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

ELIZABETH LONGSTRETH CARTER	:	CIVIL ACTION
	:	
v.	:	
	:	
PHILADELPHIA STOCK EXCHANGE	:	NO. 99-2455
and	:	
STOCK CLEARING COMPANY OF PENNSYLVANIA	:	
and	:	
PHILADELPHIA DEPOSITORY TRUST COMPANY	:	
and	:	
NICHOLAS GIORDANO	:	
ROBERT DONEY	:	
LOUIS BONATATIBUS	:	
BRUCE REEVES	:	
GILBERT ADDEO	:	
ANTHONY G. WARD	:	
JOHN EGAN	:	
TIM GUIHEEN	:	

MEMORANDUM

Ludwig, J. August 25, 1999

All defendants - Philadelphia Stock Exchange (Exchange), Stock Clearing Company of Philadelphia (SCOOP), Philadelphia Depository Trust Company (PHILADEP), Nicholas Giordano, Robert Doney, Louis Bonatatibus, Bruce Reeves, Gilbert Addeo, Anthony G. Ward, John Egan, and Tim Guiheen - move to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim. Fed. R. Civ. P. 12(b)(1), (6).[1] Jurisdiction is federal question and

[1]Defendants have moved in part to dismiss for lack of subject matter jurisdiction based on plaintiff's failure to exhaust administrative remedies. Fed. R. Civ. P. 12(b)(1). The complaint may be dismissed for lack of subject matter jurisdiction "when on the face of the pleadings it is clear that administrative remedies have not been exhausted." Robinson v. Dalton, 107 F.3d 1018, 1022 (3d

supplemental. 28 U.S.C. §§ 1331, 1367.

Plaintiff Elizabeth Longstreth Carter was employed by defendant Exchange from September 29, 1996 until December 4, 1996 when she was terminated. Compl. ¶ 7. Plaintiff sues for disability[2] and sex discrimination, including unequal pay and harassment. Id. ¶¶ 25-30. The complaint also alleges termination in retaliation for complaints to her supervisors and further retaliation that resulted in her being discharged from two subsequent employment positions. Id. ¶ 30. The action was filed under the American with Disabilities Act (ADA), Title VII, and the Pennsylvania Human Relations Act (PHRA), and there are supplemental state claims for intentional infliction of emotional distress and intentional interference with contractual relationships.

Defendants move to dismiss all five counts in whole or in part.[3] Their

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Cir. 1997). Alternatively, questions as to the timeliness of exhaustion are properly treated under Rule 12(b)(6). Id.

Under Rule 12(b)(1), "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." Id., at 1021 (quoting Mortenson v. First Federal Sav. and Loan Assn., 549 F.2d 884, 891 (3d Cir. 1977)). Under Rule 12(b)(6), the allegations of the complaint are accepted as true, all reasonable inferences are drawn in the light most favorable to the plaintiff, and dismissal is appropriate only if it appears that plaintiff could prove no set of facts that would entitle her to relief. See Weiner v. Quaker Oats Co., 129 F.3d 310, 315 (3d Cir. 1997).

[2]According to the complaint, plaintiff "has physical disabilities and has been treated medically for approximately ten years for hypersomnia, pituitary micradenoma, pineal cyst, attention deficit disorder, and hyperthyroidism." Compl. ¶ 8.

[3]Defendants Gilbert Addeo and Anthony G. Ward each filed separate motions incorporating by reference and asserting similar arguments to those made in the motion filed by remaining defendants. Addeo mot. at 2; Ward mot. at 2.

motion will be granted in part and denied in part.

