

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

ALVARO CRESPO-MEDINA	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 01-0298
RICHARD DANZIG, SECRETARY	:	
OF THE NAVY	:	
THE PENTAGON	:	
	:	
Defendant.	:	

M E M O R A N D U M

BUCKWALTER, J.

September 21, 2001

Plaintiff Alvaro Crespo-Medina ("Plaintiff" or "Crespo-Medina") filed this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, the United States Constitution, and the Pennsylvania Human Relations Act, Pa. Stat. Ann. Tit. 43 § 951 et seq., seeking economic and injunctive relief, alleging that his former employer, the Department of Navy (the "Navy"), discriminated against him on the basis of his race (Hispanic) and national origin (Puerto Rican). Plaintiff's complaint also seeks damages for negligent infliction of emotional distress, intentional infliction of emotional distress, and wrongful discharge in violation of public policy.

Presently before this Court is Defendant's Motion to Dismiss or in the Alternative, for Summary Judgment. For the reasons that follow, the Court grants Defendant's Motion in part

and denies in part, dismissing all counts brought against the Defendant with the exception of Plaintiff's claim that he was discriminated against in violation of Title VII when the Navy removed Plaintiff from the flextime and compressed work week program.

I. BACKGROUND

Plaintiff is a former employee of the Navy where he was employed as an Electronics Engineer, GS-12, until his termination effective May 19, 2000. On March 23, 1999, Crespo-Medina filed a formal complaint of discrimination with the Navy alleging that he was discriminated against on the basis of his race and national origin with regard to various personnel actions taken by his employer, the Navy. Plaintiff claimed that he was removed from the flextime and compressed work week program; that he was subjected to a pattern of continuous harassment and intimidation by supervisors and section employees; that he was subjected to an unfair distribution of travel, overtime, compensatory time, distribution of equipment and distribution of training; and that Plaintiff was forced to relocate to unwanted office space.

On June 23, 1999, the Navy issued a Notice of Partial Acceptance/Dismissal of Crespo-Medina's discrimination complaint, dismissing all claims made by Plaintiff with the exception of his removal from the flextime and compressed work week program. With

respect to the dismissed claims, this notice constituted the Navy's final decision on Crespo-Medina's complaint.

On March 1, 2000, the Equal Employment Opportunity Commission (the "EEOC") remanded the appeal of the dismissed issues to the Navy for further administrative processing due to new EEOC regulations. On March 8, 2000, Crespo-Medina requested a hearing. Later that month, on March 29, 2000, the EEOC issued an Acknowledgment and Order, acknowledging receipt of Crespo-Medina's request for a hearing and giving the parties 30 days to identify any claims the EEOC had dismissed from the formal complaint of discrimination and to comment on the appropriateness of each dismissal.

During the investigation of Crespo-Medina's formal complaint of discrimination, Plaintiff suffered a work related injury and was unable to return to work until May 1, 2000, approximately one year after Plaintiff incurred the injury. Soon after Crespo-Medina's return to work, and while his formal complaint of discrimination was still pending, the Navy issued a Decision on Proposed Removal of Crespo-Medina from employment. The stated basis for the Navy's proposed removal was the excessive unauthorized absences of Plaintiff. Crespo-Medina immediately appealed the Navy's removal decision to the Merit Systems Protection Board (the "MSPB") by way of letter written by his attorney.

Around the same time that Crespo-Medina filed his appeal to the Navy's Decision on Proposed Removal, Plaintiff missed the 30-day deadline ordered by the EEOC in its Acknowledgment and Order dated March 29, 2000, which required the parties to identify and comment on the appropriateness of any claims the EEOC had dismissed from Plaintiff's formal complaint of discrimination. Consequently, on May 18, 2000 the EEOC issued an Order affirming the dismissals and limiting the issues of Crespo-Medina's appeal of the Notice of Partial/Acceptance Dismissal to his removal from the flextime and compressed work week program. Subsequently, the EEOC issued an Order, on the merits of the one claim which was not dismissed, finding no discrimination with respect to the Navy's decision to remove Crespo-Medina from the flextime and compressed work week program. The EEOC's Order additionally imposed sanctions on Crespo-Medina for his failure to cooperate and failure to comply with the administrative judge handling this appeal. On October 23, 2000, the Navy issued a final Order regarding the outcome of Crespo-Medina's discrimination complaint concerning his removal from the flextime and compressed work week program.

