

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

DENISE E. YOUNG : CIVIL ACTION
 :
 v. :
 :
 VISITING NURSES ASS'N, :
 MARIANNE CARROLL : NO. 98-6290

MEMORANDUM ORDER

Plaintiff has asserted claims for age and race discrimination, retaliation and breach of contract. Presently before the court is defendants' Motion to Dismiss insufficiency of service of process on defendant Carroll and for failure to state a cognizable breach of contract claim.

Plaintiff has been employed by defendant Vising Nurses Association ("VNA") as a community health nurse since September 1989. VNA issued job postings in 1997 for a full time Pediatrics Continuous Care Field Supervisor. Defendant Carroll, a white woman, was Director of Special Needs Pediatrics and plaintiff's supervisor. She was the selecting official for the position of Pediatrics Continuous Care Field Supervisor. Ms. Carroll did not interview or select plaintiff for the position. Ms. Carroll hired Carol Robinson, a white woman approximately eight years younger than plaintiff, for the position.

Plaintiff filed her complaint on December 1, 1998. Her claims are essentially predicated on defendants' failure to promote her to the position of Pediatrics Continuous Care Field

Supervisor. She alleges, inter alia, that she entered into a contract to work for VNA in exchange for a discrimination free place of employment with benefits based upon its policy, rules and practices as incorporated in written and oral agreements. She alleges that VNA breached this contract by failing "to adhere to its own policy, rules and practices especially with respect to promotions, recruitment and hiring."

Plaintiff effected service on VNA on March 30, 1999, the last of the 120 days provided for service. See Fed. R. Civ. P. 4(m). In her response to the motion to dismiss, plaintiff requested an extension to May 31, 1999 to serve Ms. Carroll and effected service on her on May 20, 1999.

If good cause exists for an extension for service of process, one should be granted. See Petrucci v. Bohringer & Ratzinger, 46 F.3d 1298, 1305 (3d Cir. 1995); Suegart v. United States Customs Service, 180 F.R.D. 276, 278 (E.D. Pa. 1998). If good cause is not shown, the court in its discretion may dismiss the case without prejudice or extend time for service. See Petrucci, 46 F.3d at 1305; Suegart, 180 F.R.D. at 279.

Plaintiff attempted unsuccessfully to serve Ms. Carroll at a former place of employment shortly before the expiration of the service period. Plaintiff does not detail any other efforts, let alone diligent efforts, timely to locate and serve Ms. Carroll. Plaintiff does not explain why the steps she took successfully to

serve Ms. Carroll on May 20th could not have been undertaken earlier. Plaintiff has not demonstrated good cause for an extension. Nevertheless, as Ms. Carroll was in fact served shortly after the deadline and has not demonstrated any resulting prejudice in her ability to defend, the requested extension will be granted. See Suegart, 180 F.R.D. at 280 (E.D. Pa. 1998)(denying motion to dismiss and granting an extension of time to serve defendant in absence of showing that ability to defend was prejudiced); Harley v. City of Philadelphia, 1997 WL 363884, *2 (E.D. Pa. June 12, 1997)(denying motion to dismiss for insufficiency of service of process where defendant did not show prejudice).

The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of a complaint. See Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). In deciding such a motion, 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. See Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). Dismissal of a claim is appropriate only when it clearly appears that the plaintiff can prove no set of facts which would entitle him to relief. See Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984); Robb v. Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984).

Defendants contend that their only contractual relationship with plaintiff is based on a collective bargaining agreement ("CBA") between VNA and the National Union of Hospital and Health Care Employees District 1199C, plaintiff's exclusive bargaining unit. Defendants attach the CBA as an exhibit to their motion. Defendants argue that because of this agreement, plaintiff's state law contract claim is preempted by the Labor Management Relations Act. See 29 U.S.C. §185.

In deciding a motion to dismiss, a court considers the allegations in the complaint, any exhibits appended to the complaint and matters of public record. Pension Benefit Gar. Corp. v. White Consol.. Incus., 868 F.2d 1192, 1196 (3d Cir. 1993); See J/H Real Estate Inc. v. Abramson, 901 F. Supp. 952, 955 (E.D. Pa. 1995). A court may also consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claim is based on the document. Pension Benefit, 868 F.2d at 1196; See J/H Real Estate, 901 F. Supp. at 955.

Plaintiff, however, makes no reference to the CBA in her complaint and none of her claims as pled are predicated on that agreement. The court thus cannot rely on the CBA in deciding the motion to dismiss. See Childs v. Meadowlands Basketball Asscs., 954 F. Supp. 994, 996-97 (D.N.J. 1997)(court denied motion to dismiss plaintiff's state law contract claims on

LMRA preemption grounds where collective bargaining agreement was not pled or appended to the complaint). See also Silfa v. Meridian Bank, 1999 WL 199851, *6 (E.D. Pa. April 8, 1999) (court will not examine documents attached to defendant's motion to dismiss which are not referenced in plaintiff's complaint); Fosburg v. Lehigh Univ., 1999 WL 124458, *2 (E.D. Pa. March 4, 1999)(court cannot consider defendant's exhibits where they were not referenced in plaintiff's complaint); J/H Real Estate, 901 F. Supp. at 955 (court may not consider documents submitted by defendant with motion to dismiss which were not referenced or relied upon by plaintiff in the complaint).

To plead a proper claim for breach of contract under Pennsylvania law, a plaintiff must allege: (1) the existence of a contract to which he and the defendants were a party; (2) the contract's essential terms; (3) breach of the contract; and, (4) damages. See, e.g. Rototherm Corp. v. Penn Linen & Uniform Serv., Inc., 1997 WL 419627, *12 (E.D. Pa. July 3, 1997). Plaintiff has alleged the essential elements of a breach of contract claim. It thus cannot be said from the face of the complaint and other materials properly considered that plaintiff clearly can prove no set of facts in support of her contract claim which could entitle her to relief. In so concluding, the court does not foreclose defendants' preemption argument. See In re Crown Am. Realty Trust Sec. Litig., 1999 WL 529581, *6 (W.D.

Pa. July 21, 1999)(noting that although court cannot consider them on motion to dismiss, documents defendants provided with their motion may be highly relevant on summary judgment).

ACCORDINGLY, this day of November, 1999, upon consideration of defendants' Motion to Dismiss (Doc. #6) and plaintiff's response including her request for a de novo extension of time to May 31, 1999 to effect service of process on defendant Carroll, **IT IS HEREBY ORDERED** that the request for an extension is **GRANTED** and the Motion to Dismiss is **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.