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

ROBERT MCLAUGHLIN	**:**	**CIVIL ACTION**
	:	
v.	**:**	**NO. 04-5559**
	:	
KVAERNER ASA, et al.	**:**	

MEMORANDUM AND ORDER

Kauffman, J. **March 8 , 2007**

Plaintiff Robert McLaughlin brings this action against Defendants Kvaerner ASA, Aker ASA, Aker American Shipping Inc., Aker Philadelphia Shipyard, Inc., and Kvaerner Philadelphia Shipyard, Inc. (collectively "Defendants") for violations of Title VII, 42 U.S.C. § 2000e et seq. ("Title VII") (Count One), the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA") (Count Two), 42 U.S.C. § 1981a ("§ 1981a") (Count Three), and the Pennsylvania Human Relations Act, Pa. Stat. Ann., Tit. 43, § 951 et seq. ("PHRA") (Count Four).[1] Defendants Aker ASA and Kvaerner ASA (the "Norwegian Defendants") have filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons that follow, the Motion will be granted.

I. BACKGROUND

Accepting the allegations of the Amended Complaint as true, the facts pertinent to this Motion are as follows. Defendants jointly operate a ship-building venture located on what was formerly a portion of the Philadelphia Naval Shipyard (the "Shipyard"). Amended Complaint ¶ 18. They produce container ships for use in the United States domestic freight carriage market. Amended Complaint ¶ 21. In 1999, McLaughlin began working for Defendants at the Shipyard

[1] This Court dismissed Counts 5 and 6 of the Complaint on July 26, 2006.

site as a Procurement Manager. He remained at that position until June 13, 2003 when he was terminated. Amended Complaint ¶¶ 34, 35.

During the course of their operations at the Shipyard, Defendants subcontracted various aspects of the ship construction process. In a number of cases, the bidding process was rigged to ensure that subcontracts would be awarded to European rather than American companies. Amended Complaint ¶¶ 51-57. Many of these European companies were less qualified than their American counterparts and charged substantially higher rates. Amended Complaint ¶¶ 63-63. The result was that the quality of work suffered and costs increased dramatically. Amended Complaint ¶¶ 63-65.

To disguise the bid-rigging scheme, Defendants falsely attributed the rising costs to an increase in the cost of materials. Amended Complaint ¶ 98. Since McLaughlin was in charge of procurement, he bore the brunt of the blame for the rising expenses. Amended Complaint ¶ 102. On June 13, 2003, Defendants terminated him, citing his inability to control the cost of materials. Amended Complaint ¶¶ 37-40, 104. Five months later, on November 13, 2003, McLaughlin filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC"). After receiving a Notice of Right to Sue from the EEOC, he filed the instant action on December 1, 2004.

II. LEGAL STANDARD

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 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

The Norwegian Defendants argue that the Title VII, ADEA, and PHRA claims against them should be dismissed because McLaughlin failed to name either corporation in his EEOC Charge of Discrimination and therefore did not exhaust his administrative remedies against them.[2] It is well-settled that before a plaintiff may commence an action under Title VII, he must first exhaust his administrative remedies by filing a charge of discrimination with the EEOC against the relevant parties. 42 U.S.C. § 2000e-5; Burgh v. Borough Council of Borough of Montrose, 251 F.3d 465, 470 (3d Cir. 2001). The PHRA and the ADEA provide for the same administrative exhaustion requirement. See Cohn v. Integra Fin Corp., 1996 U.S. Dist. LEXIS 3414, at *8-10 (E.D. Pa. Mar. 19, 1996) (PHRA); Rigaud v. Garofalo, 2005 U.S. Dist. LEXIS 8735, at *6 (E.D. Pa. May 9, 2005) (ADEA).

A narrow exception to this rule has been created for situations where an unnamed party has received notice of the allegations and shares a sufficient "commonality of interest" with a named party. See Schafer v. Board of Public Education, 903 F.2d 243, 252 (3d Cir. 1990);

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[2] The Norwegian Defendants also seek dismissal of McLaughlin's claims against them on the basis of lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2). McLaughlin has requested limited discovery to respond to the jurisdictional challenge. However, it is clear from the present record that McLaughlin has not properly exhausted his administrative remedies with respect to the Norwegian Defendants. Accordingly, the Court need not reach the personal jurisdiction issue at this time.