With respect to Crespo-Medina's concurrent appeal to the MSPB concerning the Navy's Decision on Proposed Removal, Plaintiff requested the MSPB to dismiss his appeal of May 19, 2000 without prejudice, to allow him to refile within 60 days.

Crespo-Medina's request was granted by the MSPB on August 29, 2000, stating that Crespo-Medina must refile his appeal no later than October 30, 2000.

On November 22, 2000, Crespo-Medina refiled his appeal of the Navy's Decision on Proposed Removal. Before the MSPB had an opportunity to act on his appeal, on January 18, 2001, Crespo-Medina filed the instant suit pursuant to Title VII and various state causes of action, alleging discrimination in connection with the Navy's personnel actions cited in Crespo-Medina's original formal complaint of discrimination filed with the Navy on March 23, 1999, retaliatory discharge in connection with the Navy's Decision on Proposed Removal and various new allegations of discriminatory practices. Subsequently, the MSPB issued a decision with respect to Crespo-Medina's refiled appeal to the MSPB concerning the Navy's Decision on Proposed Removal, dismissing the appeal as untimely. Thereafter, Crespo-Medina filed a Petition for Review of the MSPB dismissal, which is currently pending before the MSPB.

II. LEGAL STANDARD

In considering a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court must only consider those facts alleged in the complaint. See ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). The reviewing court must take all well pleaded facts in the complaint as true

and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). The pleader must provide sufficient information to outline the elements of the claim, or to permit inferences to be drawn that these elements exist. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). A complaint should be dismissed if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59, 65 (1984).

III. DISCUSSION

A. Count I-Title VII

Defendant's motion to dismiss Plaintiff's Title VII claim on the ground that Plaintiff has failed to timely exhaust his administrative remedies is treated under Federal Rule of Civil Procedure 12(b)(6), governing motions to dismiss for failure to state a claim, rather than Rule 12(b)(1) governing motions to dismiss for lack of subject matter jurisdiction. Robinson v. Dalton, 107 F.3d 1018, 1022 (3d Cir. 1997).

Plaintiff claims that he was subjected to discrimination based on race and national origin through the Navy's adverse personnel actions, including his removal from employment. Title VII permits civilian employees of Military Departments to file civil actions based on allegations of racial

and national origin discrimination within 90 days of a final action taken by the Military Department or a final action on a complaint filed with the EEOC. See 42 U.S.C. 2000e-16(c) (1994). However, "[a] complaint does not state a claim upon which relief may be granted unless it asserts the satisfaction of the precondition to suit specified by Title VII:" plaintiff must have first timely exhausted available administrative remedies, which includes "prior submission of the claim to the EEOC for conciliation or resolution." Robinson, 107 F.3d at 1022; see also 29 C.F.R. § 1614.105 (2000).

Evaluating whether or not Plaintiff has first exhausted his administrative remedies involves two lines of inquiry; one relating to the submission of Plaintiff's formal complaint of discrimination on March 23, 1999 and one relating to Plaintiff's appeal of the Navy's Decision of Proposed Removal to the MSPB. Because each differs in its required administrative remedies, this Court will examine the proper procedures of each, and the Plaintiff's compliance therewith, to determine whether Plaintiff's complaint has stated a claim upon which relief can be granted under Title VII.

1. Plaintiff's Formal Complaint of Discrimination

The EEOC regulatory procedures require an aggrieved employee to initiate contact with an EEO counselor within 45 days of the date of the matter alleged to be discriminatory. 29 C.F.R. § 1614.105(a)(1) (2000). The EEO counselor ordinarily has

thirty days to resolve the dispute informally or notify the employee of the right to file a formal written administrative complaint within fifteen days of receipt of the notification. 29 C.F.R. § 1614.105(d) (2000). After the filing of a formal complaint, the EEO counselor investigates the alleged events and issues a final agency decision within 180 days. 29 C.F.R. § 1614.108(e) (2000). A complainant may appeal the final action or dismissal of a complaint with the EEOC. 29 C.F.R. § 1614.401(a) (2000). Such appeal must be filed within 30 days of the employee's receipt of the dismissal, final action or decision. 29 C.F.R. § 1614.402 (2000). In the alternative, an employee may forego an appeal to the EEOC, and as long as the employee has first filed an individual complaint, is authorized under Title VII to file a civil action in the appropriate United States District Court. 29 C.F.R. § 1614.407 (2000). This action must be commenced within 90 days of receipt of the final action. 29 C.F.R. § 1614.407(a) (2000).