1. American with Disabilities Act (Count I) - Denied.[4]

Failure to exhaust administrative remedies with respect to the disability claim is asserted because plaintiff's original EEOC charge referred only to sex discrimination and retaliation. "The relevant test in determining whether [defendant] was required to exhaust her administrative remedies [ ] is whether the acts alleged in the subsequent . . . suit are fairly within the scope of the prior EEOC complaint, or the investigation arising therefrom." Antol v. Perry, 82 F.3d 1291, 1295 (3d Cir. 1996) (quoting Waiters v. Parsons, 729 F.2d 233 (3d Cir. 1984)). Although disability discrimination was not part of the EEOC charge filed with the EEOC on July 31, 1997, plaintiff's ADA intake questionnaire is dated March 27, 1998 - almost a year before the right to sue letter was issued on March 17, 1999.[5] This questionnaire detailed her claims of disability discrimination and

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Accordingly, all three motions will be treated together in this memorandum.

[4]Claims under the ADA (Count I) and Title VII (Count II) appear to have been confined to the institutional defendants. Compl. ¶¶ 35, 42. Nonetheless, plaintiff concedes that individuals may not be held liable under either Act, resp. ¶ C, and to the extent those claims may be read to be against the individual defendants, they will be dismissed. See Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061, 1078 (3d Cir. 1996) (no individual liability under Title VII); Cohen v. Temple Physicians, Inc., 11 F. Supp. 2d 733, 737 (E.D. Pa. 1998) (same under ADA).

[5]Both defendants and plaintiff have attached to their briefs exhibits related to the EEOC charge. These documents may be considered without converting defendants' motion into one for summary judgment under Fed. R. Civ. P. 56. See Dixon v. Philadelphia Housing Auth., 43 F. Supp. 2d 543, 544 (E.D. Pa. 1999) (the EEOC complaint attached to defendant's motion may be considered under Rule 12(b)(6) because "a court may consider an undisputedly authentic document that a defendant attaches to a motion to dismiss if the plaintiff's claims are based on the document") (quoting Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.,

appears to have been within the scope of a reasonable investigation by the EEOC.[6]

2. Pennsylvania Human Relations Act (Count III) - Denied as to retaliation against all defendants except for John Egan, as to whom it will be granted.

The following grounds are asserted for dismissing plaintiff's PHRA claim. The first is failure to exhaust the charge of discrimination with the Pennsylvania Human Relations Committee (PHRC), as required before instituting a PHRA claim.

However, the documents submitted to the EEOC demonstrate that plaintiff did request cross-filing of her charge both in the cover letter attached to the EEOC charge and on the first page of the charge itself, and also on an official form used by the EEOC for requests for dual-filing. Resp. ex. A and D. Although there is no showing that the charge was transmitted to the PHRC, the failure to do so is subject to equitable tolling.[7] Moreover, one year passed following the filing of

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998 F.2d 1192, 1196 (3d Cir. 1993)); Sunquest Info. Systems, Inc. v. Dean Witter Reynolds, Inc., 40 F. Supp. 2d 644, 649 (E.D. Pa. 1999) ("[A] 'document integral to or explicitly relied upon in the complaint' may be considered 'without converting the motion [to dismiss] into one for summary judgment.") (citations omitted).

[6]It should be noted that the claim number of the original charge, no. 170971798, is handwritten at the top of the ADA questionnaire. Whether written in by plaintiff or an EEOC employee, it supports an inference that the EEOC was aware of the questionnaire's relationship to the July 1997 charge and therefore included it as part of its investigation.

[7]See Woodson v. Scott Paper Co., 109 F.3d 913, 926 n.12 (3d Cir. 1997) (if the EEOC transmits the administrative charge to the PHRC, the filing requirements of the PHRA have been satisfied); Brennan v. Nat'l Telephone Directory Corp., 881 F. Supp. 986, 998 (E.D. Pa. 1995) (when cross-filing did not occur for reasons beyond plaintiff's control, tolling is appropriate because plaintiff has filed an administrative charge with the EEOC and indicated that the matter should be filed with the PHRC); Fosburg v. Lehigh Univ., 1999 WL 124458, at *8 (E.D. Pa. March 4, 1999) ("Plaintiff's timely request that his charge be filed with the PHRC and his justified reliance on the worksharing agreement equitably tolled the timing requirements of the PHRA.").

