

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

WILLIAM K. WASHINGTON, et. al,	:	CIVIL ACTION
Plaintiffs,	:	
	:	
v.	:	NO. 98-606
	:	
DEPARTMENT OF VETERANS	:	
AFFAIRS,	:	
Defendant.	:	

MEMORANDUM

R.F. KELLY, J.

OCTOBER , 1998

Plaintiffs, William K. Washington ("Washington"), John Frederick, Jr. ("Frederick"), Robert Parker ("Parker"), Daniel J. McSweeney ("McSweeney"), and Nathan Jones ("Jones")(collectively "Plaintiffs"), are five male employees of the Veterans Affairs Hospital ("VA") in Philadelphia who allege that they have suffered gender discrimination in their employment. Presently before the Court is the VA's Motion for Judgment on the Pleadings or, in the alternative, for Summary Judgment. For the reasons that follow, the Motion for Summary Judgment is granted.

I. FACTS.

The Plaintiffs have been employed by the Nutrition and Food Service Division of the VA for between four and twenty-four years. They allege that during their employment they did not receive sought after promotions because of their gender and that female employees with less seniority and experience were promoted instead. Plaintiffs contend that this practice constitutes

gender discrimination (Count I), breach of contract (Count II), breach of the implied covenant of good faith and fair dealing in violation of 42 U.S.C. § 1983 (Count III), and intentional infliction of emotional distress (Count VI). The VA contends that Plaintiffs Title VII claims are barred for failure to exhaust administrative remedies, that Plaintiffs cannot maintain their section 1983 claim because Title VII is their exclusive remedy and because state action has not been alleged, that this Court lacks jurisdiction over Plaintiffs' breach of contract claim and that Plaintiffs' failure to comply with the Tort Claims Act requires dismissal of their intentional infliction of emotional distress claim. Each argument is discussed below.

II. STANDARD.

A motion for judgment on the pleadings is subject to the same standard as a Rule 12(b)(6) motion to dismiss. Constitution Bank v. DiMarco, 815 F. Supp. 154, 157 (E.D. Pa. 1993). Under Rule 12(b)(6), the Court must determine whether the allegations contained in the complaint, construed in the light most favorable to Plaintiff, show a set of circumstances which, if true, would entitle Plaintiff to the relief he requests. Gibbs v. Roman, 116 F.3d 83, 86 (3d Cir. 1997)(citing Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996)). "If matters outside the pleadings are presented and considered by the court, the motion is treated as a motion for summary judgment." Delaware Valley

Toxins Coalition v. Kurz-Hastings, 813 F. Supp. 1132, 1136 (E.D. Pa. 1993)(citing FED. R. CIV. P. 12(b)).

Summary Judgment is proper "if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); Anderson v. Liberty Lobby Inc., 477 U.S. 242, 247 (1986). The moving party has the initial burden of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Then, the non-moving party must go beyond the pleadings and present "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(c). If the court, in viewing all reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of material fact, then summary judgment is proper. Celotex, 477 U.S. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir. 1987).

III. DISCUSSION.

A. Count I - Gender Discrimination.

It is well settled that exhaustion of administrative remedies is a prerequisite to filing a Title VII action in federal court. Metsopulos v. Runyon, 918 F. Supp. 851, 857 (D.N.J. 1996)(citing Brown v. Gen. Servs. Admin., 425 U.S. 820, 832 (1976)). Title 29 of the Code of Federal Regulations at Part 1614 sets forth the administrative process that a federal

employee who claims to have been discriminated against must follow. 29 C.F.R. Part 1614. The regulations provide that an aggrieved employee has 45 days from the date of the incident of discrimination to contact an Equal Employment Opportunity Commission ("EEOC") counselor for informal pre-complaint counseling. 29 C.F.R. 1614.105(a). If informal counseling is unsuccessful, an employee must file a formal complaint with the agency within 15 days of receiving Notice of Final Interview. 29 C.F.R. 1614.106(b). After 180 days have passed with no EEOC action or within 90 days of the agency issuing a final decision, an employee may file suit in federal court. 29 C.F.R. 1614.408.

Parker, Jones and Frederick, have never filed an administrative complaint with the EEOC. For this reason, their Title VII claims must be dismissed for failure to exhaust administrative remedies.