Plaintiff timely proceeded to the stage in which he filed a formal written administrative complaint, claiming various discriminatory personnel actions. Once Plaintiff received the EEOC's final decision regarding the dismissal of seven of his eight claims, Plaintiff had the choice of appealing the dismissals to the EEOC within 30 days or bringing a civil action under Title VII in the appropriate United States District Court within 90 days. Plaintiff technically received notification of

the EEOC's final decision regarding the dismissals on June 23, 1999 when the EEO Counselor issued its Notice of Partial Acceptance/Dismissal. However, on March 1, 2000, the EEOC remanded the appeal of the dismissed issues for further administrative processing and subsequently issued an Acknowledgment and Order on March 29, 2000 requiring Crespo-Medina to comment on the appropriateness of the dismissed issues within 30 days. After receiving no response from Crespo-Medina regarding the dismissed claims, the EEOC issued an Order on May 18, 2000, limiting the issues of Plaintiff's appeal to removal from the flextime and compressed work week program and stating that Plaintiff had waived review of the dismissed claims. Finally, Plaintiff acted on the dismissals on January 18, 2001, when he filed the instant action.

Even if this Court were to presume that Plaintiff did not receive notification of the EEO Counselor's final decision of the dismissals until the May 18, 2000 Order limiting the issues of Plaintiff's appeal, Plaintiff's civil action, filed on January 18, 2001, comes 155 days past the required 90 day period for filing. Accordingly, Plaintiff failed to timely exhaust his administrative remedies with respect to the dismissed claims: continuous harassment and intimidation by supervisors and section employees; unfair distribution of travel, overtime, compensatory time, distribution of equipment and distribution of training; and relocation to unwanted office space. Similarly, any new

discriminatory conduct Plaintiff alleges in his complaint, such as his security clearance, hostile work environment, specific work assignments, and conditions upon his return to work in May of 2000, are procedurally barred as they have never been timely raised with an EEO counselor. These matters may not be challenged now before this Court.

With respect to the one issue accepted for investigation, Defendant concedes that the issue of Plaintiff's removal from the flextime and compressed work week program is properly before this court.

2. Plaintiff's Appeal of the Navy's Decision on Proposed Removal

a. The Civil Service Reform Act

The Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 111 ("CSRA"), establishes a comprehensive structure for federal employees to resolve grievances and complaints relating to their employment. See Bush v. Lucas 462 U.S. 367, 385, 103 S. Ct. 2404, 2415, 76 L. Ed. 2d 648 (1983). The CSRA requires collective-bargaining agreements between federal agencies and unions to provide for a grievance procedure and binding arbitration for the resolution of disputes arising under the agreement. 5 U.S.C. § 7121(a), (b) (1994). Ordinarily, the negotiated grievance procedure is the exclusive administrative remedy for the resolution of grievances. 5 U.S.C. § 7121(a) (1994). Grievances that involve claims of removal under 5 U.S.C. § 7512, however, are an exception to this rule. 5 U.S.C. § 7121(e)(1) (1994); 5 C.F.R. § 1201.3(c)(1)(i) (2001). Grievances

that involve claims of discrimination under 5 U.S.C. § 7702 are also an exception to the rule. 5 U.S.C. § 7121(d) (1994); 5 C.F.R. § 1201.3(c)(1)(i) (2001). Aggrieved employees who are covered by a collective bargaining agreement that provides for a grievance procedure and who raise claims involving removal and/or discrimination may raise the matter under the statutory procedure or under the negotiated grievances procedure contained in the collective bargaining agreement, but not both. 5 U.S.C. § 7121(e)(1) (1994); 5 C.F.R. § 1201.3(c)(1)(i) (2001). An employee raising removal and/or discrimination claims therefore, must choose in which forum, either the negotiated grievance procedure or the statutory forum, he wishes to pursue his administrative remedy. See Gill v. Summers, No. CIV.A.00-CV-5181, 2001 WL 283150, at *2 (E.D. Pa. Mar. 20, 2001).

