

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

LES J. JONES, ROBIN A. ROSS, : CIVIL ACTION
MARK C. BURFORD, MELISSA ALEXIS, :
GLENN MONTGOMERY, JOHN L. :
GREENE, JR., JEANNE L. JOHNSON, :
JOSEPH C. CASHAW, JR., STEVE :
EMANUEL and JASON TRIBUE, :
individually, and on behalf of :
all other African-Americans :
similarly situated :
 :
 :
v. :
 :
 :
GPU, INC. : NO. 01-4950

MEMORANDUM ORDER

Plaintiffs are present or former employees of defendant who have initiated this action individually and on behalf of others similarly situated to redress defendant's alleged systematic pattern of racial discrimination in employment. Plaintiffs complain that defendant has discriminated against African Americans in selection and promotion procedures, compensation, discipline, training, demotion and termination, has perpetuated a racially hostile work environment and retaliated against African Americans who complained about such discrimination. In Count I, plaintiffs assert a claim pursuant to 42 U.S.C. § 1981. In Count II, plaintiffs assert a claim under ERISA, 29 U.S.C. § 1132(a) ostensibly to clarify their right to future benefits to which they would have been entitled had they not been denied more highly compensated positions because of racial discrimination.

Presently before the court is defendant's motion to dismiss claims of plaintiffs Jeanne L. Johnson, Joseph C. Cashaw, Jr. and Steve Emmanuel as time barred, to dismiss Count II for failure to plead a cognizable ERISA claim and to strike the allegation of "adverse impact" in paragraph 22(g) of the complaint.¹

Dismissal for failure to state a claim is appropriate when it clearly appears that plaintiff can prove no set of facts to support the claim which would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Robb v. Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984). Such a motion tests the legal sufficiency of a claim accepting the veracity of the claimant's allegations. See Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). A claim may be dismissed when the facts

¹ In paragraph 22(g) of the complaint, plaintiffs allege that "GPU's policies, procedures and practices have produced an adverse impact against African-American employees with respect to selection both for initial assignments and promotions, compensation, demotion, job assignments, training, transfer, layoff, discharge and discipline." Defendant moved to strike this paragraph because the use of facially neutral policies and procedures that adversely impact a racial minority does not constitute a violation of § 1981. See General Bld'g Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 390-91 (1982). Plaintiffs concede that a disparate impact theory of liability is not available under § 1981 but contend that the paragraph should not be stricken because evidence of adverse impact may be probative to their disparate treatment claim. Defendants do not object to plaintiffs' use of the allegations in paragraph 22(g) as part of a statement of a claim for intentional discrimination.

alleged and the reasonable inferences therefrom are legally insufficient to support the relief sought. See Pennsylvania ex rel. Zimmerman v. PepsiCo, Inc., 836 F.2d 173, 179 (3d Cir. 1988).

A claim may be dismissed as time barred where it is clear from the complaint that the applicable statute of limitations has lapsed. See Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.1 (3d Cir. 1994); Cito v. Bridgewater Township Police Dep't, 892 F.2d 23, 25 (3d Cir. 1989); Elliott, Reihner, Siedzikowski & Egan, P.C. v. Pennsylvania Employees Benefit Trust Fund, 161 F. Supp. 2d 413, 420 (E.D. Pa. 2001); Jaramillo v. Experian Info. Solutions, Inc., 155 F. Supp. 2d 356, 358 (E.D. Pa. 2001); Arizmendi v. Lawson, 914 F. Supp. 1157, 1160 (E.D. Pa. 1996).

It is clear from the pleadings and undisputed that plaintiffs Johnson, Cashaw and Emmanuel were not employed by GPU within two years preceding the initiation of this action. They allege no actions by GPU against them within two years preceding the filing of the complaint. Claims under § 1981 are subject to a two-year statute of limitations. See Goodman v. Lukens Steel Co., 482 U.S. 656, 664 (1987); Al-Khazraji v. Saint Francis College, 784 F.2d 505, 511 (3d Cir. 1986); Gaspar v. Merck & Co., Inc., 118 F. Supp. 2d 552, 556-57 (E.D. Pa. 2000). These plaintiffs concede that they cannot maintain claims of racial

discrimination under § 1981, but contend that they may sue under ERISA.

Plaintiffs, however, have failed to present a cognizable ERISA claim. They allege that as a result of employment opportunities they were denied because of defendant's discriminatory conduct, they received lower compensation which resulted in lower pension benefits. They seek a declaration that they are entitled to receive pension benefits in an amount to which they would have been entitled had they received more highly compensated positions. Plaintiffs have cited to no case in which a court has permitted a plaintiff to proceed under ERISA on such a theory.

A statute of limitations runs from the time of a wrongful act and not from the time of any future effects or consequence of such act. See, e.g., Perez v. Laredo Junior College, 706 F.2d 731, 734 (5th Cir. 1983), cert. denied, 464 U.S. 1042 (1984); Sendall v. Boeing Helicopters, 827 F. Supp. 325, 329 (E.D. Pa. 1993), aff'd, 22 F.3d 303 (3d Cir. 1994). To permit plaintiffs to proceed on such a theory would effectively undermine the statute of limitations for § 1981 claims in any case where a defendant employer maintained a pension or benefits plan.

Plaintiffs do not allege that GPU has administered the plan in a racially discriminatory manner or denied benefits

