

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

ADALBERTO BELVERENA,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	NO. 05-4364
	:	
CENTRAL PARKING	:	
SYSTEM, INC.,	:	
Defendant	:	

MEMORANDUM

STENGEL, J.

October 31, 2005

Plaintiff Adalberto Belverena brings this discrimination in employment case as a former parking lot attendant for the defendant. Belverena's complaint contains four counts: 1) violations of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (ADEA); 2) violations of the Pennsylvania Human Relations Act, 43 Pa.C.S. 951 *et seq.* (PHRA); 3) Intentional Infliction of Emotional Distress; and 4) Breach of Contract. Currently before this Court is the defendant's, Central Parking System Inc.'s, motion to dismiss counts one and two of Belverena's complaint to the extent that they provide for individual liability and punitive damages, and counts three and four in their entirety.

I. BACKGROUND

Belverena alleges he was wrongfully terminated on June 22, 2004, after 19 years and eight months of service as a parking lot attendant for the defendant ("CPSI"). Belverena was 70 years old at the time of firing and alleges the parking lot he worked at was scheduled to close on June 30, 2004. This claim arose after an unidentified person,

hired by CPSI as a floater, approached Belverena while he was working at the parking lot. The floater, in an attempt to test Belverena's honesty, offered him money to park his car on the lot without receiving a ticket stub. Belverena allegedly refused, the floater parked his car on the sidewalk, walked off, and then later returned and left with the car. A short while later the floater returned to the parking lot saying his cell phone was missing. Belverena pointed at the cell phone resting in the front seat of the floater's car and the floater tipped Belverena two dollars for the effort. The next day Belverena was fired for stealing revenue from CPSI. Belverena alleges the whole incident was set up by CPSI and the firing was solely based on his age. Belverena received his right to sue letter from the EEOC on June 22, 2005, and commenced this suit within 90 days.

CPSI alleges Belverena was fired after he accepted two dollars for advising the floater to park on the street instead of in the parking lot. CPSI does not deny that they hired the floater to approach Belverena and attempt to persuade him into breaking their rules; however, they specifically deny why Belverena was paid the two dollars. CPSI contends hiring floaters is a standard business practice and they routinely fire employees, regardless of age, for similar behavior.

II. STANDARD of REVIEW

When considering a motion to dismiss a complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the Court must accept as true all allegations within the plaintiff's complaint and all reasonable inferences that can be drawn from those allegations. Furthermore the Court must construe the complaint in the light most

favorable to the plaintiff. Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997) (citations omitted). The Court may properly dismiss a complaint pursuant to Rule 12(b)(6) only 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). The issue in a Rule 12(b)(6) Motion is not whether a plaintiff will ultimately prevail, but whether plaintiff is entitled to offer evidence to support the claims. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

III. DISCUSSION

Belverena concedes the defendant’s motion to the extent that he no longer seeks individual liability against CPSI’s manager, John Ponzuric. The remaining issues regard punitive damages and whether Belverena may proceed with his intentional infliction of emotional distress and breach of contract claims.

A. Has Belverena Stated a Breach of Contract Claim, and Is It Preempted by the Pennsylvania Human Relations Act?

CPSI argues that because Belverena’s state law claims are based on the same alleged facts as his ADEA and PHRA claims, they are preempted by the PHRA. “If the acts supporting a common law cause of action are only acts of discrimination, the common law claim is preempted by the Pennsylvania Human Relations Act.” Styles v. Philadelphia Elec. Co., Civ. No. 93-4593, 1994 U.S. Dist. LEXIS 7486, at *7-*8 (E.D. Pa. 1994) (Buckwalter, J.) (citing Keck v. Commercial Union Ins. Co., 758 F. Supp. 1034, 1039 (M.D. Pa. 1991)). Although CPSI is correct in asserting that the PHRA

preempts other state law causes of actions, the PHRA does not preempt causes of action arising from a separate set of facts. “[Third Circuit] courts have also recognized that where a claim for breach of contract is grounded on conduct other than the alleged discriminatory conduct, that claim is not barred by the PHRA.” Brennan v. National Telephone Directory Corp., 850 F. Supp. 331, 344-45 (E.D. Pa. 1994). See also Deramo v. Consolidated Rail Corp., 607 F. Supp. 100 (E.D. Pa. 1985) (age discrimination in employment case in which the court specifically held that plaintiff's claim for breach of contract was not preempted by the PHRA).

