedure 9(g).

In the event that this Court retains jurisdiction of the pendant state law claims after dismissing Dow's ADEA and PHRA claims, E&K argues that Dow's claims for wrongful termination in Count III and fraud in Count IV should be dismissed for failure to state a claim upon which relief may be granted. As to Dow's claim for wrongful termination, E&K argues that Dow has not shown that his employment at E&K was other than at-will employment because he failed to show the existence of a contractual assurance of employment or to establish that his claim fits under Pennsylvania's public policy exception to at-will employment. As to Dow's fraud claim, E&K argues that Dow did not allege facts to support a prima facie case for fraud. Alternatively, E&K argues that at least Dow should be required to plead his claim for fraud with particularity pursuant to Federal Rule of Civil Procedure 9(b) and that ¶¶ 32, 33, and 36 of the fraud claim should be stricken from the complaint as these paragraphs contain prejudicial and irrelevant allegations.

E&K also attacks Dow's request for damages. E&K argues that Dow's request for punitive damages in Counts I, II, and IV and damages for emotional distress in Count I be stricken from the complaint. The defendant asserts that punitive damages are not recoverable as a matter of law in a claim under the ADEA or the PHRA. Similarly, the defendant asserts that punitive damages are not recoverable in a claim for fraud, unless reckless or willful behavior is shown. E&K argues that Dow's request for emotional distress damages in Count I should be stricken because those damages are not recoverable in a claim under the ADEA.

Finally, E&K requests that this Court strike the reference to ten “Doe” defendants from the caption and complaint as such pleading is generally disfavored and Dow does not give any explanation in the complaint as to whom these ten “Does” represent.

II. Standard for a Motion to Dismiss

Rule 12(b) of the Federal Rules of Civil Procedure provides that “the following defenses may at the option of the pleader be made by motion: (6) failure to state a claim upon which relief can be granted.” In deciding a motion to dismiss under Rule 12(b)(6), a court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

The Federal Rules of Civil Procedure require only notice pleading. See Fed. R. Civ. P. 8(a) (providing that pleadings should contain “a short and plain statement of the claim showing that the pleader is entitled to relief”). A motion to dismiss the complaint for insufficiency of the pleadings should be denied “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984).

III. Analysis

I conclude that the allegations of Dow’s complaint in Count I and II for age discrimination under the ADEA and the PHRA are sufficient to satisfy the requirements of notice pleading and Federal Rule of Civil Procedure 8(a) as Dow can prove a set of facts in support of his claim which would entitle him to relief and the defendant is on sufficient notice to frame a

response to Dow's allegations. As for E&K's request that Dow amend his complaint to include specific dates and factual support for his allegations, I conclude that Dow is not required to plead those items and such information is better obtained through the mechanisms of discovery.

I conclude that the allegations of Dow's complaint in Count III for wrongful termination are sufficient to satisfy the requirements of notice pleading and Rule 8(a). Dow alleges that he was terminated from his full time position after receiving a "contractually vested promise of guaranteed employment until at least April of 1999" and that the "terms of his at-will employment were modified." Dow could prove a set of facts that would support these allegations and entitle him to relief.

As for Dow's claim for fraud in Count IV, Federal Rule of Civil Procedure 9(b) requires that "the circumstances constituting fraud . . . shall be stated with particularity." I conclude that Dow's complaint satisfies the requirements of this rule as it includes the particular representations made by the defendant which Dow alleges were fraudulent and why the representations were false when made. Further, I conclude that E&K is not entitled to have ¶¶ 32, 33, and 36 stricken from the complaint under Rule 12(f), which allows a court to strike "any redundant, immaterial, impertinent, or scandalous matter" from the pleadings upon proper motion of the defendant, as I find that these paragraphs contain non-redundant, non-scandalous allegations that are relevant to Dow's claim for fraud.

Next, I address E&K's attack on Dow's claim for punitive damages in Counts I, II, and IV of the complaint. I conclude that punitive damages are not recoverable in a claim under the ADEA; thus, Dow's request for punitives damages in Count I will be dismissed. See Rossi v. Sun Refining & Marketing Corp., 1995 WL 12056, at 7-8 (E.D. Pa.) (citing cases and noting that

the “overwhelming weight of authority dictates against an award of compensatory and punitive damages” under the ADEA).

