

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

FRANCISCO SOSA, JR.	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION
	:	
v.	:	NO: 98-CV-6602
	:	
NATE FLOYD/AMERICAN BILTRITE	:	
INC.	:	
Defendants.	:	

GREEN, S.J.

APRIL 23, 1999

MEMORANDUM- ORDER

Presently before the Court is Defendants’ Motion to Dismiss, pursuant to Fed.R.Civ.P. 12(b)(6). For the following reasons, Defendant’s motion will be denied in part and granted in part.

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

Francisco Sosa Jr. began working for Defendant American Biltrite, Inc. in 1997. Defendant Nathaniel Floyd acted as his direct supervisor. During the course of his employment, Mr. Sosa alleges that Mr. Floyd, in his capacity as supervisor of the third shift at American Biltrite, Inc., routinely demonstrated racially biased behavior in favor of African-American employees. (Pl.’s Am. Compl. at 1). In support of this assertion, Mr. Sosa contends that African-American employees were permitted to take extended lunch and break periods, while other employees were disciplined for doing the same things. *Id.* Furthermore, Mr. Sosa claims that Nathaniel Floyd also made racially biased comments about his biracial children. (Pl.’s Am. Compl. at 2).

Mr. Sosa asserts that he reported this unfair treatment to Mrs. Bonnie Posnak, a personnel director for American Biltrite, Inc. According to Mr. Sosa, Nathaniel Floyd received reports of his complaints to Mrs. Posnak and Mr. Floyd subsequently promised to retaliate against Mr. Sosa for making these allegations of favoritism and racial bias. (Pl.'s Am. Compl. at 1).

According to Mr. Sosa's account of the events occurring after his complaints of racial bias, Nathaniel Floyd began his promised retaliation by causing Mr. Sosa's time card to be suspiciously removed from its proper place. As a result, Mr. Sosa was forced to sign in late for his shift which caused his attendance record to reflect a tardy arrival to work.

Similarly, on March 19, 1998, Mr. Sosa claims that he experienced a "passing out" episode while working that required immediate medical attention. (Pl.'s Am. Compl. at 1). Nathaniel Floyd, the supervisor on duty that night, refused to immediately contact emergency medical assistance to help Mr. Sosa. However, Mr. Floyd later allowed another employee to drive Mr. Sosa to the hospital in a company van. Id. Mr. Sosa was subsequently suspended from work for leaving the employment site to seek medical attention for this illness. During negotiations with the management of American Biltrite, Inc. and the Union representing Mr. Sosa, American Biltrite, Inc. proposed a settlement agreement to resolve the conflicts surrounding Mr. Sosa's departure from work and subsequent suspension resulting therefrom. (Pl.'s Amended Complaint at 1). Mr. Sosa rejected the settlement offer and subsequently resigned from American Biltrite, Inc. on May 7, 1998. (Pl.'s Amended Complaint at 1).

Mr. Sosa then filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC) on June 1, 1998 alleging that he was discriminated against because of his national origin. He later received a Right to Sue Letter on October 23, 1998.

Subsequently, Mr. Francisco Sosa Jr. filed a motion for leave to proceed in forma pauperis in this Court which was granted on January 21, 1999. On the same day, Mr. Sosa filed a pro se complaint bringing causes of action against Nate Floyd and American Bilrite, Inc. (Dkt. entry #5). Mr. Sosa also moved for appointment of counsel and this Court directed the Clerk of Court to attempt to appoint counsel from the employment discrimination panel. (Dkt. Entry #4).

Nate Floyd and American Bilrite, Inc. subsequently filed a motion to dismiss Mr. Sosa's claims pursuant to Fed.R.Civ.P. 12(b)(6). Mr. Sosa then filed a motion to extend the time for filing a response to the motion to dismiss for an additional thirty days and also submitted additional correspondence to the Court entitled "addendum." The Court construed the additional correspondence as a motion to amend the complaint and ordered the correspondence filed and docketed as an amendment to the Plaintiff's complaint. In addition, the Court granted Mr. Sosa an additional thirty days to respond to the motion to dismiss. To date, Mr. Sosa has not responded to the motion to dismiss.¹

II. DISCUSSION

A. Standard of Review

It is, of course, firmly established that in reviewing a Fed.R.Civ.P. 12(b)(6) motion, the Court must draw all reasonable inferences in the plaintiff's favor. See Schrob v. Catterson, 948 F.2d 1402, 1405 (3d Cir.1991). Just as a pleading must "be construed as to do substantial justice," a plaintiff generally need not explicitly allege the existence of every element

