

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

| | | |
|--------------------------------|---|-----------------|
| DARRYL W. PETERS, |) | |
| |) | Civil Action |
| Plaintiff |) | No. 05-CV-02038 |
| |) | |
| vs. |) | |
| |) | |
| AIR PRODUCTS & CHEMICALS, INC. |) | |
| and |) | |
| ASHLAND-ACT, |) | |
| |) | |
| Defendants |) | |

* * *

APPEARANCES:

DONALD P. RUSSO, ESQUIRE
On behalf of Plaintiff

MICHAEL L. BANKS, ESQUIRE
On behalf of Defendants

* * *

M E M O R A N D U M

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on Defendants' Motion to Dismiss the Second Amended Complaint, which motion was filed July 21, 2005. Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Complaint was filed August 4, 2005. Upon consideration of the briefs of the parties and for the reasons expressed below, we grant in part and deny in part defendants' motion to dismiss.

Specifically, we grant defendants' motion to dismiss plaintiff's claims of discrimination under the Age Discrimination

in Employment Act¹ ("ADEA"), which provides for federal question jurisdiction. We conclude that plaintiff's ADEA claims of are barred by the applicable statute of limitations. In addition, plaintiff fails to state a prima facie claim for unlawful retaliation. Therefore, we dismiss Count I of plaintiff's Second Amended Complaint and Count II as it relates to an ADEA claim for unlawful retaliation.

We deny defendants' motion to dismiss plaintiff's remaining state-law claims and remand plaintiff's remaining state-law claims for unlawful retaliation and violations of the Pennsylvania Human Relations Act² ("PHRA") to the Court of Common Pleas of Lehigh County, Pennsylvania.

JURISDICTION AND VENUE

This action is before the court on federal question jurisdiction. 28 U.S.C. § 1331. Specifically, Counts I and II of plaintiff's Second Amended Complaint assert causes of action under the ADEA, which provides for federal question jurisdiction. Venue is proper because plaintiff alleges that the facts and circumstances giving rise to his causes of action occurred within the jurisdiction of this court. 28 U.S.C. §§ 118, 1391.

¹ 29 U.S.C. §§ 621 to 634.

² Act of October 27, 1955, P.L. 744, No. 222, §§ 1-13, as amended, 43 P.S. §§ 951-963.

PROCEDURAL HISTORY

Plaintiff's claims in this matter arise from the termination of his employment as Principal Scientist at defendant Ashland-ACT ("Ashland")³ on March 12, 2003. On July 14, 2003 plaintiff Darryl W. Peters filed an age discrimination complaint with the Equal Employment Opportunity Commission ("EEOC"). On September 10, 2003 plaintiff simultaneously filed an administrative claim of discrimination with the EEOC and the Pennsylvania Human Relations Commission against defendant Ashland. On August 30, 2004 the EEOC issued plaintiff a right-to-sue letter.

On November 19, 2004 plaintiff commenced this action against defendant Air Products & Chemicals, Inc. ("APCI") by filing a praecipe for writ of summons with the Clerk of Courts-Civil Division of the Court of Common Pleas of Lehigh County, Pennsylvania.⁴ On March 29, 2005 plaintiff filed his Complaint in the Court of Common Pleas of Lehigh County against defendant

³ Plaintiff's Second Amended Complaint designates both defendant Ashland-ACT and another entity named Ashland Specialty Chemical Company as "Ashland". Compare plaintiff's Second Amended Complaint paragraph 4 with paragraph 11. As discussed below, we conclude that Count I of plaintiff's Second Amended Complaint is barred by the applicable statute of limitations. Accordingly, we find that, whenever plaintiff's Second Amended Complaint refers to Ashland, we need not determine whether he is referring Ashland-ACT or Ashland Specialty Chemical Company.

⁴ The second sentence of Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss the Complaint states that plaintiff filed the Writ of Summons on November 19, 2004 and that an attached receipt indicates the filing date. We have reviewed the receipt, and the receipt indicates that the filing date was November 24, 2004. Nevertheless, this discrepancy is immaterial because either November date is within the 90-day statute of limitations, as discussed below.

