

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

GENE KUPER : CIVIL ACTION  
v. :  
COLONIAL PENN INSURANCE COMPANY, :  
et al. : NO. 99-172

MEMORANDUM AND ORDER

BECHTLE, J. May , 1999

Presently before the court is defendants Colonial Penn Insurance Company's ("Colonial Penn"), Ted Dezzi's ("Dezzi") and Kathryn McMaster's ("McMaster") (collectively "Defendants") motion to dismiss and plaintiff Gene Kuper's ("Kuper") response thereto. For the reasons set forth below, the court will grant the motion in part and deny the motion in part.

**I. INTRODUCTION**

On November 30, 1998, Kuper filed a civil action under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, et seq. and the Pennsylvania Human Relations Act ("PHRA"), Pa. Stat. Ann. tit. 43, §§ 955-63, alleging discrimination based on religion and ethnicity.<sup>1</sup> The Complaint also alleges claims for intentional infliction of emotional distress and negligent or malicious breach of duty under Pennsylvania common law. On February 22, 1999, Defendants filed the instant motion to

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1. The Complaint was initially filed in state court. On January 13, 1999, Defendants removed the action to this court.

dismiss. For the reasons set forth below, the court will grant Defendants' motion in part and deny the motion in part.

## II. LEGAL STANDARD

For the purposes of a motion to dismiss, the court must accept as true all well-pleaded allegations of fact in a plaintiff's complaint, construe the complaint in the light most favorable to the plaintiff, and determine whether "under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665-66 (3d Cir. 1988). The court, however, need not accept as true legal conclusions or unwarranted factual inferences. Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997) (citations omitted). A complaint is properly dismissed only 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." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Generally, courts may not look beyond the complaint in deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). However,

a court may properly look beyond the complaint to matters of public record including court files, records and letters of official actions or decisions of government agencies and administrative bodies, documents referenced and incorporated in the complaint and documents referenced in the complaint or essential to a plaintiff's claim which are attached to a defendant's motion.

Arizmendi v Lawson, 914 F. Supp. 1157, 1160-61 (E.D. Pa. 1996) (citations omitted) (considering EEOC right to sue letter

attached to defendant's motion to dismiss); see also Gallo v. Board of Regents of Univ. of California, 916 F. Supp. 1005, 1007 (S.D. Cal. 1995) (considering EEOC right to sue letter referenced in complaint). Accordingly, the court will consider various documents generated or maintained by the Equal Employment Opportunity Commission ("EEOC") in the course of its investigation and processing of Kuper's discrimination charge.

### **III. DISCUSSION**

Defendants seek dismissal of all four counts alleged in Kuper's Complaint. In his response to Defendants' motion, Kuper states that he withdraws his claim under the PHRA and his claim for breach of duty. (Pl.'s Opp. at 16-17, 21.) Additionally, Kuper states that he is withdrawing his claim of intentional infliction of emotional distress against Colonial Penn. Id. at 17. Accordingly, the court will only address Defendants' motion to dismiss Kuper's claim under Title VII and his claim of intentional infliction of emotional distress against Dezzi and McMaster.<sup>2</sup>

#### **1. Title VII Claim**

Before a plaintiff may commence a civil action under Title VII, the plaintiff must file a charge with the EEOC alleging that the employer engaged in a discriminatory employment practice.

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2. The court has jurisdiction over Kuper's Title VII claim under 28 U.S.C. § 1331 and supplemental jurisdiction over Kuper's state law claims under 28 U.S.C. § 1367.

Trevino-Barton v. Pittsburgh Nat'l Bank, 919 F.2d 874, 878 (3d Cir. 1990) (citations omitted). Charges filed under Title VII "shall be in writing under oath or affirmation and shall contain such information and be in such form as the commission requires." 42 U.S.C. § 2000e-5(b). The verification requirement protects an employer from having to respond to frivolous claims. Balazs v. Liebenthal, 32 F.3d 151, 157 (4th Cir. 1994). Defendants argue that Kuper's Title VII claim should be dismissed because the charge he filed with the EEOC was not filed under "oath or affirmation" as required by Title VII.

