

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

<b>JOSEPH WITTE</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiff</b>	:	
	:	
<b>v.</b>	:	<b>NO. 06-3878</b>
	:	
<b>THE ZOOLOGICAL SOCIETY OF PHILADELPHIA</b>	:	
<b>Defendant</b>	:	

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Diamond, J.

February 7, 2007

**MEMORANDUM**

In this age discrimination case brought against the Zoological Society of Philadelphia, Plaintiff Joseph Witte moves to amend his Complaint to add a claim of purposeful race discrimination under 42 U.S.C. § 1981. (Doc. No. 8.) Plaintiff, who is white, seeks to allege that the Zoo’s discrimination against its African-American employees harmed him. The Zoo argues that this claim is futile because he lacks standing to bring it. (Doc. No. 10.) For the reasons that follow, I will grant Plaintiff’s Motion.

**PROCEDURAL HISTORY**

On August 31, 2006, Plaintiff brought this lawsuit under the Age Discrimination in Employment Act and the Pennsylvania Human Relations Act. 29 U.S.C. §§ 621-34; 43 Pa. Cons. Stat. §§ 951-63. On January 4, 2007, I issued a Case Management Order requiring the completion of discovery by February 19, 2007; trial is to begin on April 10, 2007. (Doc. No. 7.)

## **PLAINTIFF'S ALLEGATIONS**

According to his Complaint, Plaintiff is fifty-four years old and worked as an Arborist in the Philadelphia Zoo's Horticulture Department from 1986 through 2004. (Doc. No. 1 at 4-5.) Under the collective bargaining agreement between the Zoo and the American Federation of State, County and Municipal Employees, whenever the Zoo eliminates a position held by a union employee, that employee may "bump" into other union positions and displace less senior employees. (*Id.* at 5.) One such union position was that of "Open Relief Keeper" in the Zoo's Animal Department. (*Id.*) This position pays a higher wage than most other available union jobs. (*Id.* at 7-8.)

Plaintiff alleges that in November 2004 the Zoo closed the Open Relief Keeper position to prevent union employees from bumping into it. (*Id.* at 5-6.) The Zoo then announced that as part of a plan to reduce staff, it intended to eliminate seven other union positions, including the Plaintiff's Arborist position. (*Id.*) Five of the seven employees holding these positions were over forty years old. (*Id.* at 5.)

Plaintiff alleges that all six individuals holding the Open Relief Keeper positions are younger than Plaintiff and have less seniority than Plaintiff, and that the Zoo closed those positions with the express purpose of precluding Plaintiff from bumping the younger, preferred employees. (*Id.* at 5-6, 8-9.) Thus, once his Arborist position was eliminated, the only union jobs available to Plaintiff for bumping were either jobs for which he was not suited or jobs paying lower wages. (*Id.* at 7-8.)

## **THE MOTION TO AMEND**

On January 4, 2007 – the same day as the Case Management Conference – Plaintiff filed the instant Motion, seeking to add a claim of race discrimination under 42 U.S.C. § 1981. (Doc. No. 8.) In his proposed Amended Complaint, Plaintiff alleges that ninety-four percent of the Animal

Department's union employees are white and that the six individuals presently holding all Open Relief Keeper positions are white. (*Id.* at 6.) Plaintiff further alleges that outside the Animal Department, almost forty percent of the Zoo's union employees are African-American. (*Id.*) Plaintiff alleges that the Zoo closed the Open Relief Keeper positions to prevent more senior black employees from bumping into them, thus keeping the Animal Department almost entirely white. (*Id.* at 6-7.) Although he is white, Plaintiff claims this alleged discrimination against his black co-workers injured him: it precluded him from bumping into an Open Relief Keeper position, thus forcing him to bump into either an unsuitable job or one with lower pay. (*Id.* at 7.)

### **LEGAL STANDARD**

“[A] party may amend the party's pleading only by leave of court ... and leave shall be freely given when justice so requires.” Fed. R. Civ. P. 15(a). I am obligated liberally to grant requests to amend. See Forman v. Davis, 371 U.S. 178, 182 (1962). “In deciding whether to grant leave, [I] may consider (1) any undue delay, bad faith, or dilatory motives on the part of the movant; (2) the futility of the amendment; and (3) prejudice to the other party.” Renart v. Chartwells, 122 F. App'x 559, 561 (3d Cir. 2004).

The Zoo objects to the amendment on the ground of futility alone, arguing that Plaintiff lacks standing to sue under § 1981. (Doc. No. 10.) “‘Futility’ means that the complaint, as amended, would fail to state a claim upon which relief could be granted.” In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d. Cir. 1997).

## DISCUSSION

The Supreme Court has held that under the Constitution, a party has standing to bring a claim if it can show:

(1) it has suffered an “injury in fact” that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000)

(discussing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). In addition, prudential considerations require that:

(1) a litigant assert his or her own legal interests rather than those of third parties; (2) courts refrain from adjudicating abstract questions of wide public significance which amount to generalized grievances; and (3) a litigant demonstrate that her interests are arguably within the zone of interests intended to be protected by the statute, rule or constitutional provision on which the claim is based.

Wheeler v. Travelers Ins. Co., 22 F.3d 534, 538 (3d Cir. 1994) (internal citations and quotations omitted).