APCI only. On April 29, 2005 defendant APCI filed a Notice of Removal pursuant to 28 U.S.C. § 1441(b) on the basis of federal question jurisdiction.⁵ Plaintiff has not contested removal.

STANDARD OF REVIEW

A Rule 12(b)(6) motion to dismiss examines the sufficiency of the Complaint. Conley v. Gibson, 355 U.S. 41, 45, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957). In determining the sufficiency of the Complaint, the court must accept all plaintiff's well-pled factual allegations as true and draw all reasonable inferences therefrom in favor of plaintiff. Graves v. Lowery, 117 F.3d 723, 726 (3d Cir. 1997).

A plaintiff's Complaint must provide defendants with notice of his claim, but it need not set out in detail the factual basis for his claims. The United States Supreme Court has held that

the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds

⁵ Neither plaintiff nor defendants have asserted diversity of citizenship as a proper basis for removal. The applicable statute found at 28 U.S.C. § 1441(b) does bars removal from state court to federal court on the basis of diversity jurisdiction when any defendant is a citizen of the state from which removal is sought. See also, Bookover Financial Services, Inc. v. Beckley, 56 F.Supp.2d 782, 787-788 (W.D.Ky. June 30, 1999). Accordingly, because neither party has asserted facts which would allow us to determine whether subject matter jurisdiction would be proper, we decline to determine whether there is diversity of citizenship.

upon which it rests.

Conley, 355 U.S. at 47, 78 S.Ct. at 103, 2 L.Ed.2d at 85.

(Footnote omitted.)

Thus, a court should not grant a motion to dismiss unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Graves, 117 F.3d at 726 (citing Conley, 355 U.S. at 45-46, 78 S.Ct. at 102, 2 L.Ed.2d at 84).

PLAINTIFF'S SECOND AMENDED COMPLAINT

Plaintiff's Second Amended Complaint contains three counts. Count I is a claim against defendant Ashland for violating the Age Discrimination in Employment Act of 1967. Count II is a claim against defendant APCI for unlawful retaliation.⁶ Count III is a claim against defendants APCI and Ashland for violating of the Pennsylvania Human Relations Act.

FACTS

Based upon the averments of plaintiff's Second Amended Complaint, which we must assume to be true for purposes of this

⁶ It is unclear whether plaintiff asserts Count II pursuant to the ADEA or the PHRA. Both statutes provide for a claim of unlawful retaliation, and we note that a review of both claims requires the "same general standards and analysis". Thakur v. The R.W. Johnson Pharmaceutical Research Institute, 268 F.Supp.2d 521 (E.D.Pa. June 25, 2003)(Rufe, J.).

As discussed below, we dismiss plaintiff's ADEA claims, which provided this court with proper subject matter jurisdiction. Thus, we are divested of jurisdiction and make no ruling, or express no opinion, on plaintiff's remaining state-law claims.

motion, the pertinent facts are as follows.

Defendant Ashland hired plaintiff in October 1995. Plaintiff's last position was as a Principal Scientist. Plaintiff reported to Mike Legenza, who was the Technology Manager of defendant Ashland. In March 2003, Mike Legenza informed plaintiff "that he could no longer do his job", and that effective March 12, 2003 plaintiff's employment was terminated.⁷

Plaintiff's employment was terminated for two reasons. The first reason was because he spoke out against management for decisions made within the company, which cost the company millions of dollars. The second reason that plaintiff's employment was terminated was his age. Plaintiff's age was a factor because Ashland either assigned plaintiff's responsibilities to younger employees or hired younger employees to replace him.⁸

On July 14, 2003 plaintiff filed an age discrimination complaint against Ashland with the EEOC. Plaintiff filed an administrative claim of discrimination with the EEOC and the PHRC, and the EEOC received the dual-filing on September 13, 2003. On October 7, 2003 the EEOC notified Ashland of plaintiff's complaint. The EEOC issued its "Notice of Right to

⁷ Second Amended Complaint at paragraphs 4-9.