E&K did not present this Court with any binding authority for the proposition that punitive damages are not permitted under the PHRA. Indeed, although the Pennsylvania Supreme Court has not yet addressed the issue of the availability of punitive damages under the PHRA, district courts in this circuit have consistently allowed plaintiff’s to pursue such claims. See Sarko v. Penn-Del Directory Co., 968 F. Supp. 1026, 1037 (E.D. Pa. 1997); Gould v. Lawyers Title Insurance Corp., 1997 WL 241146 (E.D. Pa.). Thus, Dow’s request for punitive damages in Count II will not be dismissed on this ground. Turning to the substance of Dow’s allegations, Dow alleges in ¶ 25 that E&K acted “with outrageous, deliberate willful disregard” for Dow; this pleading is sufficient to survive a motion to dismiss on Dow’s request for punitive damages in Counts II and IV.

E&K argues that Dow must detail his items of special damages, but it does not indicate to what items of special damages it is referring nor is it evident from the face of the complaint. If this Court assumes that E&K is referring to Dow’s request for punitive damages, E&K does not cite any cases to support its proposition that punitive damages constitute special damages under Rule 9(g), which requires that if “items of special damages are claimed, they shall be specifically stated.” Research conducted by this Court revealed only one case, Nelson v. G. C. Murphy Co., 245 F. Supp. 846 (D.C. Ala. 1965), which noted that punitive damages are not special damages. However, even if this Court were to consider punitive damages as special damages, Dow’s pleading satisfies even the heightened pleading requirement of Rule 9(g).

In Rogers v. Exxon Research and Engineering Co., 550 F.2d 834, 841-842 (3d Cir. 1976),

the Court of Appeals for Third Circuit held that emotional distress damages are not available under the ADEA; thus, the allegations of Dow's complaint pertaining to emotional distress damages under Count I will be dismissed on this ground. See also Rossi, 1995 WL 12056, at 7 (citing Rogers and noting that the remedies provisions of the Civil Rights Act of 1991, permitting compensatory and punitive damages in claims under Title VII, have not been extended to cover ADEA claims).

Finally, I turn to the issue of the ten "Doe" defendants. In general, the use of "Doe" to identify a defendant is not looked upon favorably by courts, except under circumstances in which the activities and omissions of the unnamed defendants are known but the identity of the defendants is not known to the plaintiff prior to the filing of the complaint. Federal Rule 10(a) requires plaintiff to name all parties. The plaintiff has not only failed to do so he has not alleged any acts or omissions allegedly done by a person whose name he does not know. Thus, Dow has not identified an actor in any way which would allow the defendant to respond to any allegations, thus a cause of action has not been pleaded nor have the principles of notice pleading been followed. The complaint cannot be served on an unnamed person. See Agresta v. City of Philadelphia, 694 F. Supp. 117, 119 n.1 (E.D. Pa. 1988); Breslin v. City and County of Philadelphia, 92 F.R.D. 764, 765 (E.D. Pa. 1981).

Dow has not even provided in his response to this motion any argument or facts or case law which will allow him to proceed against the defendants named in the caption as "Does 1-10." In cases which allow claims to proceed against a pseudonymously named plaintiff, the plaintiff has pleaded the actual facts, acts, and omissions done by a person or persons whose name is presently unknown. See Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980); Scheetz v. The

Morning Call, Inc., 130 F.R.D. 34, 36-37 (E.D. Pa. 1990) (allowing claims against “Doe” defendants to remain in the case for the duration of discovery and citing Gillespie). The vaguely incipient claims against “Does 1-10” will be dismissed and the anomalous designation deleted from the caption of this case.

IV. Conclusion

Based on the foregoing, the motion will be denied in part and granted in part. An appropriate Order follows.

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

DALTON DOW,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
EDWARDS AND KELCEY, INC. and DOES 1-10,	:	
	:	
Defendants.	:	NO. 97-807

ORDER

AND NOW, this 20th day of August, 1998, upon consideration of the motion of defendant Edwards and Kelcey, Inc. ("E&K") to strike the complaint of plaintiff Dalton Dow ("Dow") pursuant to Federal Rule of Civil Procedure 12(b)(6) and (f) (Document No. 4), and the response of Dow (Document No. 6), and based on the foregoing memorandum, it is hereby accordingly **ORDERED** that the motion is **DENIED IN PART** and **GRANTED IN PART**. The claims for punitive damages and emotional distress damages in Count I of the complaint are **DISMISSED** and the unstated claims against "Does 1-10" as well as the pseudonyms "Does 1-10" are **DISMISSED** and **STRICKEN FROM THE CAPTION**.

IT IS FURTHER ORDERED that all further reasons asserted as bases for dismissal of the complaint are **DENIED**. **IT IS FURTHER ORDERED** that the Clerk of Court shall delete the legend "Does 1-10" from the caption and the parties shall do the same in all further filings in this case.

IT IS FURTHER ORDERED that E&K shall file its answer to the complaint no later than September 21, 1998.

LOWELL A. REED, JR., J.