

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

WILLIAM BRADLEY : CIVIL ACTION
 :
 v. :
 :
 CITY OF PHILADELPHIA, :
 PHILADELPHIA DEPT. of :
 RECREATION and ANTHONY (NINO) :
 GARGIULO : NO. 98-1551

M E M O R A N D U M

WALDMAN, J.

November 9, 1998

Presently before the court is defendants' motion to dismiss plaintiff's pro se race discrimination complaint. Plaintiff alleges that he was subjected to a racially hostile work environment while employed by the City in the Department of Recreation, and was ultimately demoted and then fired because of his race. He has asserted claims against the City and the Department under Title VII and against all defendants under 42 U.S.C. § 1983.¹

In deciding a motion to dismiss, the court accepts as true the factual allegations in the complaint and reasonable inferences therefrom, and views them in a light most favorable to the nonmovant. Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir.

¹ The Department of Recreation is not an entity subject to suit under § 1983. See Bonenberger v. Plymouth Twp., 132 F.3d 20, 25 n.4 (3d Cir. 1997). As an employing governmental agency, however, the Department would appear to be a properly named party to the Title VII claim. See 42 U.S.C. §§ 2000e(a) & (b); Brown v. City of New York, 869 F. Supp. 158, 171 (S.D.N.Y. 1994) (Department of Parks and Recreation proper party to Title VII claim along with City).

1989). Dismissal of a claim is appropriate only when it appears beyond doubt that the claimant can prove no set of facts in support of his claim which would entitle him to relief. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Robb v. Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984).

The pertinent factual allegations in plaintiff's complaint are as follow.

Plaintiff is a black male. He began working for the Recreation Department in November 1993 in the position of Equipment Operator II. The requirements of that position did not, and do not, include manual labor duties.

In February 1994, defendant Gargiulo became plaintiff's supervisor. Thereafter, plaintiff was subjected by Mr. Gargiulo to "systematic and pervasive discrimination." Mr. Gargiulo assigned plaintiff tasks requiring manual labor and which were not commensurate with his background, training and skills despite the availability of tasks within the Equipment Operator II job description. Instead, defendant Gargiulo assigned less qualified white Laborers to perform these tasks although they were outside the Laborer job description. Plaintiff complained to his union representative, who in turn complained to defendant Gargiulo. Mr. Gargiulo nevertheless persisted in assigning plaintiff to manual labor tasks outside of his job classification and to

assign less qualified white Laborers to tasks which should have been performed by an Equipment Operator II.

On October 11, 1994, after plaintiff again complained to his union representative, defendant Gargiulo directed plaintiff to transport a two-ton engine using a three-quarter ton truck. The task was a manual labor job to which plaintiff should not have been assigned and the truck was far too small to transport the engine or even to allow plaintiff to fasten it to the truck. There were available white Laborers whose job descriptions included transporting such heavy equipment. There were also available larger trucks capable of bearing the weight of a two-ton engine and on which the engine could be fastened during transport. The engine fell from the rear of the truck as plaintiff pulled away from an intersection. Defendant Gargiulo told plaintiff that as a result, he would be suspended without pay for five days, demoted to a non-driving position for six months and ordered to pay for the damage to the engine. After plaintiff filed a grievance, Mr. Gargiulo withdrew the paperwork necessary to effect a demotion. A white driver involved in a similar accident was not disciplined.

When speaking to plaintiff, Mr. Gargiulo used the term "your kind," which plaintiff perceived as an unfavorable reference to black people. Mr. Gargiulo did not make similar comments to white employees.

On July 24, 1995, plaintiff was demoted to the position of Semi-Skilled Laborer. His duties included sweeping, mopping, cleaning floors and bathrooms and maintenance jobs involving heavy lifting. At a subsequent unspecified time, defendant Gargiulo accused plaintiff of having abandoned his job and fired him. Plaintiff in fact had been absent because of illness.

Plaintiff filed a race-discrimination charge with the EEOC on June 22, 1995. The EEOC concluded its investigation and issued a "right-to-sue" letter on December 31, 1997.

Defendants argue first that the court lacks subject matter over plaintiff's Title VII claim because he failed to file a timely discrimination charge with the EEOC. Second, defendants argue that plaintiff failed adequately to state a hostile environment claim. Finally, defendants argue that plaintiff has failed to plead facts from which one could find the type of policy, practice or custom necessary to establish municipal liability under § 1983.