⁸ Second Amended Complaint at paragraphs 10 and 21.

Sue" to plaintiff on August 30, 2004.⁹

During 2003, defendant APCI acquired "certain assets from Ashland", and, therefore, APCI controls the former Ashland facility in Easton, Pennsylvania.¹⁰

Defendant APCI had knowledge of the EEOC complaint because defendant APCI must have examined plaintiff's personnel records. Further, defendant APCI retaliated. In December 2003 and February 2004 defendant APCI sent two letters threatening to invoke the protections of an alleged non-compete contract. In order to obtain knowledge of such a clause defendant APCI would have had to examine plaintiff's personnel record.¹¹

DISCUSSION

Defendants make three primary arguments in their motion to dismiss. First, defendants assert that the ADEA claim against Ashland must be dismissed as untimely. Second, defendants contend that plaintiff's PHRA claims against Ashland must also be dismissed as untimely. Third, defendants argue that there is no basis for discrimination claims against APCI because plaintiff never alleged that he worked for APCI.

We agree with defendants that plaintiff's ADEA claim against Ashland is untimely and barred by the applicable statute

⁹ Second Amended Complaint at paragraphs 11, 25 and 26.

¹⁰ Second Amended Complaint at paragraph 13.

¹¹ Second Amended Complaint at paragraphs 14-18.

of limitations, and we therefore dismiss Count I of plaintiff's Second Amended Complaint. Further, we agree in part defendant that plaintiff has not stated a claim against APCI in Count II for unlawful retaliation in violation of the ADEA.

Because we dismiss plaintiff's federal claims, we lack subject matter jurisdiction over the plaintiff's remaining state-law claims. Thus, we cannot reach defendants' arguments that plaintiff's claims fail under the PHRA.

Statute of Limitations

First, defendants contend that plaintiff's claims under the ADEA are barred by the applicable statute of limitations. Specifically, defendants contend that plaintiff did not initiate a civil action within the 90-day statute of limitations period of the ADEA.¹²

Defendants contend that plaintiff received his notice of a right to sue on August 30, 2004 and therefore had 90 days, or until Monday, November 29, 2004, to file his Complaint. Defendants further assert that plaintiff did not file his initial Complaint until March 29, 2005; and, thus, plaintiff did not file within the 90-day statute of limitations period. Defendants further aver that the first document to name Ashland as a party was the Second Amended Complaint filed on June 15, 2005; and,

¹² 29 U.S.C. § 626(e).

accordingly, plaintiff filed beyond the 90-day statute of limitations period regarding defendant Ashland as well.

In his response plaintiff asserts that filing a praecipe for a writ of summons tolls the statute of limitations. Further, plaintiff contends that he filed a praecipe for a writ of summons on November 19, 2004, which tolled the statute of limitations.

Plaintiffs do not directly address defendants' contention that the first time Ashland was named as a party was in plaintiff's Second Amended Complaint. Instead, plaintiff argues that Federal Rule of Civil Procedure 15(c) allows the Second Amended Complaint to relate back to the original Complaint. We agree in part with the defendants and in part with the plaintiff. Accordingly, for the reasons expressed below, we dismiss Count I of plaintiff's Second Amended Complaint.

As a prerequisite to filing suit under the ADEA, a plaintiff must first file a charge of discrimination with the EEOC and must receive from the EEOC a notice of the right to sue. In this case, defendants do not dispute that this occurred.

A plaintiff then has 90 days in which to commence a civil action after receipt of the notice to bring suit. See 29 U.S.C. § 626(e); 42 U.S.C. § 2000e-5(f)(1). The 90-day filing period acts as a statute of limitations. McCray v. Corry Manufacturing Company, 61 F.3d 224 (3d Cir. 1995).

