

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

JAMES E. O'NEIL	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	NO. 05-5169
v.	:	
	:	
MONTGOMERY COUNTY COMMUNITY	:	
COLLEGE	:	
Defendant.	:	

MEMORANDUM

Baylson, J.

June 12, 2006

I. Introduction

Plaintiff seeks damages for employment discrimination under the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 621, the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101, and the Pennsylvania Human Relations Act (“PHRA”), 43 P.S. § 951.

The Court previously entered an order directing discovery on jurisdictional issues, which has been completed. Before the Court is Defendant’s Motion for Summary Judgment (Doc. No. 10), contending that this court lacks jurisdiction because Plaintiff failed to exhaust required administrative remedies. For the reasons that follow, summary judgment is appropriate.

II. Factual Background

Plaintiff was terminated from his employment September 29, 2003. He is disabled and currently receives Social Security disability benefits. On March 26, 2004, Mr. Tom McCourt, Plaintiff’s “representative and power of attorney,” completed a questionnaire with the Pennsylvania Human Relations Commission (“PHRC”), alleging that Plaintiff’s termination by Montgomery County Community College (“MCCC”) was discriminatory and retaliatory. The questionnaire provided an option whereby the PHRC would notify the Equal Opportunity

Employment Commission (“EEOC”) of the complaint.¹

On November 15, 2004, a representative of PHRC, Eugene Sweeney, sent a letter to Tom McCourt requesting additional information needed to perfect the complaint. Specifically, the letter requested identification of Plaintiff’s specific disability, Plaintiff’s basis for alleging retaliation, and Plaintiff’s basis for alleging age as a protected class.²

Plaintiff never communicated with, nor received communication from, the EEOC, the United States Department of Justice (“DOJ”), or the PHRC concerning the specific claims asserted in this lawsuit. Plaintiff never received a right-to-sue letter from the EEOC or DOJ.

Because, apparently, the PHRC did not consider Plaintiff’s complaint to be “perfected,” the PHRC did not investigate Plaintiff’s complaint, nor did they notify or communicate with Defendant MCCC, the EEOC, or the DOJ concerning Plaintiff’s allegations.

III. Legal Standard

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). An issue is “genuine” if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A factual dispute is “material” if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing

¹ The PHRC and EEOC are state and federal counterparts.

² The letter specified that the date that the original questionnaire was submitted would be used for statute of limitations purposes.

the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255.1

IV. Discussion

Defendant claims that Plaintiff's ADA and ADEA claims are barred because (1) no sufficient "charge" was timely filed and (2) Plaintiff did not receive a right-to-sue letter indicating that he had exhausted his administrative remedies.

In response, Plaintiff admits he did not receive a right-to-sue letter (see Pl.'s Resp. to Def.'s Statement of Facts), and he does not offer any argument explaining why this undisputed fact should not be dispositive for purposes of summary judgment. While it is not entirely clear from his short brief, Plaintiff appears to be arguing for the application of a "frustration" exception to exhaustion of administrative remedies requirement. See Pl.'s Br. at 6. Additionally, Plaintiff contends that he filed claims with the PHRC, a competent state agency,

that were sufficient to constitute a “charge” within the meaning of the law. See Pl.’s Br. at 4. Plaintiff makes this argument even though the parties agree that Plaintiff did not file a “perfected” complaint within the PHRC’s definition thereof. See Def.’s Statement of Facts No. 19, Pl.’s Response to Def.’s Statement of Facts No. 19. Plaintiff’s argument is unconvincing.

A. Plaintiff failed to obtain a right-to-sue letter signaling exhaustion of administrative remedies and ripeness of this lawsuit.

The ADA and ADEA require a plaintiff to file a complaint with the EEOC within 300 days of the alleged unlawful employment activity prior to bringing suit. See 42 U.S.C. § 12117(a) (ADA); 29 U.S.C. § 633(b) (ADEA). Under a sharing agreement between the PHRC and the EEOC, a complaint filed with the PHRC can be deemed filed with the EEOC, even if the complainant did not explicitly request a dual filing. See Holmes v. Pizza Hut of Am., No. 97-4967, 1998 WL 564433, at *3 (E.D. Pa. 1998). Issuance of a “right-to-sue” letter by the EEOC following an investigation indicates to the complainant that all administrative remedies have been exhausted. 42 U.S.C. § 2000e-5(f)(1); Burgh v. Borough Council, 251 F.3d 465, 470 (3d Cir. 2001). Failure to exhaust administrative remedies warrants dismissal of federal discrimination claims. See, e.g., Antol v. Perry, 82 F.3d 1291, 1296 (3d Cir. 1996) (holding that summary judgment was proper where plaintiff did not exhaust administrative remedies concerning sex discrimination claim).