Defendants contend that plaintiff did not file his EEOC charge within 300 days of the alleged unlawful employment practice which defendants argue was March 1994 when Mr. Gargiulo first harassed or discriminated against him. See Colgan v. Fisher Scientific Co., 935 F.2d 1407, 1414 (3d Cir.) (en banc), cert. denied, 502 U.S. 941 (1991); Brennan v. National Telephone Directory Corp., 850 F. Supp. 331, 336 (E.D. Pa. 1994).

The total failure of a plaintiff to file an EEOC charge deprives the court of jurisdiction to adjudicate his subsequent Title VII claim. See Trevino-Barton v. Pittsburgh Nat. Bank, 919 F.2d 874, 878 ("Federal courts lack jurisdiction to hear Title VII claims unless a claim was previously filed with the EEOC"); Brennan v. National Telephone Directory Corp., 881 F. Supp. 986, 993 (E.D. Pa. 1995). The time for filing a charge, however, is akin to a statute of limitations which operates as a procedural bar to recovery and is subject to waiver and tolling. See Zipes v. Trans World Airlines, 455 U.S. 385, 393 (1982); Oshiver v. Levin, Fishbein, Sedran & Brennan, 38 F.3d 1380, 1387 (3d Cir. 1994); Schafer v. Board of Public Educ., 903 F.2d 243, 251 (3d Cir. 1990). Thus, unless legally excused, the untimely filing of an EEOC charge subjects a Title VII claim to dismissal not for lack of jurisdiction but for failure to present a claim on which relief may be granted. See Robinson v. Dalton, 107 F.3d 1018, 1021-22 (3d Cir. 1997); Hornsby v. United States Postal Service, 787 F.2d 87, 90 (3d Cir. 1986).

It appears that the alleged discriminatory acts which occurred outside the statutory period could be actionable under a continuing violation theory. See West v. Philadelphia Elec. Co., 45 F.3d 744, 754 (3d Cir. 1994); Bronze Shields, Inc. v. New Jersey Dept. of Civ. Serv., 667 F.2d 1074, 1081 (3d Cir. 1981), cert. denied, 458 U.S. 1122 (1982); Jewett v. International Tel.

and Tel. Corp., 653 F.2d 89, 91 (3d Cir.), cert. denied, 454 U.S. 969 (1981). Under this theory, the limitations period effectively runs from the date of the last occurrence which is part of a pattern of discrimination. See Miller v. Beneficial Mgt. Corp., 977 F.2d 834, 842 (3d Cir. 1991).

The continuing violation theory is particularly appropriate in a hostile work environment case since a hostile "environment" generally results from a series of acts over time. See West, 45 F.3d at 755-56. A plaintiff may prove a continuing violation by showing a series of related discriminatory acts directed against him. See Green v. Los Angeles County Superint. of Schools, 883 F.2d 1472, 1480 (9th Cir. 1989); Valentino v. United States Postal Service, 674 F.2d 56, 65 (D.C. Cir. 1982). A plaintiff must show that at least one illegal act occurred within the statutory period and that the harassment is "more than the occurrence of isolated or sporadic acts" but rather "a persistent on-going pattern." West, 45 F.3d at 754-55.

Plaintiff's allegations suggest frequent related discriminatory acts and comments. The court cannot conclude at this juncture that plaintiff clearly will be unable to show a persistent ongoing pattern of racial harassment culminating in demotion and discharge well into the statutory period.²

² Defendants do not contend that the scope of the EEOC investigation could not reasonably be expected to encompass the alleged racially motivated demotion and discharge, which occurred during the pendency of proceedings before the Commission. See Robinson v. Dalton, 107 F.3d 1018, 1025-26 (3d Cir. 1997).

Defendants argue that plaintiff has failed to state a claim for racial harassment because he "has not plead sufficient facts indicating his employer was ever advised of the alleged discrimination and given an opportunity to rectify the situation" and he thus failed to show "that the conduct creating the hostile environment should be imputed to the employer." Plaintiff alleges that defendant Gargiulo was his supervisor and had the power to control his conditions of employment, to discipline and to fire him. An employer is vicariously liable to a victimized employee for an actionable hostile work environment created by a supervisor with authority over that employee. Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2292-93 (1998).