Although Count I is a federal cause of action, an ADEA claim may be brought in either federal or state court. See 29 U.S.C. § 626(c)(1). Despite the ADEA requirement that a plaintiff bring a civil action within 90 days of receiving notice of the right to sue, the statute does not specify the manner of commencing the civil action. See Heater v. Kidspeace, No. Civ.A. 05-4545, 2005 U.S. Dist. LEXIS 22512 (E.D.Pa. October 5, 2005)(Schiller, J.).

For the purpose of determining when the action commenced, we apply the Pennsylvania rules of procedure because plaintiff filed his action in state court. Heater, supra. After the action has been removed, we apply Federal procedural rules.¹³

Under Pennsylvania law “[a]n action may be commenced by filing with the prothonotary¹⁴ (1) a praecipe for a writ of summons, or (2) a complaint.” Pa.R.Civ.P. 1007 (Internal footnote added.) “Generally, compliance with the Pennsylvania procedural rule satisfies the tolling requirement in cases removed to this court.” Perry v. City of Philadelphia, No. Civ.A. 99-2989, 1999 U.S. Dist. LEXIS 12915 at *4 (E.D.Pa. Aug. 17, 1999)(Kauffman, J.).

¹³ In this instance, as discussed below, there is no Erie problem because the outcome under both federal law and state procedural law is the same. Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

¹⁴ Lehigh County does not have Prothonotary. Under the county Home Rule Charter the functions of the Prothonotary are discharged by the Clerk of Courts-Civil Division.

Under Pennsylvania law, the statute of limitations for a claim against a defendant who has been properly served a writ of summons is tolled indefinitely regardless of when a Complaint is filed. Galbraith v. Gahagen, 415 Pa. 500, 502, 204 A.2d 251, 252 (1964). The remedy for any hardship stemming from the indefinite filing date of the plaintiff's Complaint is for a defendant to move for relief by filing a Rule to file a Complaint under Pa.R.Civ.P. 1037 to force a plaintiff to promptly file a Complaint. Galbraith, supra.

Under Pennsylvania law, the statute of limitations is not tolled against a party when a plaintiff fails to commence an action against that party in accordance with Pa.R.Civ.P. 1007. Aivazoglou v. Drever Furnaces, 418 Pa.Super. 111, 116, 613 A.2d 595, 598 (1992). Moreover, under Pennsylvania law, there is a "well established rule that new parties cannot be introduced into a suit by amendment following expiration of the period of the statute of limitations." Aivazoglou, 418 Pa.Super at 118, 613 A.2d at 599 (citing Girardi v. Laquin Lumber Company, 232 Pa. 1, 81 A. 63 (1911)).

Indeed, although Pennsylvania law allows amendment of a caption at any time pursuant to Pa.R.Civ.P. 1933, "changes effected subsequent to the running of the statute of limitations are restricted to minor rectifications, not substitution of parties." Fredericks v. Sophocles, 831 A.2d 147, 150 (Pa.Super.

2003); see also, Anderson Equipment Company v. Huchber, 456 Pa.Super. 535, 690 A.2d 1239 (1997) and Powell v. Sutliff, 410 Pa. 436, 189 A.2d 864 (1963).

In addition, Federal Rule of Civil Procedure 15(c) does allow an amendment of a pleading to relate back to the date of the original pleading when three elements are met. Fed.R.Civ.P. 15(c).¹⁵ Nevertheless, neither Pennsylvania nor Federal procedural law recognizes a writ of summons as a pleading. Compare Pa.R.Civ.P. 1017 with Fed.R.Civ.P. 7.

According to the Second Amended Complaint in this case, the EEOC issued plaintiff a right-to-sue letter on August 30, 2004. Plaintiff has 90 days after receipt of the letter in which to bring a civil action. 29 U.S.C. § 626(e). Federal Rule of Civil Procedure 6(e) adds three days to the 90-day deadline if the notice letter is served by mail. If we apply the 3-day presumption under Rule 6(e), plaintiff would have received the letter three days later on September 2, 2004. Thus, plaintiff would have had 90 days after that, which is December 1, 2004, to initiate a lawsuit alleging violations the ADEA. See Pa.R.Civ.P. 1007.