It is undisputed that Plaintiff did not file a complaint with the EEOC at any point following his termination on September 29, 2003. See Def.’s Statement of Facts; Pl.’s Resp. Nos. 8-12. While the PHRC questionnaire completed by Mr. McCourt included an option for cross-filing with the EEOC, it is undisputed that the EEOC did not receive a charge or communicate with Plaintiff and Plaintiff never received the required right-to-sue letter from the

EEOC. See Def.'s Statement of Facts; Pl.'s Resp. Nos. 8-17. Moreover, Plaintiff never subsequently pursued any action with the EEOC to obtain such letter.

It is not possible to tell from the current record whether these failures may have been beyond Plaintiff's control (perhaps due to disorganization at the PHRC), but it appears that Plaintiff failed to fulfill a statutory prerequisite to bringing suit in federal court. Burgh, 251 F.3d at 470. If Plaintiff has not exhausted administrative remedies, (as evidenced by the lack of a right-to-sue letter), this Court lacks jurisdiction over Plaintiff's ADEA and ADA claims.

1. Plaintiff's PHRC complaint is insufficient as a "Charge" for ADA and ADEA purposes.

The charge filed is considered sufficient when it includes a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of. 29 C.F.R. § 1601.12(b); Benn v. First Judicial Dist. Of Pa., 2000 WL 1236201 (E.D. Pa. Apr. 26, 2000). The mere existence of a writing may not be sufficient. Michelson v. Exxon Research & Eng'g, 808 F.2d 1005, 1010 (3d Cir. 1987); Benn, 2000 WL 1236201. An intake questionnaire alone may not satisfy the filing requirement, Gulezian v. Drexel Univ., 1999 WL 153720, at *2 (E.D. Pa. Mar. 19, 1999); rather, the charge must be of the kind that would convince a reasonable person that the complainant has manifested an intent to activate the statutory machinery of the ADA or ADEA. Bihler v. Singer Co., 710 F.2d 96, 99 (3d Cir. 1983).

Both Michelson and Gulezian involved parties that contacted the EEOC expressing interest in initiating a claim (indeed, Gulezian even completed a questionnaire). Michelson, 808 F.2d at 1010; Gulezian, 1999 WL 153720, at *3. In both cases, however, the parties were informed that further information was needed. Michelson, 808 F.2d at 1010; Gulezian, 1999 WL 153720, at *3. In Michelson, the plaintiff failed to subsequently provide the information, and the

court found that sufficient charges had therefore not been filed. Michelson, 808 F.2d at 1010. In Gulezian, the court found that “the EEOC . . . did not regard or treat plaintiff’s intake questionnaire as a charge and no reasonable complainant could have perceived otherwise” until the additional information was provided. 1999 WL 153720, at *3.

Here, the parties dispute the legal issue of whether the initial questionnaire was sufficiently precise to constitute a “charge” within the meaning of the law.³ Plaintiff, relying on Benn’s criteria for a “charge,” argues that the questionnaire alone both identified the parties involved and described the practices complained of, including unlawful discrimination and the presence of a disability.⁴ See Pl.’s Br. at 4. Defendant argues that while the questionnaire was timely filed for statute of limitations tolling purposes, see Def.’s Br. 5, Ex. H, the complaint was not “perfected” – a fact which was brought to Plaintiff’s attention shortly after November 15, 2004. Def.’s Statement of Facts No. 30; Pl.’s Statement of Facts No. 30. Therefore, without the additional information, the PHRC could not begin an investigation. See Def.’s Br. at 6.

Plaintiff does not dispute that a “perfected” complaint was never filed with the PHRC, and that no complaint was ever directly filed with the EEOC. See Pl.’s Resp. to Def.’s Statement of Facts Nos. 8-17, 19. Relying on Michelson, and Gulezian, Defendant argues, convincingly, that since a perfected complaint was not filed, the questionnaire is not a sufficient

³ The questionnaire itself has not been offered as an exhibit by either Plaintiff or Defendant.

