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

CARMEN RIGAUD	**:**	**CIVIL ACTION**
	:	
v.	**:**	**NO. 04-1866**
	:	
JUDY GAROFALO, et al.	**:**	

MEMORANDUM AND ORDER

Kauffman, J. **May 9, 2005**

Plaintiff Carmen Rigaud ("Plaintiff"), brings this action against Defendants Judy Garofalo, Suburban Woods Health & Rehabilitation, Brandywine Senior Care, Business Health Services, Dr. Jeffrey Heebner, and Dr. James Nicholson alleging a Health Insurance Portability and Accountability Act ("HIPAA") violation (Count I); common law slander (Count II); intentional and negligent infliction of emotional distress (Count III); intentional interference with contractual relations against Defendants Business Health Services, Dr. Jeffrey Heebner and Dr. James Nicholson (Count IV); and wrongful termination in violation of public policy and retaliation (Count V), wrongful termination in violation of the Age Discrimination in Employment Act ("ADEA") (Count VI), wrongful termination in violation of the Americans with Disabilities Act ("ADA") (Count VII), and wrongful termination in violation of the Fourteenth Amendment and 42 U.S.C. §§ 1981, 1983, and 2000d, et seq., against Defendants Suburban Woods Health & Rehabilitation ("Suburban Woods") and Brandywine Senior Care ("Brandywine") (Count VIII). Now before the Court is Defendant Brandywine's Motion to Dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) or failure to state a claim on which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). For the

following reasons, the Court will grant the Motion.

I. Background and Procedural History

This Opinion adopts the Background outlined in the May 2, 2005 Memorandum and Order granting the Motion to Dismiss of Defendants Heebner, Nicholson and Business Health Services and dismissing Counts I, II, III and IV. Defendant Brandywine further independently moves to dismiss Counts V, VI, VII, and VIII.

II. Legal Standard

A. Fed. R. Civ. P. 12(b)(1)

In considering a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the Court must distinguish between motions that attack the complaint on its face and those that attack the existence of subject matter jurisdiction in fact. Mortensen v. First Fed. Sav. & Loan Assoc., 549 F.2d 884, 891 (3d Cir. 1977). A facial attack is considered under the same standard as a motion to dismiss under Rule 12(b)(6); all allegations in the complaint are taken to be true. Id. If the attack is factual, however, Plaintiff's allegations are not presumed to be true. Id. The Court may look beyond the pleadings and make its own determination as to whether it has the power to hear the action. Cestonaro v. United States, 211 F.3d 749, 752 (3d Cir. 2000). Further, the Plaintiff bears the burden of proving that jurisdiction does in fact exist. Mortensen, 549 F.2d at 891.

B. Fed. R. Civ. P. 12(b)(6)

When deciding a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the Court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild,

O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). The Court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted only when it is certain that no relief could be granted under any set of facts that could be proved by the plaintiff. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

III. Analysis

A. Count V – Wrongful Termination in Violation of Public Policy and Retaliation

Plaintiff asserts a claim against Defendant Brandywine for wrongful termination based on public policy. Plaintiff does not assert that Defendant Brandywine was her employer. Plaintiff also does not allege any policy that Defendant Brandywine violated. In fact, outside of the heading of the Counts and in the introductory "Parties" section of the Complaint, Plaintiff makes no substantive mention of Defendant Brandywine. Thus, Plaintiff fails to meet the minimal requirements of notice pleading set out in Fed. R. Civ. P. 8(a), as she does not include a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Accordingly, the claim for wrongful termination in violation of public policy will be dismissed as to Defendant Brandywine.

Plaintiff's claim of retaliation appears to be based on Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. To state a claim for retaliation, Plaintiff must establish that: (1) she engaged in a protected activity; (2) Defendant Brandywine took adverse action after or contemporaneous with the protected activity; and, (3) a causal link exists between the protected

activity and the employer's adverse employment action. Abramson v. William Paterson College, 260 F.2d 265, 286 (3d Cir. 2001). While termination of employment constitutes an adverse employment action for the purposes of Title VII, see Storey v. Burns Int'l Sec. Services, 390 F.3d 760, 766 (3d Cir. 2004), Plaintiff fails to allege that she engaged in a protected activity or that Defendant Brandywine took action against her: She has neither asserted that Defendant Brandywine was her employer nor that it caused the termination of her employment. Thus, Plaintiff's claim for retaliation will be dismissed as to Defendant Brandywine.

B. Count VI – Wrongful Termination under the ADEA

Plaintiff failed to exhaust her administrative remedies before filing a complaint against Defendants based on the alleged ADEA violations. See West v. Philadelphia Electric Co., 45 F.3d 744, 754 (3d Cir. 1995) (exhaustion of administrative remedies is a prerequisite to suing under Title VII and the ADEA); O'Connor v. Tandem Personnel, Inc., 1999 WL 627923, at *1 (E.D. Pa. Aug. 17, 1999). Therefore, Count VI will be dismissed without prejudice.

C. Count VII – Wrongful Termination under the ADA

Plaintiff also failed to exhaust administrative remedies before filing claims based on violations of the ADA. See 42 U.S.C. § 2000e; Churchill v. Star Enterprises, 183 F.3d 184, 190 (3d Cir. 1999) ("prior to filing suit in federal court under the ADA, a plaintiff must exhaust administrative remedies by filing a complaint with the EEOC"); Bridges v. Diesel Services Inc., 1994 U.S. Dist. LEXIS 9429 (E.D. Pa. July 11, 1994) (dismissing for failure to exhaust administrative remedies). Thus, Count VII will be dismissed without prejudice.