b. Procedural Requirements Under Statutory Election

When an aggrieved employee chooses the statutory procedure, exhaustion requires that the employee file an appeal with the MSPB within 30 calendar days after the effective date of the adverse personnel action. 5 C.F.R. § 1201.22(b) (2001). An appeal may be in any format, however, it must be in writing and contain specific identifying and background information. See 5 C.F.R. § 1201.24(a)(1)-(9) (2001). An appeal raising issues of discrimination must additionally: (1) state that there was discrimination in connection with the matter appealed, and it

must state specifically how the agency discriminated against the employee; and (2) state whether the employee has filed a formal discrimination complaint or a grievance with any agency. 5 C.F.R. § 1201.153(a) (2001). If he or she has done so, the appeal must state the date on which the employee filed the complaint or grievance, and it must describe any action that the agency took in response to the complaint or grievance. Id. An employee may comply with these content requirements by completing the official MSPB Appeal Form. 5 C.F.R. § 1201.24(c) (2001); 5 C.F.R. 1201.153(b) (2001). If an employee does not submit an appeal within the time set by statute, regulation, or order of a judge, it will be dismissed as untimely filed, unless a good reason for the delay is shown. 5 C.F.R. § 1201.22(c) (2001). In this case, the administrative judge will provide the employee an opportunity to show why the appeal should not be dismissed as untimely. Id.

The administrative judge prepares an initial decision after the record closes, issuing an order as to the final disposition of the case. 5 C.F.R. § 112(a), (b)(3) (2001). The initial decision of the administrative judge becomes final 35 days after the issuance of such initial decision. 5 C.F.R. § 1201.113 (2001). At this point in time, administrative remedies are considered exhausted. 5 C.F.R. § 1201.113(e) (2001). An aggrieved employee who is not satisfied with the outcome of his case may petition for review of the initial decision with the

MSPB by the finality date of the initial decision. 5 C.F.R. § 1201.114 (2001). An aggrieved employee also has the opportunity to obtain judicial review of a final order or decision of the MSPB, but only in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. § 7703(b)(1) (1994); 5 C.F.R. § 1201.120 (2001). Judicial review is only proper in a United States District Court when the MSPB decides an action involving discrimination under 5 U.S.C. § 7702. 5 C.F.R. § 1201.175(a) (2001). In actions involving discrimination, appeals must be filed within 30 days after the appellant received notice of the judicially reviewable action. 5 C.F.R. § 1201.175(b) (2001).

c. Plaintiff's Appeal to the MSPB

Plaintiff timely challenged the Navy's Proposed Removal Decision by way of letter to the MSPB from Plaintiff's attorney stating in full:

This letter will confirm that I have been retained by Mr. Crespo-Medina to submit in writing in an Appeal of the agency's decision to remove my client affective [sic] May 19, 2000. For your assistance, enclosed please find a copy of the decision on Proposed Removal from which we are appealing.

By copy of this letter to Donald J. Collins, the author of the Decision on Proposed Removal, I am confirming with him this written submission electing an Appeal to the Merit Systems Protection Board.

It is clear from Plaintiff's letter of appeal that he understood he was choosing to pursue his administrative

remedies under the statutory procedure.¹ It is also clear that absent from Plaintiff's letter are allegations of discrimination in connection with the matter appealed or any reference to Plaintiff's previously filed formal complaint of discrimination.² Thus, the MSPB could only be expected to address Plaintiff's appeal as one opposing the adverse agency action of removal under 5 U.S.C. § 7512, as opposed to one challenging an action involving discrimination under 5 U.S.C. § 7702.

However, the MSPB, as well as the Navy, was not without notice regarding Crespo-Medina's claims of discrimination in connection with his appeal of the Navy's Decision on Proposed Removal. After the initial, timely filing of Plaintiff's appeal, Crespo-Medina requested a dismissal of the appeal without prejudice to refile within 60 days. Plaintiff requested additional time to bring his appeal in order "to conduct discovery relative to the appellant's affirmative defenses of race and national origin discrimination." See Crespo-Medina v.

1. The Navy's Decision of Proposed Removal conspicuously stated that Plaintiff had the right to appeal this action in one of three ways: (1) to the MSPB; (2) under the negotiated grievance procedure outlined in the Labor Management Relations Agreement between the Naval Surface Warfare Center, Carderock Division Ship Systems Engineering Station, and the International Federation of Professional and Technical Engineers, Local #3, 1997; (3) under EEO Discrimination Complaint Process. The Decision of Proposed Removal further stated that whichever procedure Plaintiff initiated first would constitute an **IRREVOCABLE** election, thereby **WAIVING** Plaintiff's right to pursue either of the two appeal procedures. (emphasis in the original).