Indeed, plaintiff did initiate an action under Pennsylvania state law when he filed and served the praecipe for writ of summons against APCI. Nevertheless, under the

¹⁵ For reasons discussed below, we will not articulate the three elements.

Pennsylvania law discussed above, the timely commencement of the action against defendant APCI does not toll the statute of limitations for commencement of plaintiff's action against defendant Ashland. Accordingly, under Pennsylvania law, plaintiff did not commence an action against Ashland until he named Ashland as a party in the Second Amended Complaint.

Plaintiff has overlooked the fact that, even if plaintiff could relate the Second Amended Complaint back to the filing date of the original Complaint pursuant to Fed.R.Civ.P. 15(c), the filing date of the original Complaint is beyond the statute of limitations. Specifically, the original Complaint was filed on March 29, 2005. March 29, 2005 was nearly four months after the expiration of the 90-day statute of limitations.

Because the filing date of the original Complaint is also beyond the statute of limitations, an analysis of whether the addition of defendant Ashland as a party in the Second Amended Complaint to relates back to the filing date of the original Complaint is futile.¹⁶ Accordingly, we will not apply the Fed.R.Civ.P. 15(c) analysis to determine whether the addition of defendant Ashland in the Second Amended Complaint relates back to the date of the original Complaint.

¹⁶ Plaintiff has not cited authority for the proposition that he can bootstrap the filing date of the writ of summons to the addition of defendant Ashland in the Second Amended Complaint. We are unaware of any authority, which would allow us to do so.

Unlawful Relation in Violation of the ADEA

Defendants argue that plaintiff cannot state a claim against APCI under either the ADEA or PHRA. Defendants contend that both the ADEA and the PHRA require an employment relationship before any claims can be brought pursuant to either act. Further, defendants assert that plaintiff only ever had an employment relationship with defendant Ashland.

Plaintiff argues that APCI can be sued based upon principles of successor liability. Specifically, plaintiff asserts that because APCI bought the assets of Ashland, APCI is subject to their liabilities.

To establish a prima facie case of retaliation under the ADEA, a plaintiff must aver three elements: first, that plaintiff engaged in a protected employee activity; second, that the employer took an adverse employment action after, or contemporaneous with, the protected activity; and third, that a causal link exists between the protected activity and the adverse action. Weston v. Commonwealth of Pennsylvania, 251 F.3d 420, 430 (3d Cir. 2001).

Any adverse employment action must occur during the existence of the employment relationship between plaintiff and defendant employer. Thus, once employment is terminated, it is impossible to have an adverse employment action. Glanzman v. Metropolitan Management Corporation, 391 F.3d 506, 516 (3d Cir.

2004).

In Glanzman, plaintiff brought suit against her employer for unlawful retaliation in violation of the ADEA and PHRA. Plaintiff argued that her employer retaliated against her because she filed a claim for unemployment compensation benefits in which she cited discrimination as the cause of her termination. Glanzman, 391 F.3d at 515. The United States Court of Appeals for the Third Circuit held that once her employment was terminated it was not possible for her to suffer adverse action. Glanzman, 391 F.3d at 516

In this case, even if APCI were bound by successor liability, plaintiff has not asserted a prima facie claim for unlawful retaliation under the ADEA. Specifically, plaintiff's Second Amended Complaint avers that, "[a]fter Plaintiff engaged in the protected activity...,APCI took action against him by attempting to interfere with his current employment."¹⁷ Further, the allegedly retaliatory action occurred when APCI sent letters to plaintiff's current employer in December 2003 and February 2004.¹⁸ This is after the March 12, 2003 date on which plaintiff alleged his employment was terminated.¹⁹

Thus, we conclude that plaintiff has failed to state a

¹⁷ Second Amended Complaint at paragraph 38.

