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

TIMOTHY PERRY	:	CIVIL ACTION
	:	
v.	:	
	:	
H&R BLOCK EASTERN ENTERPRISES, INC.	:	NO. 04-6109

MEMORANDUM AND ORDER

McLaughlin, J. March 19, 2007

Timothy Perry ("Perry") has sued his former employer, H&R Block Eastern Enterprises, Inc. ("Block"), for race and sex discrimination and retaliation under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et seq. The defendant has moved for summary judgment on all counts. The Court will grant the motion.

I. FACTS

The plaintiff was employed by the defendant in the Philadelphia area over several tax seasons. During the entire 2002 season and most of the 2003 season, the plaintiff worked as an office manager at the defendant's Stoney Creek office, located in Springfield, Pennsylvania. Pl. Dep. at 15, 16-17, 19.[1]

Sometime in 2002, one of the plaintiff's subordinates, Laura Jimenez ("Jimenez"), lodged a complaint against the

[1]A copy of the plaintiff's deposition is attached to the defendant's motion for summary judgment as Exhibit 1 and cited herein as "Pl. Dep. at __."

plaintiff, using the defendant's internal grievance procedures. Jimenez alleged that the plaintiff was discriminating against her on the basis of race and sex. The defendant investigated the matter but did not discipline the plaintiff because the investigation was inconclusive. Pl Dep. at 78, 85, 87, 90-92.

In early 2003, the plaintiff was told that Jimenez had improperly put her name on a tax report that was prepared by another Block employee. The plaintiff therefore set up a meeting with Jimenez and District Manager Jeff Salyards ("Salyards") for the purpose of issuing Jimenez a corrective action. At the meeting, Jimenez again accused the plaintiff of discriminating against her on the basis of her race. The plaintiff responded to the accusation by stating that Jimenez had made that allegation before, and it had not worked. Pl. Dep. at 89-92; 2/6/03 Corr. Action Form.[2]

On February 6, 2003, Salyards issued a corrective action form to the plaintiff. The form claimed that the plaintiff had started the February 1, 2003, meeting by telling Jimenez, "I am addressing you as an Asian woman . . . because I've already been down that route and know how Asian women are and I don't need another investigation." The form stated that the plaintiff's comments at the meeting were inappropriate and

[2]A copy of the corrective action form issued to the plaintiff on February 6, 2003, is attached to the plaintiff's complaint as Exhibit A and cited herein as "2/6/03 Corr. Action Form."

that his conduct violated the defendant's Code of Business Ethics regarding retaliation. Under the space for "Associate's Comments," the plaintiff disputed Salyards' claim that he had said "I am addressing you as an Asian woman . . . ." 2/6/03 Corr. Action Form.

In early March of 2003, Salyards told the plaintiff to cut back the hours of all tax preparers. The plaintiff responded by adjusting Jimenez's schedule so that she would not work on three consecutive Saturdays, the only day of the week she worked at Block. Pl. Dep. at 98-100.

On March 5, 2003, Jimenez's attorney wrote to Patricia Armstrong, a human resources employee at Block, to complain about the plaintiff's changes to Jimenez's schedule. The letter stated that the defendant was discriminating against Jimenez on the basis of her gender and ethnic origin. The letter concluded by presenting the defendant with two alternative: (i) terminate or reassign the plaintiff, or (ii) face legal action by Jimenez. 3/5/03 Letter from Donatelli to Armstrong.[3]

On March 24, 2003, the defendant's senior counsel sent Jimenez's counsel a letter stating that the defendant had decided to terminate the plaintiff because he had failed in his responsibilities as a manager. On the same day, the defendant's

[3]A copy of Guy A. Donatelli's March 5, 2003, letter to Patricia Armstrong is attached to the plaintiff's opposition as Exhibit B and cited herein as "3/5/03 Letter from Donatelli to Armstrong."

senior counsel sent Jimenez's counsel another letter asking her not to tell Jimenez of the plaintiff's termination until after the defendant had notified Perry. 3/24/03 Letters from Gladstone to Donatelli.[4]

On March 27, 2003, Salyards issued the plaintiff a "final warning" corrective action. The notice recited the history of Jimenez's 2002 complaint, the February 2003 meeting, the consequent corrective action, and the plaintiff's three changes to Jimenez's schedule. The "final warning" corrective action concluded that the plaintiff's actions "may be perceived as discriminatory or retaliatory in nature." Under the space for "Associate's Comments," the plaintiff wrote "Comments will be through my lawyer." 3/27/03 Corr. Action Form.[5]

After issuing him the corrective action, Salyards informed the plaintiff that he was being transferred to the defendant's Folsom office. Salyards also advised the plaintiff that any further discipline would lead to the plaintiff's termination. Pl. Dep. at 105-06.