Washington has filed two complaints with the EEOC. The first, alleged a gender discrimination claim similar to the claim in this action, however, Washington did not contact the EEOC within 45 days of the alleged incident of discrimination. For this reason, Washington is barred from raising the allegations contained in that complaint in this Court.

Washington's second EEOC complaint arose out of his arrest following a verbal altercation with a co-worker and alleged civil rights violations, police brutality, favoritism,

and conspiracy. This Court's inquiry is limited to claims contained in the EEOC complaint and claims which can reasonably be expected to grow out of the EEOC investigation. Robinson v. Dalton, 107 F.3d 1018, 1025 (3d Cir. 1997). In this action, Washington alleges gender discrimination by failure to promote. The allegations contained in Washington's second EEOC complaint are separate and distinct from the allegations before the Court at this time. For this reason, Washington's gender discrimination claim has never been addressed by the EEOC and must be dismissed for failure to exhaust administrative remedies.

The final Plaintiff, McSweeney, contacted an EEOC counselor on March 19, 1998, to complain that his supervisor "authored false and malicious statements" against him in relation to a claim for Worker's Compensation. (Def.'s Mot. for J. on the Pleadings or in the Alternative, for Summ. J. at Ex. 2.) McSweeney alleged that this was evidence of a pattern of discrimination based on race. McSweeney was given "Notice of Final Interview" on May 15, 1998. A formal EEOC Complaint was filed on May 21, 1998.

180 days have not passed since McSweeney filed his formal complaint and the EEOC has not issued its final decision on the matter, thus, McSweeney has brought this suit prematurely. When this situation arises, normally the case is placed on the civil suspense docket pending receipt of a right to sue letter

from the EEOC. See, Krause v. Sec. Search & Abstract Co., Nos. 96-596, 96-5742, 1997 WL 528081 at *4 (E.D. Pa. Aug. 21, 1997).

In this case, however, it is clear from the "Notice of Final Agency Action" that McSweeney's gender discrimination claim was not properly raised before the EEOC at the informal level, and therefore will be excluded from review in this Court. 29 C.F.R. § 1614.105(b)("[O]nly the matter(s) raised in precomplaint [sic] counseling (or issues like or related to issues raised in pre-complaint counseling) may be alleged in a subsequent complaint filed with the agency.").

B. Count III - Section 1983.

Generally, Title VII is the only federal remedy available to a federal employee who claims to have been discriminated against in employment. Robinson, 107 F.3d at 1020-21; Abdullah-Johnson v. Runyon, No. 94-5240, 1995 WL 118268, at *4 (E.D.Pa. Mar.8, 1995). The Supreme Court has held that a federal statute, such as Title VII, with its own comprehensive enforcement and remedial scheme, is the exclusive remedy for violations of the statute at issue. McLaughlin v. Rose Tree Media Sch. Dist., 1 F. Supp. 2d 476, 479 (E.D. Pa. 1998)(citing Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20, (1981). The "Sea Clammers" rule, as it is called, has prevented a party from bringing a Title VII claim using the framework of 1983. McLaughlin, 1 F. Supp. 2d at 479 (citing Irby

v. Sullivan, 737 F.2d 1418, 1428 (5th Cir. 1984)). An exception to this rule allows a Title VII claim to be brought in conjunction with a 1983 claim if there is a constitutional right, separate from the rights created by Title VII, which serves as the basis for the 1983 claim. McLaughlin, 1 F. Supp. 2d at 479. Here, Count III of the complaint contains an allegation that Plaintiffs' due process rights have been violated.¹ This separate constitutional right allows Plaintiffs to bring a Title VII claim and a 1983 claim together. Unfortunately for Plaintiffs, this does not end the inquiry.