plaintiff's administrative complaint as required before judicial remedies may be resorted to under the PHRA. 4 Pa. Const. Stat. Ann. § 962(c)(1); Parsons v. City of Philadelphia Coordinating Office of Drug and Alcohol Abuse Programs, 833 F. Supp. 1108, 1112 (E.D. Pa. 1993). Accordingly, the exhaustion requirement for the PHRA claim appears to have been satisfied.[8]

The next dismissal ground is that because the administrative charge was not filed within 180 days of the alleged discrimination, it is time-barred. See 43 Pa. Const. Stat. Ann. § 959(h) ("Any complaint filed pursuant to this section must be so filed within 180 days after the alleged act of discrimination . . . ."). The administrative claim was filed on July 31, 1997. Plaintiff's termination was on December 4, 1996. Compl. ¶ 7. Plaintiff contends that because acts of discrimination - specifically retaliation - occurred after her termination from defendants' employment, there was a continuing violation - beyond the termination date.

"The continuing violation theory allows a 'plaintiff [to] pursue a. . . claim for discriminatory conduct that began prior to the filing period if [she] can demonstrate that the act is part of an ongoing practice or pattern of discrimination of the defendant[s].'" Rush v. Scott Specialty Gases, Inc.. 113 F.3d 476, 481 (3d Cir. 1997) (quoting West v. Philadelphia Elec. Co., 45 F.3d 744, 754 (3d Cir.

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[8]As noted, the charge of disability discrimination was made several months later in an ADA intake questionnaire, but it is unclear whether plaintiff requested this form to be cross-filed with the PHRC. So, too, is whether the ADA questionnaire was forwarded to the PHRC as part of the administrative file. A determination of the scope of the investigation by the PHRC - specifically whether it included disability discrimination claims - will not be made at this stage of the pleadings.

1995)). To be a continuing violation at least one discriminatory act must have occurred within the requisite time period and the discrimination must take the form of more than an isolated or sporadic act and instead be a continuing pattern. See Rush, 113 F.3d at 481.

Although the time period of the continuing violation has have not been set forth in the complaint, the EEOC charge avers that one of the subsequent retaliatory discharges occurred in April 1997 - within 180 days before the charge was filed. On this motion, reasonable inferences must be drawn from the complaint in the light most favorable to plaintiff. So viewed, at least one act of retaliation may be said to have occurred within the prescribed filing period.

In determining whether the discrimination was continuous, three factors must be considered: (1) whether the alleged acts involve the same type of discrimination; (2) whether the acts are frequent and recurring as opposed to isolated; and (3) whether the act has a degree of permanence such that it triggers the employee's awareness of and duty to assert his or her rights. See Rush, 113 F.3d at 482 (citing Berry v. Bd. of Supervisors of Louisiana State Univ., 715 F.2d 971, 981 (5th Cir. 1983)).

Applying these factors, plaintiff's claims of sexual harassment and unequal pay cannot be saved by the continuing violation theory. The complaint sets forth no allegations of harassment after the date of termination to support a prolongation of this type of discrimination. See West, 45 F.3d at 756 (a discrete event such as a lost job triggers a duty of plaintiff to assert her rights). However, inasmuch as the retaliation is alleged to have continued after that date, the

continuing violation theory may be applied to toll the statute of limitations as to that claim.[9] For this reason, the retaliation claim under the PHRA will not be dismissed.

The last reason given for dismissal is that the PHRA claims cannot proceed against the individual defendants in that (1) they were not named in the administrative complaint, and (2) there is no individual liability under the PHRA.

A suit is not barred against defendants named in the body but not in the caption of plaintiff's administrative charge: Such defendants have "received every indication that their conduct was being formally reviewed." Dreisbach v. Cummins Diesel Engines, Inc., 848 F. Supp. 593, 596 (E.D. Pa. 1994) (quoting Kinally v. Bell of Pennsylvania, 748 F. Supp. 1136, 1140 (E.D. Pa. 1990)). All of the individual defendants except for Egan were named in either the original EEOC charge or the ADA questionnaire. Consequently, these defendants were includable in the administrative complaint, and these claims may be regarded as exhausted.