¹⁸ Second Amended Complaint at paragraphs 15 and 16.

¹⁹ Second Amended Complaint at paragraph 9.

prima facie claim against defendant APCI for unlawful retaliation in violation of the ADEA. Accordingly, we dismiss Count II from plaintiff's Second Amended Complaint insofar as it states a claim for unlawful retaliation in violation of the ADEA. However, we abstain from ruling on any of plaintiff's state-law claims because we conclude that we lack subject matter jurisdiction over those claims.

Pendant State Claims

Pursuant to a federal court's supplemental jurisdiction, we may entertain state-law claims when they are so related to federal claims within the court's original jurisdiction that they form a part of the same case or controversy. 28 U.S.C. § 1367. However, if all federal claims are dismissed before trial, the court should ordinarily dismiss any remaining state-law claims as well. Fortuna's Cab Service v. City of Camden, 269 F.Supp.2d 562, 566 (D.N.J. 2003).

In this case, removal jurisdiction was based on federal question jurisdiction pursuant to 28 U.S.C. § 1331. Having determined that all federal claims against defendants must be dismissed, the only remaining claims sound in state law. We conclude that there is no federal question jurisdiction over these claims pursuant to 28 U.S.C. § 1331.

Moreover, as noted in footnote five, above, neither party has asserted diversity of citizenship as a basis for

subject matter jurisdiction. Nor has either party alleged facts which, if true, would provide for diversity of citizenship. Accordingly, it would be improper for us to conclude that diversity of citizenship was a proper ground for removal or continued review of this matter. Thus, the court does not have jurisdiction pursuant to 28 U.S.C. § 1332.

Therefore, we decline to exercise supplemental jurisdiction over the remaining claims. Therefore, because this matter was originally filed in the Court of Common Pleas of Lehigh County, Pennsylvania, rather than dismissing plaintiff's state-law claims, we remand the remaining state law claims to that court for disposition.

Furthermore, because we have dismissed plaintiff's federal claims and remanded this matter to state court, we decline to address defendant's additional arguments regarding plaintiff's state-law claims.

CONCLUSION

For all the foregoing reasons, we grant defendant's motion to dismiss plaintiff's ADEA claim as barred by the statute of limitations. In addition, we decline to exercise supplemental jurisdiction over plaintiff's remaining state-law claims. Thus, we remand this matter to the Court of Common Pleas of Lehigh County, Pennsylvania for disposition of the remaining state law claims.

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

| | |
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| DARRYL W. PETERS, |) |
| |) Civil Action |
| Plaintiff |) No. 05-CV-02038 |
| |) |
| vs. |) |
| |) |
| AIR PRODUCTS & CHEMICALS, INC. |) |
| and |) |
| ASHLAND-ACT |) |
| |) |
| Defendants |) |

O R D E R

NOW, this 30th day of March, 2006, upon consideration of Defendants' Motion to Dismiss the Second Amended Complaint, which motion was filed on July 21, 2005; upon consideration of Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Complaint, which response was filed on August 4, 2005; upon consideration of the letter request to file a reply brief by defendants Air Products and Chemicals, Inc. and Ashland

ACT, presented on August 19, 2005; and for the reasons expressed in the accompanying Memorandum,

IT IS ORDERED that defendants' request to file a reply brief is denied.

IT IS FURTHER ORDERED that Count I of plaintiff's Second Amended Complaint is dismissed.

IT IS FURTHER ORDERED that Count II of plaintiff's Second Amended Complaint is dismissed insofar as it states a claim for unlawful retaliation in violation of the ADEA.

IT IS FURTHER ORDERED that in all other respects defendants' motion to dismiss is denied.

IT IS FURTHER ORDERED that the within case is remanded to the Court of Common Pleas of Lehigh County, Pennsylvania.

BY THE COURT:

/s/ James Knoll Gardner
James Knoll Gardner
United States District Judge