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

MATTHEW MICHELS	**:**	**CIVIL ACTION**
Plaintiff,	**:**	
	:	
v.	**:**	**NO. 04-1906**
	:	
SUNOCO HOME COMFORT SERVICE,	**:**	
SCOTT CHEEK and ROBERT	**:**	
YOUNG	**:**	
Defendants.	**:**	

O R D E R

AND NOW, this 10th day of December, 2004, upon consideration of the Motion of Sonoco, Inc., D/B/A Sunoco Home Comfort Service, Scott Cheek, and Robert Young to Dismiss Counts I and IV of the Second Amended Complaint Pursuant to Rule 12(b)(6) (Document No. 21, filed October 6, 2004), and Plaintiff's Response to Defendants' Motion to Dismiss Counts I and IV of Plaintiff's Second Amended Complaint (Document No. 22, filed October 18, 2004), and the related submissions, **IT IS ORDERED** that the Motion of Sonoco, Inc., D/B/A Sunoco Home Comfort Service, Scott Cheek, and Robert Young to Dismiss Counts I and IV of the Second Amended Complaint Pursuant to Rule 12(b)(6) is **GRANTED** and Counts I and IV of plaintiff's Second Amended Complaint[1] are **DISMISSED.** The case shall proceed on Counts III, V, VI, VII, and VIII of the Second Amended Complaint in accordance with the Scheduling Order of August 26, 2004.

[1] The Court notes that plaintiff mistakenly titled his Second Amended Complaint as "Amended Complaint."

MEMORANDUM

I. BACKGROUND

Plaintiff Matthew Michels filed an eight-count Second Amended Complaint claiming that as a result of an alleged suspension from his employment, and other action by defendant, his rights under various state and federal laws were violated. In their Motion, defendants seek dismissal of Counts I and IV of plaintiff's Second Amended Complaint for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons set forth below, the Court grants defendants Motion to Dismiss.

II. PROCEDURAL HISTORY

Plaintiff, an employee of defendant Sunoco Home Comfort ("Sunoco"), filed a Complaint against his employer and two of its employees, Scott Cheek and Robert Young. Defendants filed a Motion to Dismiss Counts I, II, V, and VIII of the Complaint. Prior to deciding the Motion to Dismiss, this Court granted a request by plaintiff to file an Amended Complaint and denied defendants' Motion to Dismiss as moot. On June 16, 2004, plaintiff filed an Amended Complaint. Defendants moved to dismiss Counts I, II, V, and VIII of the Amended Complaint. This Court granted defendant's Motion to Dismiss to Count VIII of the Amended Complaint which stated a claim for intentional infliction of emotion distress. With respect to Counts I, II, and IV of the Amended Complaint, the Court granted defendants' Motion to Dismiss with leave to amend those counts of the Amended Complaint.

On September 13, 2004, plaintiff filed a Second Amended Complaint.[2] In this Complaint, Count I alleges that defendants discriminated against plaintiff on the basis of a disability in violation of 42 U.S.C § 12111 of the American with Disabilities Act ("ADA") and 43 P.S. § 951 of the Pennsylvania Human Relations Act ("PHRA"). Count IV alleges that defendants unlawfully suspended plaintiff in violation of the Family and Medical Leave Act ("FMLA"). Plaintiff seeks compensatory and injunctive relief and attorneys' fees and costs.

On October 6, 2004, defendants moved to dismiss Counts I and IV of plaintiff's Second Amended Complaint under Federal Rule of Civil Procedure 12(b)(6).

II. STANDARD OF REVIEW

Rule 12(b)(6) of the federal rules of civil procedure provides that, in response to a pleading, a defense of "failure to state a claim upon which relief can be granted" may be raised by motion. Fed. R. Civ. P. 12(b)(6). In considering a motion to dismiss under Rule 12(b)(6), a court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). Only those facts alleged in the complaint may be considered in deciding such a motion. ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). 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 (1984). Therefore, the facts alleged in plaintiff's Second Amended Complaint are accepted as true in deciding this motion.

[2] The Court notes that plaintiff mistakenly titled his Second Amended Complaint as "Amended Complaint."

III. DISCUSSION

A. ADA and PHRA claims – Count I

This Court issued an Order on August 26, 2004, in which it dismissed plaintiff's claims for disability discrimination under the Americans with Disabilities Act ("ADA") and the Pennsylvania Human Relations Act ("PHRA"), but gave plaintiff leave to file and serve a second amended complaint. In granting defendant's Motion to Dismiss plaintiff's ADA and PHRA claims, the Court stated that plaintiff's claims under the ADA and the PHRA failed to state a claim of disability discrimination because the Amended Complaint contained insufficient facts to support a claim for disability discrimination as plaintiff did not even state the nature of his claimed disability or impairment.