2. If Plaintiff had used the MSPB's Appeal Form, which had been provided to him along with the Navy's Decision on Proposed Removal, Plaintiff presumably would have read and responded to the following question, "If you believe you were discriminated against by the agency, in connection with the matter appealed, because of your race, color, religion, sex, national origin, marital status, political affiliation, disability, or age, indicate so and explain why you believe it to be true."

Department of the Navy, Initial Decision of the Merit Systems Protection Board, August 29, 2000. The MSPB permits an appellant to raise a claim or defense not included in the appeal at any time before the end of the conference held to define the issues in the case. 5 C.F.R. § 1201.24(b) (2001). The MSPB granted the dismissal without prejudice and issued an initial decision stating that Plaintiff was required to refile his appeal no later than October 30, 2000. Plaintiff did not refile until November 22, 2000, 23 days after the time limit prescribed by the administrative judge. Consequently the MSPB dismissed Plaintiff's refiled appeal as untimely.

Upon notification of this dismissal, Plaintiff's options were to petition the MSPB for review of the timeliness decision by its finality date or obtain judicial review in the United States Court of Appeals for the Federal Circuit by filing in that court within 30 days. If this Court were to view the MSPB's dismissal as a final decision of an appeal involving discrimination because of Plaintiff's later raised affirmative defenses of race and national origin discrimination, Plaintiff would have the third option of filing a civil action in the appropriate United States District Court within 30 days.³

Plaintiff elected to file a Petition for Review of the timeliness

3. Plaintiff's filing of the instant action on January 18, 2001 would not properly institute a civil action with respect to the MSPB's Initial Decision dismissing Crespo-Medina's appeal as untimely. The MSPB's decision was not issued until March 28, 2001 and an employee who seeks judicial review of an action involving discrimination must await a final decision of the MSPB before filing a civil action in a United States District Court.

decision to the MSPB, which is currently pending. Given that the 30 day time periods have now run, Plaintiff has lost his opportunity appeal the dismissal in either the United States Court of Appeals for the Federal Circuit or in a United States District Court.

d. Removal as Retaliation

Viewing the Navy's Decision on Proposed Removal as a retaliatory act ancillary to Plaintiff's earlier administrative complaint does not save this claim from dismissal because Plaintiff failed to exhaust EEOC administrative remedies. The Third Circuit has expressly declined to adopt a per se rule that all claims of retaliation against a discrimination victim based on the prior submission of an EEOC complaint are ancillary to the original complaint, and therefore do not require administrative prerequisites such as filing an EEOC complaint. Robinson, 107 F.3d at 1024. However, where the subsequent incident (1) falls within the scope of the prior EEOC complaint, or (2) falls within the scope of the EEOC investigation which arose out of the prior complaint, the subsequent event may be considered as fairly encompassed within that prior complaint. Id. In this situation, the procedural barrier of a double filing with an EEO Counselor is not imposed on the aggrieved employee. This Court thus must examine carefully the prior pending EEOC complaint and the unexhausted claim of retaliation before determining that a second complaint need not have been filed. The scope of our examination

is limited to Plaintiff's claim involving his removal from the flextime and compressed work week program because this rule of law only operates with respect to earlier complaints for which the victim can still bring suit. Walters v. Parsons, 729 F.2d 233, 235 (3d Cir. 1984).

In making a determination as to whether a previously filed administrative complaint encompasses a charge based on a subsequent discharge, the Third Circuit directs a court to examine 1) whether the previous complaints alleged the same retaliatory intent inherent in the retaliatory discharge claim, 2) whether the subject of these previous complaints were used as a basis for the Agency's decision to terminate the employee; 3) whether the EEOC should have been put on notice of Plaintiff's claim of retaliatory discharge and therefore investigated that claim, and 4) whether there is enough overlapping in Plaintiff's subsequent allegations with the earlier complaints that this removal complaint fairly falls within the scope of the earlier complaints. Robinson, 107 F.3d at 1026.