Plaintiffs are required to make a prima facie showing of the VA's potential liability under section 1983 by alleging that (1) a person acting under color of state law (2) deprived them of a right, privilege or immunity secured by the constitution or federal law. 42 U.S.C. § 1983; Parratt v. Taylor, 451 U.S. 527, 535, (1981), overruled on other ground by, Daniels v. Williams, 474 U.S. 327 (1986); Carter v. City of Philadelphia, 989 F.2d 117, 119 (3d Cir. 1993). As discussed above, Plaintiffs have properly alleged that their constitutional

¹ Count III of Plaintiffs' Complaint is entitled "Breach of the Implied Covenant of Good Faith and Fair Dealing." That allegation is insufficient to show Plaintiffs' have been deprived of a "right privilege or immunity secured by the constitution or federal law." 42 U.S.C. § 1983. Paragraph 29 of Count III, however, alleges a due process violation that is sufficient to show a deprivation of a constitutional right, therefore, I will treat Count III as alleging a due process violation under section 1983.

right to due process has been violated. The state actor element, however, is lacking. Plaintiffs were employed at the VA, a federal facility. Section 1983 "does not apply to actions under color of federal law." McGinness v. United States Postal Service, 744 F.2d 1318, 1322 (7th Cir. 1984). For this reason, Summary Judgment is granted as to Count III of Plaintiffs' complaint.

C. Counts II and VI - Breach of Contract and Intentional Infliction of Emotional Distress.

Plaintiffs indicate in their Answer to this Motion that Counts II and VI are also grounded upon section 1983. Reference to Plaintiffs' Complaint shows otherwise. Neither Count contains any reference to section 1983 and for good reason. As discussed above, section 1983 provides a remedy for a violation of "a right privilege or immunity secured by the Constitution or federal law." Neither Plaintiffs' breach or contract claim nor Plaintiffs' intentional infliction of emotional distress claim could allege such a deprivation. These claims arise under the law of the State of Pennsylvania, not federal law. McGinness, 744 F.2d at 1322.

As to Plaintiffs' breach of contract claim, Plaintiffs seek to recover an amount "in excess of \$200,000." (Compl. at ¶¶ 25-27 and wherefore clause.) "The Tucker Act, as codified at 28 U.S.C. §§ 1346, 1491, gives the Claims Court jurisdiction over

non-tort claims against the United States, and gives the district courts concurrent jurisdiction over such claims not exceeding \$10,000." Hahn v. United States, 757 F.2d 581, 585-86 (3d Cir. 1985). This Court lacks jurisdiction over contract claims against the United States exceeding \$10,000; exclusive jurisdiction rests with the United States Court of Federal Claims. Id.; see, e.g., New Mexico v. Regan, 745 F.2d 1318, 1322 (10th Cir. 1984), cert. denied, 471 U.S. 1065(1985); Zumerling v. Marsh, 591 F. Supp. 537, 542 (W.D. Pa. 1984), aff'd, 769 F.2d 745 (Fed. Cir. 1985). For this reason, Plaintiffs' breach of contract claim is dismissed.

Finally, Plaintiffs' seek to recover for intentional infliction of emotional distress sustained while working at the VA. The VA argues that Plaintiffs' failure to comply with the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b) & 2671-2680, requires dismissal of their claim.² Plaintiffs do not respond to this argument.

"The FTCA is the exclusive remedy for claims for money damages sounding in tort for injuries resulting from acts of federal agencies or employees." Volpini v. Resolution Trust Corp., No. 96-7535, 1997 WL 476347, at *3 (E.D. Pa. Aug. 19, 1997). Jurisdictional prerequisites to a suit under the FTCA are

² Neither party contends that the Federal Employment Compensation Act, 5 U.S.C. § 8101 et seq., is applicable to this matter.

that Plaintiffs have presented their claim to an appropriate federal agency, in writing, with a requested sum certain, within two years of an occurrence, and that the agency has denied the claim. Deutsch v. United States, 67 F.3d 1080, 1091 (3d Cir. 1995)(citing Corte-Real v. United States, 949 F.2d 484, 485-86 (1st Cir. 1991)(citations omitted)). Plaintiffs have not complied with any of the requirements stated above, therefore, this Court lacks subject matter jurisdiction and Summary Judgment is proper.

An Order follows.

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

WILLIAM K. WASHINGTON, et. al,	:	CIVIL ACTION
Plaintiffs,	:	
	:	
v.	:	NO. 98-606
	:	
DEPARTMENT OF VETERANS	:	
AFFAIRS,	:	
Defendant.	:	

ORDER

AND NOW, this day of October, 1998, upon consideration of Defendant's Motion for Judgment on the Pleadings, or in the alternative for Summary Judgment, and Plaintiffs' Response thereto, it is hereby ORDERED that said Motion is GRANTED. The Clerk's Office is directed to mark this case CLOSED.

BY THE COURT:

Robert F. Kelly, J.