¹ In the absence of a timely response from an adverse party, a motion may be granted as uncontested, unless it is a motion for summary judgment. See Loc. R. Civ. P. 7.1(c). In the instant case, I decline to grant Defendant's motion as uncontested because the plaintiff is continuing with this action pro se while he awaits appointment of voluntary counsel from the District Court's employment discrimination panel.

in a cause of action if fair notice of the transaction is given and the complaint sets forth the material points necessary to sustain recovery. See Menkowitz v. Pottstown Memorial Medical Center et al., 154 F.3d 113, 124 (3d. Cir 1999). This is especially so if the material deficiencies in the complaint stem from nothing more than inartful pleading-- "the precise sort of pleading that may result from a pro se Plaintiff's unfamiliarity with the Federal Rules of Civil Procedure and other rules of law. See Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285)(finding that a pro se complaint, "however inartfully pleaded," must be held to "less stringent standards than formal pleadings drafted by lawyers" and can only be dismissed for failure to state a claim if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."). Simply put, the complaint will withstand a Fed.R.Civ.P. 12(b)(6) attack if the material facts as alleged, in addition to inferences drawn from those allegations, provide a basis for recovery. Id. at 125.

B. Claims of Racial and National Origin Discrimination

In the instant matter, the pro se Plaintiff alleges that he was the victim of discrimination while he was employed at American Biltrite, Inc. He filed a charge of discrimination with the EEOC, wherein he alleged that he was discriminated against, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, because of his Hispanic origin. He later received a Right to Sue Letter which he properly attached to his amended complaint.

The amended complaint alleges that Mr. Sosa is a Hispanic male who was employed by American Biltrite, Inc. for approximately one year. He carried out his duties as a packer for American Biltrite, Inc. until he resigned after perceived unfair treatment at the hands of his

immediate supervisor. Mr. Sosa asserts that this unfair treatment was motivated by discriminatory animus that ultimately caused him to terminate his employment due to fear of further retaliation against him.

To state a claim upon which relief can be granted in a racial and/or national origin discrimination case, brought pursuant to Title VII, a plaintiff must establish a prima facie case--essentially, that he or she is a member of a protected class and was qualified for an employment position, but that he or she was either not hired for that position or was fired from it "under circumstances that give rise to an inference of unlawful discrimination." Hampton v. Borough of Tinton Falls Police Dept. et al., 98 F.3d 107, 112 (3d. Cir. 1996)(citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 1094 (1981)). Thus, construing Mr. Sosa's pro se amended complaint liberally, as the Court must, the allegations therein satisfy the necessary criteria for stating a claim for racial and/or national origin discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et. seq.*

Therefore, the Defendants' Motion to Dismiss for failure to state a claim upon which relief can be granted will be denied as to the plaintiff's Title VII claims for racial and national origin discrimination.

C. Claims of Unlawful Retaliation

An employer is prohibited from discriminating against an employee who "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. §2000e-3(a). Before a plaintiff may file suit in federal court alleging discriminatory retaliation, however, he must exhaust all applicable administrative remedies by filing a charge with the appropriate state and/or federal agency. Trevino-Barton v.

Pittsburgh Nat'l Bank, 919 F.2d 874, 878-79 (3d Cir. 1990). In the instant case, Mr. Sosa filed a charge of discrimination with the EEOC alleging that the Defendants discriminated against him because he was Hispanic. However, the Plaintiff's EEOC charge of discrimination makes no reference to retaliation claims against American Biltrite, Inc. or Nathaniel Floyd. Therefore, Mr. Sosa has not satisfied the exhaustion of administrative remedies requirement of Title VII. Accordingly, to the extent that Plaintiff's amended complaint alleges charges of retaliation in violation of Title VII, those claims must be dismissed.

III. Conclusion

For the foregoing reasons, Defendants' motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) will be granted in part and denied in part. An appropriate order follows.

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

FRANCISCO SOSA, JR.	:	
Plaintiff,	:	
	:	CIVIL ACTION
v.	:	NO: 98-CV-6602
	:	
NATE FLOYD/AMERICAN BILTRITE	:	
INC.,	:	
Defendants.	:	

ORDER

AND NOW, this 22nd day of April 1999, upon consideration of Defendants' Motion to Dismiss, pursuant to Fed.R.Civ.P. 12(b)(6), IT IS HEREBY ORDERED that:

1. The Motion to Dismiss is DENIED as to Plaintiff's Title VII claims of racial and national origin discrimination; and
2. The Motion to Dismiss is GRANTED as to Plaintiff's Title VII claims of unlawful retaliation.

BY THE COURT,

CLIFFORD SCOTT GREEN, S.J.