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

LANA K. YANG,	:	CIVIL ACTION
Plaintiff,	:	No. 04-4626
v.	:	
ASTRAZENECA,	:	
Defendant.	:	

MEMORANDUM

ROBERT F. KELLY, Sr. J. **FEBRUARY 10, 2005**

Presently before this Court is Defendant AstraZeneca Pharmaceuticals LP's Motion to Dismiss Counts Three and Four of the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons that follow, the Motion will be granted.

Plaintiff Lana K. Yang, who is a Chinese-American female, was hired by Defendant AstraZeneca as a Clinical Research Scientist on January 9, 1996. She later assumed the position of Market Research Manager. At some point during her employment, Plaintiff developed severe back pain. Plaintiff took short term disability leave twice, from July 8, 2002 to September 8, 2002, and from July 3, 2003 to September 24, 2003. Before taking disability leaves, Plaintiff received satisfactory or better performance ratings from Defendant. However, after taking leave, Plaintiff was placed on a Performance Action Plan, and later, a Performance Improvement Plan. Plaintiff was terminated by Defendant on January 8, 2004.

On or about November 21, 2003, Plaintiff filed her first Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC"). In that Charge, Plaintiff stated her claim as follows:

> I was hired on January 9, 1996 as a Clinical Research Scientist. My current position is Market Research Manager. Due to a number of symptoms that I was experiencing, I made Jim Eash, Director of Market Research, aware of my disability. Due to the severity of my disability I went on the first Short Term Disability ("STD") leave from July 8, 2002 to September 8, 2002. After release by my treating physician, he recommended that I work no more than 4 hours per day at the computer but the Respondent [AstraZeneca] increased it to 8 hours at the computer. This aggravated my symptoms. I took a second STD leave from July 3, 2003 to September 24, 2003. When I was released for work, my physician recommended no more than 3 hours [per] day at the computer, 30 hours per week for a four work day week. However, Respondent demanded that I work five days per week. After returning from my first STD, I was placed on a Performance Action Plan on March 6, 2003. As a result of this action, I was denied my bonus and salary increase. After return from my second STD leave, Respondent placed me on a Performance Improvement Plan from September 30, 2003 to December 31, 2003. During the second STD leave, Respondent denied 10 weeks of disability payments which I was entitled to. I was placed on Family Medical Leave.
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> Because my disability precludes me from sitting for extended periods of time, I first approached Mr. Eash in October 2001, that I needed a different type of job which my Neurologist had recommended. I also spoke to Ron Pszallgowski, Human Resource Director and Lynn Tetrault, Vice President, Human Resources on July 2, 2003. In May and June of 2003, I applied for the following positions: Medical Marketing Director (promotional opportunity 6); Medical Marking Director (lateral transfer); Sale Representative and Phoenix Brand Manager. For the Medical Marketing Director, there were six openings and three or four opening in the Medical Marketing Manager position. The Sales Representative position would have been an ideal reasonable accommodation because it required almost no computer work. On November 18, 2003, I learned that my employment status is currently listed as paid leave of absence, even though I returned to work on September 25, 2003. Moreover, on my 401(k) Plan, my employment status is listed as an <u>unpaid leave</u>. As a result, I have been paying my own benefits out of pocket.

> I believe I have been discriminated against because of my disability in violation of the Americans with Disabilities Act of 1990, as amended because I was denied reasonable accommodation and prior to my disability and being placed on the aforementioned plans, I was rated excellent on my performance evaluations for three consecutive years.

(Def.'s Mem. L. Supp. Mot. Dismiss at Ex. A). Plaintiff filed her second Charge of Discrimination on or about January 27, 2004. In that Charge, she stated her claim as follows:

> On September 30, 2003, I was placed on a Performance Improvement Plan. From October 6, 2003 to December 18, 2003, I had weekly progress meetings with my managers. During these meetings, my managers were always critical of my performance followed by documentation, despite my verbal or written rebuttal. On January 7, 2004, I disputed my treatment by my managers in an e-mail to Mike Siena, Senior Director, Market Research. On January 18, 2004, Debbie Maynard, Director, Market Research, David Mathes, Brand Leader, and Mary Schmittlein, Senior Human Resource Partner, met with me to discuss the outcome of my Performance Improvement Plan. Despite my disagreement and request to respond in writing, I was terminated immediately and escorted out my office.
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> Respondent's reason for this action was due to unsatisfactory performance.
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> I believe I have been retaliated against for filing an employment discrimination charge on November 21, 2003 (170-2004-00540), in violation of the Americans with Disabilities Act of 1990, as amended. I also allege that my physician recommended telecommuting one day per week as a reasonable accommodation. However, I was denied. Yet, several employees in my department are allowed telecommuting two days per week. I also believe this is another act of retaliation.

(Def.'s Mem. L. Supp. Mot. Dismiss at Ex. C).