First it must be noted that Plaintiff's prior formal complaint of discrimination did not provide specific, factual information in support of his discrimination claim other than a conclusory statement that he was removed from the flextime and compressed work week program. Therefore, it is impossible for this Court to conclude that the previous complaint alleged the same retaliatory intent inherent in the retaliatory discharge

claim. Second, the Navy's stated reason for the removal decision, excessive unauthorized absence, and the corresponding investigation, is wholly independent from, and does not evidence that the Navy's removal decision was based on Plaintiff's previous complaint. Third, the EEOC could not be expected to have notice of Plaintiff's claim of retaliatory discharge given Plaintiff's election to appeal the Navy's Decision on Proposed Removal to the MSPB via letter, which did not even raise issues of discrimination. Finally, this Court does not find, nor does Plaintiff point to, overlapping allegations between the two complaints. During the one year period between the filing of the formal complaint of discrimination and the Navy's Decision on Proposed Removal, Plaintiff was not even present at the work site due to injury. Plaintiff could not have been subjected to a pattern of harassment during his absence, a scenario which could possibly provide the causal link between his prior formal complaint of discrimination and his removal from employment. Accordingly, this Court holds that Plaintiff's previous complaint regarding removal from the flextime and compressed work week program does not encompass a charge based on subsequent discharge, excusing Plaintiff from administrative prerequisites.

For the reasons stated above, Plaintiff's claims surrounding his removal from employment are procedurally barred.

B. Count II -- Constitutional Tort for Racial Discrimination

Count II of Plaintiff's complaint, wherein Plaintiff claims that the Navy's discriminatory practices violated his constitutional rights, is dismissed. Plaintiff has conceded that Title VII provides the exclusive federal remedy for federal claims of discrimination, precluding federal constitutional and statutory claims for monetary damages. See Owens v. United States, 822 F.2d 408, 409-10 (3d Cir. 1987).

C. Count III - Racial Discrimination Under the Pennsylvania Human Relations Act (PHRA)

Under Pennsylvania law, to bring suit under the PHRA, a plaintiff must first have filed an administrative complaint with the Pennsylvania Human Relations Commission (PHRC) within 180 days of the alleged act of discrimination. Woodson v. Scott Paper Co., 109 F.3d 913, 925 (3d Cir. 1997) (citing Pa. Stat. Ann. Tit. 43 § 959(a), 962). If a plaintiff fails to file a timely complaint with the PHRC, then he or she is precluded from judicial remedies under the PHRA. Id. Furthermore, "filing with the EEOC does not function as a filing for PHRA purposes." Id. at 927. There is nothing before this Court which indicates that Crespo-Medina filed any administrative complaint with the PHRC or that his EEOC complaint was cross-filed with the PHRC. Therefore, Count III of Plaintiff's complaint alleging violation of the PHRA for racial discrimination is dismissed.

D. Counts IV, V and VI -- Negligent Infliction of Emotional Distress, Intentional Infliction of Emotional Distress and Wrongful Discharge in Violation of Public Policy

While Title VII provides federal employees their exclusive federal remedy for claims of discrimination, state constitutional and common law claims are permissible in the Third Circuit against federal officials, which are based upon the same facts and circumstances as the Title VII claim, as long as the federal official is not afforded absolute immunity. See Owens, 822 F.2d at 410. Absolute immunity is extended when two requirements are satisfied: first, the official act must involve policymaking or the exercise of judgment; and second, the official act must be within the outer perimeter of the official's duties. Owens, 822 F.2d at 410; Araujo v. Welch, 742 F.2d 802, 804 (3d Cir. 1984) (discussing the scope of absolute immunity afforded federal officials announced in Barr v. Matteo, 360 U.S. 564, 79 S. Ct. 1335, 3 L. Ed. 2d 1434 (1959)). This Court applies this rule to Plaintiff's one remaining claim, that of removal from the flextime and compressed work week program.

The policymaking or judgmental element "has sometimes been phrased as permitting officials to enjoy immunity from liability for the exercise of 'discretionary' but not 'ministerial' functions." Araujo, 742 F.2d at 804. Plaintiff's pleadings do not shed light as to the supervisory responsibilities of Defendant, Richard Danzig. In fact, it

appears that Danzig did not play a role in the decision to remove Plaintiff from the flextime and compressed work week program, rather, the challenged action appears to have been effectuated by Bruce Marshall, Branch Head and second-line supervisor to Plaintiff and Arthur Cautilli, Supervisory Electronics Engineer and Plaintiff's first-line supervisor. Nonetheless, this Court assumes that as Secretary of the Navy, Danzig's responsibilities included ultimate supervision of all employees where Plaintiff was employed.