The Zoo contends that Plaintiff has no standing because he is necessarily attempting to assert not his own legal interests, but those of third parties: his African-American co-workers against whom the racially discriminatory acts were allegedly directed. (Doc. No. 10 at 3-6.) Plaintiff contends that he is asserting his own interests: he is seeking redress for the Zoo's allegedly racist acts that harmed him. (Doc. No. 11 at 3.)

Section 1981 prohibits discrimination in the making and enforcement of private contracts. Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 459-60 (1975). Individuals who have suffered an adverse employment action on account of race discrimination may sue under § 1981. See, e.g.,

Turgeon v. Marriott Hotel Servs., Inc., 2000 WL 1887532 at \*6-9 (E.D. Pa. Dec 27, 2000) (white plaintiff alleging disparate treatment by employer sued under § 1981). In alleging that he was harmed by the Zoo's discrimination against his African-American coworkers, I believe that Plaintiff has brought himself within § 1981's protection.

Neither party has offered any authority that is directly on point, and I have found none. For instance, the Zoo relies on several federal decisions in which a plaintiff of one race sought to bring an action complaining of discrimination against third parties of another race. See, e.g., Clifton Terrace Assocs., Ltd. v. United Techs. Corp., 929 F.2d 714 (D.C. Cir. 1991); Bartley v. Virgin Grand Villas, 197 F. Supp. 2d 291 (D. V.I. 2002). These courts held that the plaintiffs were without standing because they were seeking to remedy harms inflicted on third parties. Clifton Terrace Assocs., 929 F.2d at 721; Bartley, 197 F. Supp. 2d at 295-96. As I have observed, however, Plaintiff here seeks to allege that the Zoo's racist actions harmed Plaintiff himself.

Significantly, courts have held that non-minority plaintiffs have standing to sue under § 1981 for discrimination directed at minorities. For example, courts have held that a white plaintiff who allegedly suffered retaliation for opposing discriminatory treatment of African-Americans has standing to sue under § 1981. See, e.g., Skinner v. Total Petroleum, 859 F.2d 1439, 1446-47 (10th Cir. 1988) (white employee had standing to sue under § 1981 when defendant employer fired him for assisting black co-worker with co-worker's EEOC claim); Winston v. Lear-Siegler, Inc., 558 F.2d 1266, 1270-71 (6th Cir. 1977) (white employee had standing to sue under § 1981 when his employer fired him for protesting the discriminatory firing of a black co-worker). See also Liotta v. Nat'l Forge Co., 629 F.2d 903, 906-07 (3d Cir. 1980) (summary judgment inappropriate where material issues of fact remained regarding § 1981 claim brought by white plaintiff who claimed he

was fired for supporting rights of black co-workers).

Courts have similarly held that corporations injured on account of racial discrimination have standing to sue under § 1981. See, e.g., Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc., 368 F.3d 1053, 1060 (9th Cir. 2004) (“if a corporation ... suffers discrimination harm cognizable under § 1981 ... it is sufficiently within the statutory zone of interest to have prudential standing to bring an action under § 1981”); Gersman v. Group Health Ass’n, 931 F.2d 1565, 1570-71 (D.C. Cir. 1991), vacated on other grounds, 502 U.S. 1068 (1992) (regardless of whether a corporation acquired an imputed racial identity, corporation has standing to sue under § 1981 when it has suffered injury from racial discrimination); Rosales v. AT&T Info. Sys., Inc., 702 F. Supp. 1489, 1495-96 (D. Colo. 1988) (“there is no reason why a corporation, even one without a minority racial or ethnic identity, should not be allowed to assert a claim under § 1981” when corporation has been injured as a result of race discrimination). See also Alizadeh v. Safeway Stores, Inc., 802 F.2d 111, 114 (5th Cir. 1986) (white plaintiff has standing to bring a § 1981 claim against a defendant who discriminated against the plaintiff because the plaintiff’s spouse was African-American); Faraca v. Clements, 506 F.2d 956 (5th Cir. 1975) (same).

These closely analogous cases persuade me that § 1981 provides a remedy for any person or entity that has suffered actual harm as a result of racial discrimination, even if the discrimination was directed at a third party of a different race. That is exactly what Plaintiff seeks to allege: that in closing the Open Relief position to keep black employees out of the Animal Department, the Zoo harmed Plaintiff by precluding him from bumping into that position. (Doc. No. 8 at 6-7.) Thus, Plaintiff seeks to bring a § 1981 claim so that he may assert his own interests, not those of a third party. Accordingly, I conclude that Plaintiff has standing to sue under § 1981.

In these circumstances, I believe Plaintiff's § 1981 claim is not futile and that he may amend his Complaint.

An appropriate Order follows.

BY THE COURT.

*/s Paul S. Diamond, J.*

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Paul S. Diamond, J.

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<b>OF PHILADELPHIA</b>	:	
<b>Defendant</b>	:	

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**ORDER**

AND NOW, this 7<sup>th</sup> day of February, 2007, it is **ORDERED** that Plaintiff's Motion for Leave to Amend Complaint is **GRANTED**.

IT IS SO ORDERED.

*/s Paul S. Diamond, J.*

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Paul S. Diamond, J.