Plaintiff filed a Second Amended Complaint on September 13, 2004. Defendants argue that Count I of the Second Amended Complaint should be dismissed because plaintiff has again failed to state a claim under the ADA and PHRA.[3]

Plaintiff's Second Amended Complaint fails to satisfy the pleading requirements for a claim of disability discrimination under the ADA and the PHRA[4] – he has not stated the nature of his claimed disability as directed by the Order of August 26, 2004. Plaintiff made only one change with respect to this claim – he substituted "mental impairment" in the Second Amended Complaint for "physical impairment" in the Amended Complaint. (Second Amended Compl. ¶ 22). That change is insufficient to state a cause of action under the ADA and the PHRA.

---

[3] These claims were asserted in Counts I and II of plaintiff's Amended Complaint. The Second Amended Complaint does not contain a Count II.

[4] The Third Circuit treats claims under the PHRA, the state counterpart to the ADA, in the same manner. See Kelly v. Drexel University, 94 F. 3d 102, 105 (3d Cir. 1996).

Accordingly, Count I of plaintiff's Second Amended Complaint is dismissed.

B. FMLA Claim - Count IV

In the same Order dated August 26, 2004, the Court dismissed Count V of plaintiff's Amended Complaint for failure to state a claim under the FMLA. The Order stated that "plaintiff has not alleged . . . that he is entitled to the protection of the FMLA because he has not alleged that he took any leave, or that any absences from his employment were subject to the FMLA."

Count IV of plaintiff's Second Amended Complaint asserts the same claim under the FMLA as did Count V of the first Amended Complaint. Plaintiff's Second Amended Complaint fails to correct the deficiencies identified by the Court in its Order of August 26, 2004.

The FMLA entitles eligible employees to twelve weeks of unpaid leave during any twelve-month period if the employee has a "serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). Courts recognize two causes of action under the FMLA: interference claims, in which an employee asserts that his employer denied or otherwise interfered with his FMLA rights pursuant to 29 U.S.C. § 2615(a)(1), and retaliation claims under 29 U.S.C. § 2615(a)(2), in which an employee asserts that his employer discriminated against him because he engaged in activity protected by the Act. See, e.g., Sherrod v. Phila. Gas Works, 57 Fed. Appx. 68, 72 (3d Cir. 2003); Bearley v. Friendly Ice Cream Corp., 322 F. Supp. 2d 563, 571 (M.D. Pa. 2004).

The only notable changes in the Second Amended Complaint is that plaintiff adds allegations that he was at times required to attend the Employment Assistance Program (EAP) for counseling during work hours, that he was suspended for "exercising these protected rights to take time to care for a serious health condition on a continuous or intermittent basis," and that he

was not returned to a comparable position when he returned to work after his alleged suspension. (Second Amended Compl. at ¶¶ 49, 52, 53)

These allegations are insufficient to state a claim under the FMLA. Plaintiff still has not alleged that any absences from his employment were subject to the FMLA. In addition, he fails to allege that he requested leave to attend the EAP counseling sessions. An employee who seeks FMLA-protected leave must give the employer adequate notice of the need for leave – 30 days in advance for foreseeable leave, 29 U.S.C. § 2612(e)(1), or "as soon as practicable" for unforeseeable leave, 29 U.S.C. § 2612(e)(1).

Furthermore, to state a claim under the FMLA, plaintiff must identify a serious health condition, and he fails to do so. A serious health condition is defined in the FMLA as an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility, or continuing treatment by a health care provider. 29 U.S.C. § 2611(11). There are no facts alleged in the Second Amended Complaint sufficient to satisfy this requirement. In that Complaint, plaintiff asserts only that he "[took] time to care for a serious health condition" (Second Amended Compl. at ¶ 52). Determining whether an illness qualifies as a serious health condition for purposes of the FMLA is a legal question, which a plaintiff may not avoid "merely by alleging his condition to be so." Haefling v. United Parcel Service, Inc., 169 F. 3d 494, 499 (7th Cir. 1999).

Finally, plaintiff does not set forth allegations sufficient to state a retaliation claim under the FMLA. To make out a prima facie case of retaliation under the FMLA, a plaintiff must allege that (1) he engaged in protected activity; (2) his employer took adverse action after or contemporaneous with his protected activity; and (3) a causal link exists between his protected

activity and the employer's adverse action. Abramson v. Wm. Patterson College of N.J., 260 F.3d 265, 286 (3d Cir. 2001). Plaintiff has not satisfied the first part of this test – he has not alleged facts sufficient to demonstrate that he was entitled to protection under the FMLA. Moreover, he has not set forth any facts sufficient to establish a casual link existed between any FMLA-protected leave and his suspension.

For the reasons set forth above, defendants' Motion to Dismiss Count IV of plaintiff's Second Amended Complaint is granted.

BY THE COURT:

_____

JAN E. DUBOIS, J.