In this case, Belverena argues that an implied contract existed between him and CPSI which required CPSI to give him a warning or suspension prior to firing him after almost 20 years of service. According to Belverena other similarly situated employees have been warned and/or suspended prior to being fired for similar behavior. Belverena alleges an implied contract between him and the corporation exists according to the terms of the employee manual. This claim requires a separate set of facts be proven than his ADEA claim, namely the existence of an implied contract.¹ Accepting Belverena’s pleaded facts as true, Belverena could be entitled to relief under a breach of contract claim, and because it requires a separate set of facts, the claim is not necessarily preempted by the PHRA.

¹Belvena included in his pleadings that he has not received a copy of CPSI’s employee manual, and that he believes his breach of contract claim may be resolved once a copy of the manual is provided to him.

B. Is Belverena's Intentional Infliction of Emotional Distress Claim Preempted by the Pennsylvania Human Relations Act, or the Pennsylvania Workers' Compensation Act?

Common law claims of intentional infliction of emotional distress that are based upon the same allegations of discrimination, and are not examples of egregious or outrageous conduct are also preempted by the Pennsylvania Human Relations Act. See Bolds v. Sports Center Assoc., Civ. No 98-2980, 1999 U.S. Dist. Lexis 380 (E.D. Pa 1999) (Shapiro J.) (denying plaintiff's motion for reconsideration of dismissal of intentional infliction of emotional distress claim where allegations of sexual harassment were insufficiently outrageous to overcome PHRA preemption). In this case the question is whether CPSI's conduct qualifies as extreme and outrageous. This is a very tough standard to meet. "[I]t is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary" to support a claim of intentional infliction of emotional distress. Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988). "The only instances in which courts applying Pennsylvania law have found conduct outrageous in the employment context is where an employer engaged in both sexual harassment and other retaliatory behavior against an employee." Id. The conduct in this case is not of a sexual or retaliatory nature. Belverena avers that he was set up by CPSI, wrongfully accused of stealing, and fired all because of his age. Although this alleged conduct is offensive, it likely does not rise to the level required under Pennsylvania law. See Swofford v. SciCor, Inc., Civ. No. 91-4969, 1991 U.S. Dist. Lexis

17514, at *7-*9 (E.D. Pa. 1991) (Newcomer J.) (plaintiff’s intentional infliction of emotional distress claim, based in part upon her termination of employment, was dismissed as not meeting the outrageous standard).²

C. Is Belverena Entitled to Punitive Damages?

“Neither punitive damages nor damages for pain and suffering are recoverable under the ADEA.” Steward v. Sears Roebuck & Co., 312 F. Supp. 2d 719, 730 (E.D. Pa. 2004). However, liquidated damages may be available to Belverena if he is able to prove CPSI willfully violated the ADEA. 29 U.S.C. § 626(b). In this case, Belverena’s response to CPSI’s motion to dismiss seeks liquidated damages arguing that at this point in the litigation, the court does not have enough information to conclude that CPSI did not act willfully. I agree. Although it is clear that Belverena may not seek punitive damages on his ADEA and PHRA claims, he may seek liquidated damages.

IV. CONCLUSION

Based upon the analysis above, I will grant CPSI’s motion in part and will dismiss Belverena’s intentional infliction of emotional distress claim along with his request for punitive damages for his ADEA and PHRA claims. CPSI’s motion to dismiss

² Although moot since the intentional infliction of emotional distress claim does not rise to the level of extreme and outrageous conduct as required under Pennsylvania law, the claim is also preempted by the Pennsylvania’s Workers’ Compensation Act. See Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 940 (3d Cir. 1997) (“Pennsylvania’s workers’ compensation statute provides the sole remedy ‘for injuries [continued] [continued] allegedly sustained during the course of employment.’ Dugan v. Bell Telephone of Pennsylvania, 876 F. Supp. 713, 723 (W.D. Pa. 1994) (citing 77 PA. CONS. STAT. ANN. § 481(a)). The exclusivity provision of that statute bars claims for ‘intentional and/or negligent infliction of emotional distress [arising] out of [an] employment relationship.’ Id. at 724.”).

Belverena's breach of contract claim, however, is denied. CPSI's manager named in Belverena's complaint, John Ponzuric, is dismissed from this case pursuant Belverena's concession. An appropriate order follows.

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	:	
CENTRAL PARKING SYSTEM, INC.,	:	
Defendant	:	

ORDER

STENGEL, J.

AND NOW, this 31st day of October, 2005, upon careful consideration of the defendant's motion to dismiss (Docket # 5), it is hereby ordered that the motion is **GRANTED IN PART** and **DENIED IN PART**. Plaintiff's Intentional Infliction of Emotional Distress claim

and claim for punitive damages pursuant to his ADEA and PHRA claims are dismissed.

Defendant's motion to dismiss plaintiff's Breach of Contract claim is denied.

BY THE COURT:

LAWRENCE F. STENGEL, J.