D. Count VIII – Wrongful Termination in Violation of 28 U.S.C. §§ 1331 and 1343, the Fourteenth Amendment and 42 U.S.C. §§ 1981, 1983 and 2000d, et seq.[1]

1. Fourteenth Amendment and 42 U.S.C. § 1983

To allege a Fourteenth Amendment violation or a § 1983 violation, a plaintiff must allege that some form of "state action" was involved in the defendant's wrongful conduct. See Shelley v. Kramer, 334 U.S. 1, 13 (1948) ("[the Fourteenth] [A]mendment erects no shield against merely private conduct, however discriminatory or wrongful"); Williams v. Borough of West Chester, 891 F.2d 458, 464 (3d Cir. 1989) (stating that to establish a claim under 42 U.S.C. § 1983, the plaintiff must show that the defendant, acting under color of law, deprived him of a right or privilege secured by the Constitution or laws of the United States).

The Complaint is devoid of any assertion that Defendant Brandywine, or any Defendant, is a state actor or acted under color of state law, and no allegation in the Complaint involves state action. Plaintiff merely alleges that Defendant Brandywine is a "corporation operating under authority granted by the Secretary of the Commonwealth ..." Complaint ¶ 8. However, the fact that a defendant corporation is incorporated by the state is insufficient to meet the state action requirement. See Jackson v. Met. Edison Co., 419 U.S. 345, 351 (1974); O'Donnell v. Ahnert Enter., 1986 WL 918, at *1 (E.D. Pa. Jan. 17, 1986). Thus, any claim pursuant to the Fourteenth Amendment or § 1983 will be dismissed.

2. 42 U.S.C. § 1981

Under § 1981, "all persons within the jurisdiction of the United States shall have the

[1] The Court notes that there are no substantive causes of action arising from 28 U.S.C. §§ 1331 and 1343. They are simply jurisdictional statutes permitting federal question jurisdiction in federal courts.

same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence and to the full equal benefit of all laws ..." 42 U.S.C. § 1981. In order to maintain a cause of action under § 1981, Plaintiff must allege: (1) that she is a member of a racially cognizable group; (2) Defendant Brandywine's intention to discriminate on the basis of race; and, (3) that the discrimination concerned one or more of the activities enumerated in the statute, that is the making and enforcing of contracts. Brown v. Phillip Morris, Inc., 250 F.3d 789, 796 (3d Cir. 2001); McBride v. Hosp. of the Univ. of Pa., 2001 WL 1132404, at *3 (E.D. Pa. Sept. 21, 2001) (to maintain a § 1981 claim, a plaintiff must demonstrate that the defendant intentionally discriminated against her "because of race in the making, performance, enforcement of the benefits, terms, or conditions of the contractual relationship"). Plaintiff does not allege the existence of any contractual relationship with Defendant Brandywine. Forcades v. Feeney, 2004 WL 2603733, at*1 (E.D. Pa. Nov. 10, 2004) (dismissing § 1981 claim because the plaintiff neither alleged that the defendant's action was motivated by racial based animus nor that there had been an interference with a private contract). In the present case, Plaintiff does not allege any conduct by Defendant Brandywine based on racial animus; in fact, all conduct alleged in this count is that of Defendant Suburban Woods. Defendant Brandywine is mentioned only in the heading of the Count. Thus, any claim against Defendant Brandywine pursuant to § 1981 will be dismissed.

3. 42 U.S.C. § 2000d, et seq.

Under Title VII of the Civil Rights Act, 42 U.S.C. § 2000d, "no person in the United States shall, on the grounds of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving

federal assistance." 42 U.S.C. § 2000d. Plaintiff has failed adequately to plead a claim under § 2000d; she has not alleged either that she was involved in any program or activity that was receiving federal financial assistance or that she was excluded from participating in or was the intended beneficiary of such a program. Consequently, Plaintiff has not provided notice under Fed. R. Civ. P. 8(a)(2) as to her claim and the grounds on which it rests. Thus, any claim pursuant to § 2000d will be dismissed without prejudice.

IV. Conclusion

For the foregoing reasons, the Court will grant Defendant Brandywine's Motion to Dismiss. An appropriate Order follows.

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ORDER

AND NOW, this 9th day of May, 2005, upon consideration of Defendant Brandywine's Motion to Dismiss (docket no. 18), it is **ORDERED** that the Motion is **GRANTED**. It is **FURTHER ORDERED** that:

(1) Count V is **DISMISSED** as to Defendant Brandywine;

(2) Count VI is **DISMISSED** without prejudice:

(3) Count VII is **DISMISSED** without prejudice;

(4) The portion of Count VIII brought pursuant to 42 U.S.C. § 1981 is **DISMISSED** solely as to Defendant Brandywine. The portion of Count VIII brought pursuant to 42 U.S.C. § 2000d is **DISMISSED** without prejudice as to all remaining Defendants. The portions of Count VIII brought pursuant to 42 U.S.C. § 1983, the Fourteenth Amendment and 28 U.S.C. §§ 1331 and 1343, are **DISMISSED** as to all remaining Defendants.

BY THE COURT:

S/Bruce W. Kauffman
BRUCE W. KAUFFMAN, J.