⁴ The court in Benn specifically noted the sparse initial complaint was sufficient under the law at least in part because there was no evidence that the EEOC considered it insufficient or needed further information. Benn, 2000 WL 1236201.

charge under the law.⁵ We agree with Defendant: Michelson, Gulezian, and common sense dictate that (1) Plaintiff failed to take the necessary steps to “perfect” his PHRC complaint and (2) an unperfected PHRC complaint, considered insufficient by the PHRC itself, does not constitute a “charge” under the law. Michelson, 808 F.2d at 1010; Gulezian, 1999 WL 153720, at *3.⁶

Summary judgment is therefore appropriate.

2. Sufficiency of the PHRC Complaint for PHRA Purposes

Plaintiffs must file complaints of discrimination with the PHRC within 180 days of the alleged discrimination prior to filing suit. See 43 P.S. §§ 959(a), 962; Woodson v. Scott Paper Co., 109 F.3d 913, 925 (3d Cir. 1997).

The parties do not dispute that Plaintiff filed an initial questionnaire on March 26, 2004, within the required statute of limitations. However, as discussed supra, Plaintiff admits that he never “perfected” his PHRC complaint. Summary judgment is therefore also appropriate for the PHRA claim.

⁵ Plaintiff may be arguing that a “perfected” complaint and a “charge” are different concepts, though he does articulate or support such a position.

⁶ Assuming, as we suggest, that the intake questionnaire originally completed by Mr. McCourt is insufficient as a “perfected” charge, the parties also appear to dispute facts as to whether Plaintiff timely responded to the request for additional information so as to “perfect” a charge. Plaintiff argues that Mr. McCourt responded within fifteen days of receipt of the request, while Defendant argues that PHRC never received a response from Plaintiff until after November 7, 2005 – a date after the filing of the instant lawsuit. However, given that Plaintiff has *admitted that no perfected complaint was filed* (see Pl.’s Resp. to Def.’s Statement of Facts No. 19), we consider this dispute to be largely immaterial.

B. “Frustration” Exception

Plaintiff’s briefing mentions, strictly in passing, the potential application of a “frustration” exception concerning the exhaustion of required administrative remedies.

Exhaustion of administrative remedies may not be required where exhaustion would be futile or inadequate. Honig v. Doe, 484 U.S. 305, 327 (1988). Following Honig, many Courts of Appeals have interpreted the “futility” exception narrowly and has set the bar quite high for ADA/ADEA claims. See, e.g., M.T.V. v. DeKalb County Sch. Dist., 446 F.3d 1153, 1159 (11th Cir. 2006) (burdening plaintiffs with showing more than speculative futility for an ADA claim); Coomer v. Bethesda Hosp., Inc., 370 F.3d 499, 505 (6th Cir. 2004) (requiring a “clear and positive” indication of futility). While the Third Circuit has not dealt with this issue specifically in the context of the ADA or ADEA, it has interpreted the “futility” exception narrowly in analogous administrative contexts. See W.B. v. Matula, 67 F.3d 484, 496 (3d Cir. 1995) (Individuals with Disabilities Education Act); Lester H. v. Gilhool, 916 F.2d 865, 868 (3d Cir. 1990) (Education of Handicapped Act). The court has recognized the unique competence of administrative agencies to investigate allegations and develop a factual record. Lester H., 916 F.2d at 868. Only where the plaintiff can show that the issues to be resolved are legal rather than factual will a futility exception be justified. See W.B., 67 F.3d at 496 (recognizing futility where a factual record was already established); Lester H., 916 F.2d at 868.

Here, however, Plaintiff does not even offer a rudimentary explanation as to why his pursuit of administrative remedies would be futile. Nor does Plaintiff assert that the substantive issues involved in this discrimination suit are purely legal in nature.

In short, it is simply unclear from Plaintiff’s briefing why this exception is requested and on what basis it could be granted. In the absence of any compelling argument whatsoever, there

is no convincing reason for the court to excuse Plaintiff's failure to exhaust administrative remedies. More importantly, however, is the fact that, as discussed supra, even if Plaintiff were eligible for an exhaustion exception, he likely still could not survive summary judgment because he did not file a sufficient charge to activate the statutory machinery that could allow this lawsuit.

V. Conclusion

The Court will grant Defendant's Motion for Summary Judgment because Plaintiff (1) did not file a sufficient charge below, and, as a result, (2) did not receive a right-to-sue letter from the EEOC indicating that administrative remedies were exhausted.

An appropriate order follows.