Before leaving the Stoney Creek office that day, the plaintiff made copies of his corrective action form and

[4]A copy of Lois A. Gladstone's March 24, 2003, letters to Guy A. Donatelli are attached to the plaintiff's opposition as Exhibit B and cited herein as "3/24/03 Letters from Gladstone to Donatelli."

[5]A copy of the corrective action form issued to the plaintiff on March 27, 2003, is attached to the plaintiff's complaint as Exhibit B and cited herein as "3/27/03 Corr. Action Form."

distributed it to other employees. At some point shortly thereafter, the plaintiff also attempted to lodge a complaint by telephone, using the defendant's internal procedures. On April 1, 2003, Tammy Serati, a Senior Vice President at Block, sent the plaintiff a letter acknowledging his attempt to reach someone by telephone and advising him to submit his concerns in writing. Pl. Dep. at 107-08, 113-14; 4/1/03 Letter from Serati to Perry.[6]

On March 30, 2003, the plaintiff tripped over a wire in the defendant's Folsom office. He filed a worker's compensation claim for these injuries on April 1, 2003. Compl. ¶ 15.

On April 3, 2003, Salyards issued the defendant another corrective action, terminating the plaintiff's employment immediately. The form stated that the plaintiff's conduct in distributing his previous corrective action "serves to create an environment where all associates may be dissuaded from bringing concerns to the attention of management. In addition, this conduct may be perceived as retaliatory." 4/3/03 Corr. Action Form.[7]

The plaintiff filed an EEOC Charge on January 22, 2004. In the Charge, the plaintiff recites the history of his various

[6]A copy of Tammy Serti's April 1, 2003, letter to Perry is attached to the plaintiff's complaint as Exhibit C and cited herein as "4/1/03 Letter from Serati to Perry."

[7]A copy of the corrective action form issued to the plaintiff on April, 2003, is attached to the plaintiff's complaint as Exhibit D and cited herein as "4/3/03 Corr. Action Form."

altercations with Jimenez and Salyards, including the 2002 meeting, the two corrective actions, the transfer to Folsom, and the termination of his employment.[8] The EEOC sent the plaintiff a dismissal and notice of rights on October 1, 2004. The plaintiff filed the present lawsuit on December 30, 2004.

II. STANDARD OF REVIEW

On a motion for summary judgment, a court must view the evidence and draw reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. See, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Summary judgment is proper if the pleadings and other evidence on the record "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) (2006).

III. ANALYSIS

The defendant has moved for summary judgment on the grounds that the plaintiff's claims are time-barred, unexhausted, and/or unsupported by the record. The Court will grant summary judgment in favor of the defendant on all counts.

A. Count One – Age and Sex Discrimination

[8]A copy of the plaintiff's EEOC charge of discrimination is attached to the plaintiff's complaint as Exhibit E and cited herein as "EEOC Charge."

In count one of the complaint, the plaintiff alleges that the defendant discriminated against him on the basis of race and sex when Salyards disciplined him for "no more than Plaintiff's discipline and reduction in hours of a female Asian American employee under Plaintiff's supervision." Compl. ¶ 20. The Court understands this claim as arising from the February 6 and March 27 corrective actions, which were issued in response to (i) the plaintiff's attempted disciplining of Jimenez, and (ii) the plaintiff's reduction in Jimenez's hours. The defendant is entitled to summary judgment on this count because the plaintiff did not file a timely charge of discrimination with the EEOC.

To pursue a claim for discrimination under Title VII, a plaintiff must file an EEOC Charge alleging such discrimination within 300 days of the discriminatory act. See 42 U.S.C. § 2000e-5(e) (2006) (Title VII); Watson v. Eastman Kodak Co., 235 F.3d 851, 854 (3d Cir. 2000).