When no tangible employment action has been taken, an employer may avoid liability by proving it acted reasonably to prevent and promptly correct harassing behavior and that the plaintiff unreasonably failed to avail himself of the preventive or corrective opportunities provided. Id. at 2293. As this is an affirmative defense, a complaint cannot be dismissed because the plaintiff does not anticipate and rebut it. Moreover, an employer has no defense against vicarious liability when, as alleged in the instant case, "the supervisor's harassment culminates in a tangible employment action such as discharge, demotion or undesirable reassignment." Id. See also Levendos v. Stern Entertainment, Inc., 909 F.2d 747, 751-52 (3d Cir. 1990);

Hudson v. Radnor Valley Country Club, 1996 WL 172054, at *4 (E.D. Pa. Apr. 11, 1996).

Defendants correctly argue that there is no respondeat superior liability under § 1983. A municipal defendant may be held liable only when a constitutional deprivation results from an official custom or policy. See Bd. of County Com'rs. of Bryan County, Okl. v. Brown, 117 S. Ct. 1382, 1388 (1997); Monell v. Department of Social Servs. of City of New York, 436 U.S. 658, 691-94 (1978); Montgomery v. De Simone, 1998 WL 721345, at *6 (3d Cir. Oct. 16, 1998). A "policy is made when a decisionmaker posses[ing] 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 . . . [are] so permanent and well-settled' as to virtually constitute law." Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990). While Mr. Gargiulo was not the Commissioner of the Department, it may be inferred from the face of the complaint that final decisionmaking authority to demote and fire subordinates had been delegated to him.

Moreover, a municipal defendant may be held liable under § 1983 on a failure to train theory if the plaintiff can ultimately "identify a failure to provide specific training that has a causal nexus with [his] injuries" and "demonstrate that the

absence of that specific training can reasonably be said to reflect a deliberate indifference to whether the alleged constitutional deprivations occurred." Reitz v. County of Bucks, 125 F.3d 139, 144 (3d Cir. 1997). Plaintiff alleges that the City "deliberately failed to adequately train, supervise, discipline, or otherwise direct Defendant Gargiulo concerning racial and employment discrimination, thereby causing [Gargiulo] to engage in the unlawful and illegal conduct." In view of plaintiff's allegations of persistent discriminatory conduct by Mr. Gargiulo and plaintiff's complaints, albeit to a union representative, the court cannot conclude beyond doubt at this juncture that plaintiff will be unable to sustain a failure to train or discipline claim.

Further, although defendants request a complete dismissal of plaintiff's complaint, they present no argument as to why the § 1983 claim against defendant Gargiulo should be dismissed. Plaintiff has pled a facially cognizable § 1983 claim against Mr. Gargiulo for the alleged racially motivated firing and racially discriminatory employment practices. See Forrester v. White, 846 F.2d 29, 32 (7th Cir. 1988); Poolaw v. City of Anadarko, 660 F.2d 459, 462 (10th Cir. 1981); Ware v. Curley, 934 F. Supp. 259, 263 (E.D. Mich. 1996); Palace v. Deaver, 838 F.

Supp. 1016, 1019 (E.D. Pa. 1993).³

For the foregoing reasons, defendants' motion will be denied. An appropriate order will be entered.

³ The limitations period for a parallel federal constitutional claim is not tolled by the pendency of an EEOC charge. Johnson v. Railway Express Agency, 421 U.S. 454, 466 (1975); Black v. Broward Employment and Training Admin., 846 F.2d 1311, 1313-14 (11th Cir. 1988); Carter v. District of Columbia, 14 F. Supp.2d 97, 102 (D.D.C. 1998); Linville v. State of Hawaii, 874 F. Supp. 1095, 1105 (D. Haw. 1994); Coleman v. O'Grady, 803 F. Supp. 226, 228 (N.D. Ill. 1992), aff'd, 19 F.3d 21 (7th Cir. 1994); Zangrillo v. Fashion Institute of Technology, 601 F. Supp. 1346, 1351 (S.D.N.Y. 1985). Plaintiff's demotion, the last discriminatory act for which he provides a specific date, occurred 32 months before he filed this action. Plaintiff suggests he was fired shortly thereafter and presumably the City has records which document the precise date. Unless the demotion preceded the termination by eight months or more, plaintiff's § 1983 claim would be barred by the two year statute of limitations. The statute of limitations, however, is an affirmative defense which defendants have not asserted in connection with the § 1983 claim.

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O R D E R

AND NOW, this day of November, 1998, upon
consideration of defendants' Motion to Dismiss (Doc. #8),
consistent with the accompanying memorandum, **IT IS HEREBY ORDERED**
that said Motion is **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.