Furthermore, the PHRA recognizes claims against individuals who have aided and abetted the employer's unlawful discriminatory practices. See 43 Pa. Const. Stat. Ann. § 955(e) (forbids "any person, employer, employment agency, labor organization or employee, to aid, abet, incite, compel or coerce the doing of

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[9]Plaintiff need not rely on the continuing violation theory to assert her rights as to later acts of retaliation that occurred within the 180-day filing period, such as termination from subsequent employment positions. However, in order to present evidence of acts outside the time period as part of her claim of retaliation, plaintiff must demonstrate a continuous pattern of retaliatory acts such that "it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct." Rush, 113 F.3d at 482.

any act declared by this section to be an unlawful discriminatory practice"); Dici v. Commonwealth of Pa., 91 F.3d 542, 552 (3d Cir. 1996); Davis v. Levy, Angstreich, Finney, Baldnate, Rubenstein & Coren, 20 F. Supp. 2d 885, 887 ("[A]n individual supervisory employee can be held liable under an aiding and abetting/accomplice liability theory pursuant to § 955(e) for his own direct acts of discrimination or for his failure to take action to prevent further discrimination by an employee under supervision.") (citations omitted). All individual defendants named in the administrative complaint can be categorized as supervisory employees. The PHRA claim for retaliation against them survives at this point because plaintiff may be able to establish that their discriminatory conduct had the effect of aiding and abetting their employer's allegedly unlawful retaliatory conduct.

3. Intentional Infliction of Emotional Distress (Count IV) - Denied.

Three bases are advanced to dismiss this claim: (1) the allegations do not constitute extreme and outrageous conduct; (2) the claim is barred by the two-year statute of limitations; and (3) it is barred by the Worker's Compensation Act. These arguments are rejected.

"[I]t is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress." Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 940 (3d Cir. 1997) (quoting Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988)). However, retaliation is the "extra factor" that may support an intentional infliction claim in the workplace. Andrews

v. City of Philadelphia, 895 F.2d 1469, 1487 (3d Cir. 1990). Here, the complaint avers acts of retaliation in addition to sexual and disability-based harassment and therefore sufficiently pleads the elements of intentional infliction of emotional distress.

Pennsylvania law imposes a two-year statute of limitations on this cause of action. 42 Pa. Const. Stat. Ann. § 5524(7); Osei-Afriyie v. Medical College of Pa., 937 F.2d 876, 884 (3d Cir. 1991). The question is whether the cause of action accrued at the time of termination on December 4, 1996, or whether it is also subject to the continuing violation theory given the alleged retaliation that occurred after termination.

The allegation of continuing tortious conduct - in this instance, retaliation - is sufficient to survive a motion to dismiss. See Linker v. Custom-Bilt Mach., Inc., 594 F. SUPP. 894, 903 (E.D. Pa. 1984) (claim could not be dismissed as time-barred when the wrongful conduct was alleged to have been continuing); Jacobson v. Community Med. Ctr., 1992 WL 398451, at * 6 (M.D. Pa. March 18, 1992) (motion to dismiss intentional infliction of emotional distress claim denied where averment of continuing violation); cf. Dellape v. Murray, ___, Pa. Cmwlth. ___, ___, 651 A.2d 638, 640 (1994) (continuing violation theory does not apply when the "alleged tort . . . is one that arises from completed conduct that caused continuing harm."); see also Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.1 (3d Cir. 1994) (affirmative defense of statute of limitations can be raised in Rule 12b(6) motion to dismiss only "where the complaint facially shows noncompliance with the limitations period and the affirmative defense clearly

appears on the face of the pleading").