Here, the plaintiff filed his EEOC Charge on January 22, 2004. The plaintiff is therefore barred from pursuing a Title VII claim based on any allegedly discriminatory acts that occurred before March 28, 2003. The last act of race and sex discrimination alleged in count one occurred on March 27, 2003, when Salyards issued the plaintiff a corrective action for reducing Jimenez's hours. The plaintiff is therefore barred from pursuing a Title VII claim based on any of the discriminatory

acts alleged in count one because none of them occurred within 300 days of his filing a formal charge of discrimination.[9]

The plaintiff argues that his EEOC Charge was timely because the earlier acts of discrimination were part of a continuing violation, culminating in his termination. Under the Supreme Court's decision in National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002), however, the plaintiff's discrimination claims are based on discrete acts that cannot be linked with later acts to survive a time-bar.

The plaintiff in Morgan brought suit under Title VII for race discrimination based on several alleged acts, some of which occurred more than 300 days before he had filed the EEOC Charge. The district court granted summary judgment to the defendant on all incidents that occurred more than 300 days before the EEOC Charge was filed, but the United States Court of Appeals for the Ninth Circuit reversed. Id. at 104-108. The Court of Appeals reasoned that the district court should have considered all discriminatory or retaliatory acts that were plausibly or sufficiently related to an act that fell within the 300-day period, because such acts were part of a continuing

[9]The plaintiff did file his EEOC Charge within 300 days of his termination, but he has not alleged that the termination was an act of race or sex discrimination. Count one of the complaint alleges discrimination only with regard to the corrective actions that were issued to the plaintiff in response to (i) the plaintiff's attempted disciplining of Jimenez in February of 2003, and (ii) the plaintiff's reduction in Jimenez's hours in March of 2003. Compl. ¶ 20.

violation. Id. at 114.

The Supreme Court rejected the Court of Appeals' reasoning. The Supreme Court held that "[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act" and "are not actionable if time barred, even when they are related to acts alleged in timely filed charges." Id. at 113; accord O'Connor v. City of Newark, 440 F.3d 125, 127 (3d Cir. 2006).

The Morgan court's "non-exhaustive list of discrete acts for which the limitations period runs from the act" includes "wrongful discipline." O'Connor, 440 F.3d at 127. Thus, any claims arising from the plaintiff's February 6 and March 27 corrective actions are time-barred and cannot be aggregated with any timely claims.

B. Count 2 - Retaliation Based on the Dissemination of the March 27 Corrective Action

In count two of the complaint, the plaintiff alleges that the defendant violated Title VII by firing him in retaliation for his copying and disseminating the March 27 corrective action. Compl. ¶ 22. The defendant argues that the Court should enter summary judgment in its favor because (i) the plaintiff failed to exhaust his administrative remedies, and (ii) the defendant is entitled to judgment as a matter of law. The Court will grant the defendant's motion because the plaintiff has

failed to put forth any evidence that he engaged in a protected activity.

1. Failure to Exhaust

The defendant argues that the plaintiff failed to exhaust his administrative remedies because he failed to raise the retaliation claim in his EEOC Charge. The Court is not persuaded by this argument.

To determine whether a plaintiff has exhausted his administrative remedies, a court must examine whether the "acts alleged in the subsequent Title VII suit are fairly within the scope of the prior EEOC complaint [] or the investigation arising therefrom. See Antol v. Perry, 82 F.3d 1291, 1295 (3d Cir. 1996) (quoting Waiters v. Parsons, 729 F.2d 233, 237 (3d Cir. 1984)). Because charges are most often drafted by individuals who are not well-versed in the art of legal description, the scope of the charge should be construed liberally. See Hicks v. ABT Assoc., Inc., 572 F.2d 960, 965 (3d Cir. 1978).

In his EEOC Charge, the plaintiff wrote "On April 3, 2003, I received a termination notice because I copied my corrective action of March 27, 2003, and provided my associates with a copy." EEOC Charge. This allegation mirrors the plaintiff's claim in count two of his complaint, which states, "[b]y terminating Plaintiff's employment for no more than Plaintiff's engaging in the protected activity of copying and

disseminating the corrective action form...Defendant...retaliated against Plaintiff in violation of 42 U.S.C. § 2000e-3(a)." Compl. ¶ 22. The only significant difference between the two allegations is the complaint's use of the terms "protected activity" and "retaliated." The plaintiff, an individual who is not well-versed in the art of legal description, will not be penalized for failing to use such precise legal language.