Plaintiff was removed from the flextime and compressed work week program after an investigation in which Plaintiff's supervisors determined that Plaintiff had falsified his time sheet. This Court views a decision to remove an employee from an employment program after an investigation which evidenced workplace misconduct to be within a supervisor's discretionary powers.

The second prong, "within the outer perimeter" of the official's duties, embodies the distinction "between action in reference to matters which are manifestly or palpably beyond the officer's authority, and action having more or less connection with the general matters committed by law to his control or supervision." Araujo, 742 F.2d at 805. In order for an action to be considered within the officer's authority, "an official act must enhance the performance of official function by advancing some legitimate purpose of the office in question." Owens, 822

F.2d at 410; see also Araujo, 742 F.2d at 805. The proper approach is to consider the precise function at issue, and to determine whether an officer is likely to be unduly inhibited in the performance of that function by the threat of liability for tortious conduct. Araujo, 742 F.2d at 805; see also Owens, 822 F.2d at 412. It is appropriate to assume that the Secretary of Navy, and Plaintiff's supervisors, have available numerous means for disciplining recalcitrant subordinates for workplace misconduct. Removal from an optional or beneficial program such as the flextime and compressed work week program is certainly an appropriate response when misconduct is discovered and investigated. Therefore, this Court holds that the challenged act was "within the outer perimeter" of Plaintiff's supervisors and Defendant's duties. Accordingly, because Defendant satisfies both requirements, he is entitled to absolute immunity. Thus, Count IV - Negligent Infliction of Emotional Distress, Count V - Intentional Infliction of Emotional Distress, and Count VI - Wrongful Discharge in Violation of Public Policy must be dismissed.

E. Count V - Injunctive Relief

Plaintiff requests injunctive relief in the form of reinstatement. While Title VII permits equitable relief in the form of an injunction, see 42 U.S.C. 2000e-5(g), in deciding whether to issue a preliminary injunction a court must first determine "(1) whether the movant has shown reasonable

probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest." ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1477 n.2 (3d Cir. 1996).⁴ This Court notes that with respect to Plaintiff's one claim permitted to go forward, reinstatement to the flextime and compressed work week program, is not entirely practical given that the Plaintiff is no longer employed by the Navy. It would be necessary for Plaintiff to be reinstated to employment before achieving the equitable relief requested. However, because this Court has dismissed Plaintiff's removal claim, Plaintiff has not shown reasonable probability of success on the merits which would entitle him to reinstatement to employment. Furthermore, removal from employment is essentially an economic damage in the form of loss of income, an injury which alone does not constitute irreparable harm. Morton v. Beyer, 822 F.2d 364, 372 (3d Cir. 1987). Accordingly, Plaintiff's request for injunctive relief is denied.

4. It is premature for Plaintiff to request a permanent injunction in that the moving party has not yet shown actual success on the merits. See ACLU, 84 F.3d at 1477 n.3.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss Plaintiff's Complaint or in the Alternative for Summary Judgment is granted in part and denied in part. Plaintiff's Complaint is dismissed with respect to all counts brought against the Defendant except Plaintiff's claim that he was discriminated against in violation of Title VII when the Defendant removed Plaintiff from the flextime and compressed work week program.

An appropriate order follows.

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

ALVARO CRESPO-MEDINA	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 01-0298
RICHARD DANZIG, SECRETARY	:	
OF THE NAVY	:	
THE PENTAGON	:	
	:	
Defendant.	:	

O R D E R

AND NOW, this 21st day of September, 2001, it is hereby

ORDERED:

Upon consideration of the Motion of Defendant To Dismiss Plaintiff's Complaint or in the Alternative for Summary Judgment (Docket No. 4), Plaintiff's response thereto (Docket No. 5), and Defendant's reply (Docket No. 6), Defendant's motion is hereby **GRANTED** in part and **DENIED** in part. More specifically, Plaintiff's Complaint is **DISMISSED** with respect to all counts brought against the Defendant except Plaintiff's claim that he was discriminated against in violation of Title VII when the Defendant removed Plaintiff from the flextime and compressed work week program.

With regard to the remaining count, the following scheduling order is entered:

1. All discovery is to be completed by November 30, 2001.

2. **TRIAL** is set for **Monday, December 10, 2001 at 10:00 a.m. in Courtroom 14A.**

BY THE COURT:

RONALD L. BUCKWALTER, J.