Plaintiff filed the present action on October 1, 2004. The five count complaint alleges Americans With Disabilities Act ("ADA") discrimination (Count One), ADA retaliation (Count Two), Title VII violations (Count Three), Title VII retaliation (Count Four), and violation

of 42 U.S.C. § 1981 (Count Five). Defendant moved to dismiss counts Three and Four on November 23, 2004.

A motion to dismiss, pursuant to Federal Rule of Civil Procedure 12(b) (6), tests the legal sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). A court must determine whether the party making the claim would be entitled to relief under any set of facts that could be established in support of his or her claim. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984) (citing Conley, 355 U.S. at 45-46); see also Wisniewski v. Johns-Manville Corp., 759 F.2d 271, 273 (3d Cir. 1985). In considering a Motion to Dismiss, all allegations in the complaint must be accepted as true and viewed in the light most favorable to the non-moving party. Rocks v. City of Phila., 868 F.2d 644, 645 (3d Cir. 1989) (citations omitted).

As a threshold matter, there is some dispute as to whether the two Charges of Discrimination filed by Plaintiff, which are attached not to the Complaint but to Defendant's Motion to Dismiss, may be considered for the present motion without converting it to a motion for summary judgment. See Fed. R. Civ. Proc. 12(b). As these documents are a matter of the public record, are undisputedly authentic, and central to Plaintiff's claims, they may be considered on a motion to dismiss without converting the motion to one for summary judgment. Rogan v. Giant Eagle, Inc., 113 F. Supp. 2d 777, 781 (W.D. Pa. 2000), aff'd, 276 F.3d 579 (3d Cir. 2001).

In order to properly sue an employer under Title VII, a plaintiff must first exhaust her administrative remedies by filing a charge of discrimination with the EEOC and receiving a right to sue letter. Robinson v. Dalton, 107 F.3d 1018, 1020 (3d Cir. 1997). The purpose of requiring resort to EEOC procedures before bringing suit is twofold: to give notice to the charged

party and to promote voluntary compliance without litigation. Reddinger v. Hosp. Cent. Servs., Inc., 4 F. Supp. 2d 405, 409 (E.D. Pa. 1998).

The scope of the civil complaint is accordingly limited by the charge filed with the EEOC and the investigation which can reasonably be expected to grow from that charge. Id. (citing Powers v. Grinnell Corp., 915 F.2d 34, 38 (1st Cir. 1990)). However, an administrative charge is not a blueprint for the ensuing litigation. The relevant test in determining whether a claimant is required to exhaust her administrative remedies is whether the acts alleged in the subsequent suit are fairly within the scope of the prior EEOC complaint, or the investigation arising therefrom. Antol v. Perry, 82 F.3d 1291, 1295 (3d Cir. 1996); Waiters v. Parsons, 729 F.2d 233, 237 (3d Cir. 1984). The determination "turns on whether there is a close nexus between the facts supporting each claim or whether additional charges made in the judicial complaint may fairly be considered explanations of the original charge or growing out of it." Galvis v. HGO Servs., 49 F. Supp. 2d 445, 448-49 (E.D. Pa. 1999).

Defendant argues that the charges filed by Plaintiff address only her claims of discrimination on the basis of her disability and do not contain allegations of discrimination on the basis of race, national origin, or gender. I agree. Although Plaintiff argues that the failure to check the boxes for race, national origin, or gender was a clerical error committed by the EEOC, the narrative of the charges are devoid of any allegations of such discrimination. Rather, they are limited solely to discrimination based upon Plaintiff's alleged disability. Furthermore, even if the boxes for race, national origin, or gender discrimination had been checked, the charges would still be insufficient to establish those charges without supporting allegations in the narrative section of the charge. Johnson v. Chase Home Fin., 309 F. Supp. 2d 667, 672 (E.D. Pa. 2004).

Plaintiff argues that the necessary allegations were made in her June 26, 2003, Charge Questionnaire filed with the EEOC. However, making allegations on the questionnaire is insufficient to exhaust administrative remedies. Rather, the allegations must appear in the formal charge signed by the claimant and served on the respondent. Id.; see also Rogan, 113 F. Supp. 2d at 788.

As I conclude that the formal charges made against Defendant by Plaintiff were devoid of allegations from which one could conclude that race, national origin, or gender discrimination had been charged, I conclude that Plaintiff has failed to exhaust her administrative remedies with respect to those claims. As a result, Counts Three and Four for Title VII discrimination and retaliation will be dismissed.

An appropriate Order follows.

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Defendant.	:	

ORDER

AND NOW this 10th day of February, 2005, upon consideration of Defendant AstraZeneca Pharmaceuticals LP's Motion to Dismiss Counts Three and Four of the Complaint (Doc. No. 4) it is hereby **ORDERED** that:

1. the Motion is **GRANTED**; and

2. Counts Three and Four of the Complaint are hereby **DISMISSED WITH PREJUDICE**.

BY THE COURT:

/s/ Robert F. Kelly
ROBERT F. KELLY Sr. J.