Kuper alleges that he dual-filed his charge of ethnic and religious discrimination with the Pennsylvania Human Relations Commission and the EEOC on November 20, 1997. (Compl. ¶ 8.) That document was not signed or otherwise verified under oath or affirmation. (Pl.'s Opp., Ex. 2a.) The EEOC assigned a charge number to Kuper's claim and on January 14, 1998 sent Colonial Penn a "Notice of Charge of Discrimination." (Pl.'s Opp., Ex. 4a.) The notice indicates that Kuper filed a claim under Title VII alleging discrimination based on religion and national origin. On January 16, 1998, the EEOC sent Kuper's attorney four questionnaires. (Pl.'s Opp., Ex. 5a.) The EEOC received the questionnaires from Kuper on February 9, 1998. (Pl.'s Opp., Ex. 1a.) One of the questionnaires is entitled "Conduct-Related Discipline Questionnaire." (Pl.'s Opp., Exs. 11a-16a.) That questionnaire sets forth Kuper's allegations that he was treated differently than other Colonial Penn employees because of his

ethnicity and religion. Id. Additionally, that questionnaire is signed by Kuper under penalty of perjury. Id. On March 10, 1998, the EEOC sent a copy of Kuper's Charge of Discrimination to Colonial Penn with a request for a "Position Statement." (Pl.'s Opp., Exs. 22a-23a.) On July 7, 1998, Colonial Penn submitted a position statement to the EEOC in response to Kuper's allegations. (Pl.'s Opp., Ex. 31a.) On July 28, 1998, Kuper's counsel submitted a rebuttal to Colonial Penn's position statement. (Pl.'s Opp., Ex. 35a.) On August 31, 1998, the EEOC issued a "Right to Sue Letter" to Kuper in response to his charge. (Compl. ¶ 9.)

Colonial Penn primarily relies on Danley v. Book-of-the-Month Club, Inc., 921 F. Supp. 1352 (M.D. Pa. 1996), aff'd, 107 F.3d 861 (3d Cir. 1997) (table), in seeking dismissal of Kuper's Title VII claim. In Danley, the plaintiff sent correspondence to the EEOC indicating that she wished to file a formal charge against the defendant. Id. at 1353. The plaintiff did not submit any additional documentation and the EEOC did not take any action until it issued a right to sue letter. Id. The court held that "a private litigant cannot maintain a Title VII claim where his or her EEOC charge was not verified prior to the EEOC's issuance of a right to sue letter." Id. at 1354. See also Balazs v. Liebhenthal, 32 F.3d 151 (4th Cir. 1994) (holding same).

Kuper argues that his failure to sign the Charge of Discrimination under oath or affirmation as required by Title VII should not result in dismissal of his Title VII claims under the

circumstances of this case.<sup>3</sup> Kuper correctly asserts that if the charge is not initially filed under oath or affirmation it may be amended or verified any time before the EEOC issues a right to sue letter. Balazs, 32 F.3d at 157 (stating that amendment or verification may occur prior to EEOC's issuance of right to sue letter); Philbin v. General Elec. Capital Auto Lease, Inc., 929 F.2d 321, 322-25 (7th Cir. 1991) (allowing same); Peterson v. City of Wichita, 888 F.2d 1307, 1309 (10th Cir. 1989) (stating same); Danley, 921 F. Supp. at 1353-54 (same). In this case, the court must decide whether Kuper's signing of the Conduct-Related Discipline Questionnaire, under penalty of perjury, constitutes an amendment or verification for purposes of satisfying Title VII's requirement that all charges shall be filed under oath or affirmation.<sup>4</sup> The court holds that Kuper's signing of the Conduct-Related Discipline Questionnaire serves as a verification of his charge because the purpose behind the oath

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3. Kuper's charge complies with EEOC requirements in all other aspects and Defendants do not challenge any other aspect of the charge. See 29 C.F.R. § 1601.12 (stating "a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of").

4. The court notes that courts have treated questionnaires and letters as satisfying the charge requirement for statute of limitations purposes. See Philbin, 929 F.2d at 322-25 (holding that filing questionnaire not signed under oath or affirmation satisfies statutory time limit requirement); Peterson v. City of Wichita, 888 F.2d 1307, 1308-09 (10th Cir. 1989) (holding that unverified complaint constitutes timely charge); Roche v. Supervalu, Inc., No. 97-753, 1999 WL 46226, \*6 (E.D. Pa. Jan. 15, 1999) (finding that questionnaire constitutes timely charge).

or affirmation requirement was fulfilled under the circumstances of this case.