McLaughlin v. Rose Tree Media School Dist., 52 F. Supp. 2d 484, 492 (E.D. Pa. 1999). This exception helps preserve the claims of Plaintiffs not versed in the vagaries of Title VII law. "The applicability of this exception, however, is limited to plaintiffs who were not represented by counsel at the time the EEOC complaint was filed." Fordham v. Augusta Westland, N.V., 2007 U.S. Dist. LEXIS 2979, at *7-9 (E.D. Pa. Jan. 11, 2007); see also Christaldi-Smith v. JDJ, Inc., 367 F. Supp. 2d 756, 764 n.3 (E.D. Pa. 2005); Cronin v. Martindale Andres & Co., 159 F. Supp. 2d 1, 9 (E.D. Pa. 2001); Harrington v. Hudson Sheraton Corp., 2 F. Supp. 2d 475, 478 (S.D.N.Y. 1998); Tarr v. Credit Suisse Asset Mgmt., 958 F. Supp. 785, 788 (E.D.N.Y. 1997).

In this case, McLaughlin acknowledges that the Norwegian Defendants were not named in his EEOC charge, but he argues that this failure should be excused because the Norwegian Defendants share a commonality of interest with the parties he did name. McLaughlin does not contest, however, that he was represented by counsel during his EEOC proceedings. Thus, his failure to exhaust his administrative remedies cannot be excused. See Cronin, 159 F. Supp. 2d at 9.

In the alternative, McLaughlin argues that the Court should excuse his failure to exhaust because the Norwegian Defendants may be "successors" to the entities that he named at the administrative stage. In certain circumstances, the successor liability doctrine allows recovery against a successor when an entity acquires the assets of another. The Court considers three factors before making a successor liability determination: (1) continuity in the operations and work force of the successor and predecessor employers; (2) notice to the successor employer of its predecessor's legal obligation; and (3) ability of the predecessor to provide adequate relief directly. Rego v. ARC Water Treatment Co., 181 F.3d 396, 402 (3d Cir. 1999).

The Complaint does not allege successor liability and it fails to allege the facts necessary to establish successor liability. Without the necessary allegations in the Complaint, McLaughlin is not entitled to a period of discovery and cannot rely on successor liability to excuse his failure to exhaust. See U.S. Claims, Inc. v. Flomenhaft & Cannata, LLC, 2006 U.S. Dist. LEXIS 90074, at *18-19 (E.D. Pa. Nov. 14, 2006) (refusing to consider plaintiff's argument because "the first time plaintiff raised this alternative argument was in response to [defendant's] motion to dismiss . . . [and] the Amended Complaint is completely devoid of the factual allegations necessary" to establish the claim); see also Gueson v. Feldman, 2002 U.S. Dist. LEXIS 16265, at *4 (E.D. Pa. Aug. 22, 2002) ("A plaintiff may not raise new claims in response to a motion to dismiss"). Accordingly, Counts One, Two, and Four of McLaughlin's Amended Complaint will be dismissed as against the Norwegian Defendants.

This leaves McLaughlin with one remaining claim. In Count Three, he alleges that Defendants violated his rights under § 1981a. "The great weight of authority," however, "holds that § 1981a does not create an independent cause of action, but only serves to expand the field of remedies for plaintiffs in Title VII suits." Pollard v. Wawa Food Market, 366 F. Supp. 2d 247, 251 (E.D. Pa. 2005); Rotteveel v. Lockheed Martin Corp., 2003 U.S. Dist. LEXIS 12329 at *10 (E.D. Pa. July 15, 2003). Accordingly, "relief under Section 1981a may only be afforded if [the] plaintiff's Title VII claim is permitted to go forward." Sharp v. Whitman Council, Inc., 2006 U.S. Dist. LEXIS 54582, at *14 n.2 (E.D. Pa. 2006). Because McLaughlin's Title VII claim will be dismissed against the Norwegian Defendants, the § 1981a claim alleged against them in Count Three will also be dismissed.

IV. CONCLUSION

For the foregoing reasons, the Court will dismiss McLaughlin's Amended Complaint as against the Norwegian Defendants. An appropriate Order follows.

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ORDER

AND NOW, this 8th day of March, 2006, upon consideration of Aker ASA and Kvaerner ASA's Motion to Dismiss (docket no. 35) and all responses thereto, and for the reasons stated in the accompanying Memorandum, it is **ORDERED** that the Motion is **GRANTED.** Accordingly, all counts of McLaughlin's Amended Complaint are **DISMISSED** as to Defendants Aker ASA and Kvaerner ASA.

BY THE COURT:

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