2. Merits

The defendant argues that it is entitled to summary judgment because the plaintiff has provided no evidence that would allow a jury to find that the defendant violated Title VII. The court will grant the defendant's motion on this ground.

To make out a prima facie case of retaliation under Title VII, a plaintiff must prove that: (i) he engaged in a protected activity; (ii) he suffered a materially adverse action; and (iii) there was a causal connection between the protected activity and the adverse action. Cardenas v. Massey, 269 F.3d 251, 263 (3d Cir. 2001). An employee engages in a protected activity when he opposes an employment practice that is unlawful or perceived to be unlawful under Title VII. See 29 U.S.C. § 623(d) (2006); see also Moore v. City of Philadelphia, 461 F.3d 331, 341 (3d cir. 2006). This opposition need not be formal. Barber v. CSX Distrib. Serv., 68 F.3d 694, 702 (3d Cir. 1995). Accepted methods of opposition include making complaints to

management, writing critical letters to customers, protesting against discrimination by industry or society in general, and expressing support for coworkers who have filed formal charges. Id. (citing Sumner v. U.S. Postal Serv., 899 F.2d 203, 209 (2d Cir. 1999)).

The employee must, however, provide some indication that he is opposing an employment practice that he perceives to be unlawful under Title VII. See id. In Barber, the court held that an employee did not engage in a protected activity when he wrote a letter complaining about unfair treatment in general and the fact that someone "less qualified" was awarded the desired position. Id. at 701-02. The letter did not explicitly or implicitly allege that age was the reason for the alleged unfairness. Id. at 702. The court concluded that such a general complaint of unfair treatment does not translate into a charge of illegal discrimination. Id.; see also Slagle v. County of Clarion, 435 F.3d 262, 267 (3d Cir. 2006) (holding that a plaintiff is not engaged in a protected activity when he files an EEOC charge that fails to allege that his employer violated Title VII).

In the present case, the plaintiff has provided no evidence that he was opposing a violation of Title VII when he disseminated the corrective action form. Nothing in the March 27 corrective action itself suggests that the plaintiff was

complaining about sex or race discrimination. In the "Associate's Comments" section, the plaintiff wrote only: "Comments will be through my lawyer." When asked during his deposition why he distributed the form, the plaintiff stated only two reasons: (i) he wanted a senior manager to explain why he received it, and (ii) he wanted to explain to his employees why Jimenez was not disciplined after she allegedly placed her name on another preparer's report. See Pl. Dep. at 113-14. Like the complaint in Barber, this general complaint of unfair treatment does not translate into a charge of illegal discrimination.

C. Count 3 - Retaliation Based on Filing of Worker's Compensation Claim

In count three of the complaint, the plaintiff alleges that the defendant violated Title VII by firing him in retaliation for filing a claim with the Bureau of Worker's Compensation. Comp. ¶ 24. The Court will grant the defendant's motion for summary judgment on this count because the plaintiff has failed to exhaust his administrative remedies.

As discussed above, to determine whether a plaintiff has exhausted his administrative remedies, a court must examine whether the "acts alleged in the subsequent Title VII suit are fairly within the scope of the prior EEOC complaint [] or the investigation arising therefrom." See Antol, 82 F.3d at 1295 (3d Cir. 1996).

The plaintiff does not make any mention of worker's compensation or the Bureau of Worker's Compensation in his EEOC Charge. The plaintiff has therefore failed to exhaust his administrative remedies on this claim.

An appropriate Order follows.

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ORDER

AND NOW, this 19th day of March, 2007, upon consideration of the defendant's motion for summary judgment (Doc. No. 30) and the plaintiff's response thereto (Doc. No. 34), and following oral arguments on the motion on June 2, 2006, IT IS HEREBY ORDERED that the motion is GRANTED for the reasons stated in the memorandum of today's date.

Judgment is hereby entered in favor of the defendant and against the plaintiff. This case is CLOSED.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.