The underlying purpose of protecting a defendant against the filing of frivolous claims is satisfied in this case. See Danley, 921 F. Supp. at 1354 (stating that verification requirement safeguards employers from defending frivolous charges) (citation omitted). The fact that the Conduct-Related Discipline Questionnaire, which sufficiently describes the allegations contained in the charge, is signed under penalty of perjury gives Colonial Penn protection against defending a frivolous claim. See Philbin, 929 F.2d at 324 (signing of questionnaire provides affirmation of allegations in questionnaire). This is particularly compelling where, as here, the Conduct-Related Discipline Questionnaire was signed before Colonial Penn was asked to defend against the charge.<sup>5</sup> See Danley, 921 F. Supp. at 1354 (finding employer unfairly prejudiced who was not notified of charge until EEOC issued right to sue letter). Additionally, in this case, unlike the defendants in Danley, Colonial Penn received notice of the charges being asserted against it before the EEOC issued a right to sue letter. On March 10, 1998, the EEOC sent Colonial Penn a notice of the charge and attached a copy of the charge filed by

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5. Colonial Penn argues that because all the questionnaires submitted by Kuper are not signed the court should not allow the Conduct-Related Discipline Questionnaire to serve as verification of the charge. The court disagrees. The Conduct-Related Discipline Questionnaire sufficiently describes the allegations contained in the charge and is signed under penalty of perjury.

Kuper. That notice informed Colonial Penn that Kuper filed the charge and was alleging discrimination based on religion and national origin. The attached copy of the charge provided further detail of the alleged discrimination. This notice provided Colonial Penn with an opportunity to defend the claim at the administrative level. Under the circumstances of this case, the court finds that a questionnaire signed under penalty of perjury which sufficiently incorporates the allegations contained in the charge and is filed after the charge, but before the EEOC issues a right to sue letter, serves as a verification that satisfies Title VII's oath or affirmation requirement. Accordingly, the court will not dismiss Kuper's Title VII claim.

Although the court finds that the administrative requirements were satisfied before Kuper filed the instant action, the court will require Kuper to state under oath, through affidavit, that the statements contained in the charge he filed on November 20, 1997 are true to the best of his knowledge, information and belief. The court is not imposing this requirement in lieu of the administrative requirements. Rather, the court believes that Defendants are entitled to such a statement for purposes of this civil action and its related proceedings.

**2. Intentional Infliction of Emotional Distress**

In Count III of his Complaint, Kuper alleges a claim of intentional infliction of emotional distress. As mentioned above, Kuper is withdrawing this claim against Colonial Penn and

is only pursuing it against defendants McMaster and Dezzi. Kuper alleges that on May 29, 1997, McMaster, then vice-president of human resources for Colonial Penn, and Dezzi, a special investigator for Colonial Penn, called him into an unscheduled meeting. (Compl. ¶ 17.) Kuper alleges that, at the meeting, McMaster and Dezzi subjected him to two hours of interrogation and wrongly accused him of "being involved in and receiving kickbacks from a scheme of sale of auto insurance to a group of Russian-Jewish immigrants who staged false accidents and filed false insurance claims working in concert with a Russian-Jewish immigrant lawyer and Jewish doctors." (Compl. ¶¶ 18-19.) Kuper also alleges that after the meeting he was suspended from work and escorted off the premises and told not to return until he received further instructions. (Compl. ¶ 21.) Kuper further alleges that the wrongful accusations and questions implying involvement in serious criminal misconduct based on an undisclosed anonymous letter caused him extreme emotional distress. (Compl. ¶ 34.)

Defendants argue that Kuper's claim for intentional infliction of emotional distress should be dismissed because it is barred by the Pennsylvania Workmen's Compensation Act ("PWCA"), Pa. Stat. Ann. tit 77, § 481(a), and because it fails to allege the extreme and outrageous conduct necessary to state such a claim. The court agrees that the PWCA bars Kuper's claim for intentional infliction of emotional distress and that Kuper does not allege conduct that would subject McMaster and Dezzi to

individual liability for intentional infliction of emotional distress under section 72 of the PWCA.<sup>6</sup> Specifically, Kuper fails to allege that McMaster and Dezzi were acting outside the scope of their employment when questioning him or were acting for any purpose other than to investigate the allegations against him on behalf of their employer. See Adams v. USAir, Inc., 652 A.2d 329, 330 (Pa. Super. Ct. 1994) (holding that co-workers cannot be found individually liable under Pa. Stat. Ann. tit. 77, § 72 for emotional distress when investigating alleged wrongdoing of plaintiff within scope of their duties).