Moreover, the Pennsylvania Worker's Compensation Act is not a good defense. The Act "is the exclusive remedy available to employees against employers for work-related injuries." Winterberg v. Transportation Insurance Co., 72 F.3d 318, 322 (3d Cir. 1995). However, it does not extend to torts "caused by an act of a third person intended to injure the employee because of reasons personal to him, and not directed against him as an employee or because of his employment." 77 Pa. Const. Stat. Ann. § 411(1). This exception has been applied to claims for intentional infliction of emotional distress arising from discriminatory harassment in the workplace. See Price v. Philadelphia Elec. Co., 790 F. Supp. 97, 100 (E.D. Pa. 1992). Such conduct may be "personal in nature and not part of the proper employer/employee relationship." Gruver v. Ezon Products, Inc., 763 F. Supp. 772, 775 (M.D. Pa. 1991) (quoting Schweitzer v. Rockwell Int'l, 402 Pa. Super. 34, 50, 586 A.2d 383, 391 (1990)).[10]

4. Intentional Interference with Contractual Relations (Count V) - Denied.

The elements of this claim are: "(1) the existence of a contractual relationship; (2) an intent on the part of the defendant to harm the plaintiff by interfering with that contractual relationship; (3) the absence of a privilege or justification for such interference; and (4) damages resulting from the defendant's

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[10] Although our Court of Appeals has expressed skepticism as to whether a sexual harassment claim may fall under the personal animosity exception, at this point it cannot be determined that the alleged acts directed at plaintiff would be preempted. See Durham Life Ins. Co. v. Evans, 166 F.3d 139, 160-61 (3d Cir. 1999) ("Because [sexual harassment] is like other workplace hazards, we suspect that Pennsylvania would find [intentional infliction of emotional distress] claims based on this kind of harassment to be preempted.").

conduct." Beidleman v. The Stroh Brewery Co., ___ F.3d ___, ___ (3d Cir. 1999).

As defendants point out, for this claim to succeed, there must have been a contractual and not simply an at-will employment relationship between plaintiff and her subsequent employers. See Hennessy v. Santiago, ___, Pa. Super. ___, ___, 708 A.2d 1269, 1279 (1998) ("An action for intentional interference with performance of a contract in the employment context applies only to interference with a prospective employment relationship, whether at-will or not, not a presently existing at-will employment relationship."); Parvensky-Barwell v. County of Chester, 1999 WL 213371, at *8 (E.D. Pa. April 13, 1999) (no action for interference with an at-will employment relationship). Here, the complaint alleges that defendants' conduct interfered with her "contractual employment relations" with Janney Montgomery Scott, Inc. and Dean Witter, Inc. by causing her to be terminated by those companies. Compl. ¶¶ 30D, 56-57. That averment is a sufficiently pleaded predicate for this claim.

In summary, the following claims will survive: the ADA and Title VII claims (Counts I and II) against defendants Exchange, SCOOP, and PHILADEP; the PHRA claim for retaliation (Count III) against defendants Exchange, SCOOP, PHILADEP, Doney, Bonatatibus, Reeves, Addeo, and Ward; intentional infliction of emotional distress (Count IV); and intentional interference with contractual relationships (Count V).

Edmund V. Ludwig, J.

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ANTHONY G. WARD	:	
JOHN EGAN	:	
TIM GUIHEEN	:	

ORDER

AND NOW, this 25th day of August, 1999, the motion to dismiss of defendants Philadelphia Stock Exchange (Exchange), Stock Clearing Company of Philadelphia (SCOOP), Philadelphia Depository Trust Company (PHILADEP), Nicholas Giordano, Robert Doney, Louis Bonatatibus, Bruce Reeves, Gilbert Addeo, Anthony G. Ward, John Egan, and Tim Guiheen is granted in part and denied in part, Fed. R. Civ. P. 12(b)(1), (6), as follows:

1. Americans with Disabilities Act, 29 U.S.C. §§ 1211, et seq. (Count I) - granted as to the individual defendants;

2. Title VII, 42 U.S.C. § 2000e-5 (Count II) - granted as to the individual defendants;

3. Pennsylvania Human Relations Act, 43 Pa. Const. Stat. Ann. § 955 (Count III) - denied as to claims for retaliation against all defendants except for John Egan;

4. Intentional infliction of emotional distress (Count IV) - denied;

5. Intentional interference with contractual relationships (Count V) - denied.

A memorandum accompanies this order.

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Edmund V. Ludwig, J.