Even if a claim for intentional infliction of emotional distress was not barred by the PWCA, the alleged conduct of McMaster and Dezzi does not rise to the level of outrageousness necessary to state a claim for intentional infliction of emotional distress. Under Pennsylvania law, to prevail on a claim for intentional infliction of emotional distress the plaintiff must show "conduct which is extreme or clearly outrageous." Hoy v. Angelone, 720 A.2d 745, 753-54 (Pa. 1998). To meet this high threshold, "[t]he conduct must be so outrageous in character, and so extreme in degree, as to go beyond all

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6. Pa. Stat. Ann. tit. 77, § 72 of the PWCA provides:

If disability or death is compensable under this act, a person shall not be liable to anyone at common law or otherwise on account of such disability or death for any act or omission occurring while such person was in the same employ as the person disabled or killed, except for intentional wrong.

possible grounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." Buczek v. First National Bank of Mifflintown, 531 A.2d 1122, 1125 (Pa. Super. Ct. 1987). Additionally, "it 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." Cox v. Keystone Carbon, 861 F.2d 390, 395 (3d. Cir. 1988). The court determines as a matter of law if the alleged conduct meets the standard of outrageousness needed to state a claim for intentional infliction of emotional distress. Id.

Kuper primarily relies on Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265 (3d Cir. 1979), in arguing that he has stated a claim for intentional infliction of emotional distress. In Chuy, the defendant doctor told a reporter, with knowledge of its falsity, that the plaintiff suffered from a potentially fatal blood disorder. Id. at 1274-76. That conduct was found to meet the high standard of extreme and outrageous conduct. Id. The court finds that, in this case, the alleged conduct does not rise to the level of outrageousness demonstrated in Chuy.

In Chuy, the defendant knowingly disseminated false information about the plaintiff that caused severe emotional distress. Id. at 1274-76. That key factor is not present in this case. Kuper has not alleged that McMaster and Dezzi made accusations about him that they knew to be false. Additionally,

it is not unusual for an employer to question an employee about theft or other wrongdoing in order to ascertain information about alleged misconduct. Federal courts following Pennsylvania law have found that accusing an employee of wrongdoing, even if found to be untrue, does not constitute the type of outrageous conduct required to permit a recovery for intentional infliction of emotional distress. See Gonzalez v. CNA Ins. Co., 717 F. Supp. 1087, 1089 (E.D. Pa. 1989) (finding that employee's allegation that his employer falsely accused him of sexually harassing fellow employees did not rise to level of outrageousness necessary to state claim for intentional infliction of emotional distress); Sugarman v. RCA Corp., 639 F. Supp. 780, 788 (M.D. Pa. 1985) (finding claim that employee was falsely charged with theft and humiliated in front of fellow employees not outrageous). While being falsely accused of a crime by your employer, assuming Kuper's allegations to be true, is an unfortunate experience, such conduct does not rise to the level of extreme and outrageous conduct that has been found to permit a recovery for intentional infliction of emotional distress. See Hoy, 720 A.2d at 754 (citing cases). The court will dismiss Kuper's claim for intentional infliction of emotional distress.

### **III. CONCLUSION**

For the reasons set forth above, the court will deny Defendants' motion to dismiss Kuper's Title VII claim and will dismiss Kuper's claim for intentional infliction of emotional

distress against all Defendants.

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ORDER

AND NOW, TO WIT, this day of May, 1999, upon consideration of defendants Colonial Penn Insurance Company's, Ted Dezzi's and Kathryn McMaster's motion to dismiss and plaintiff Gene Kuper's response thereto, IT IS ORDERED that said motion is GRANTED IN PART AND DENIED IN PART as follows:

- (1) the motion to dismiss the Title VII claim contained in Count One of the Amended Complaint is DENIED;
- (2) the claim for a violation of the Pennsylvania Human Relations Act contained in Count Two of the Amended Complaint is DISMISSED;
- (3) the claim for intentional infliction of emotional distress contained in Count Three of the Amended Complaint is DISMISSED; and
- (4) the claim for breach of duty contained in Count Four of the Amended Complaint is DISMISSED.

IT IS FURTHER ORDERED that within fifteen (15) days from the date of this Order, Gene Kuper will file with the court, and serve on all defendants, an affidavit stating that the information provided to the Equal Employment Opportunity

Commission in his charge of discrimination filed on November 20,  
1997 is true to best of his information, knowledge and belief.

SO ORDERED.

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LOUIS C. BECHTLE, J.