

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

HOWARD LEBOSKY : CIVIL ACTION  
 :  
 v. :  
 :  
 CITY OF PHILADELPHIA : NO. 06-CV-5106

MEMORANDUM AND ORDER

Ditter, J.

April 24, 2007

Plaintiff Howard Lebofsky, a former employee of the city of Philadelphia Law Department, has filed this action against the city for alleged age discrimination, race discrimination, and retaliation. Lebofsky asserts that he endured discriminatory and retaliatory conduct during his tenure as an employment discrimination lawyer in the law department. He claims that his complaints of discrimination and retaliation were ignored and that the situation continued until his constructive discharge in April 2001.

The city has moved for a partial dismissal of this complaint alleging Lebofsky failed to exhaust his administrative remedies as to certain claims and that Lebofsky has not proven that he was constructively discharged as a matter of law. Lebofsky has agreed to withdraw his claim under 42 U.S.C. §1981 (Count V), and his claims for separate causes of actions based on the law department's failure to promote him in 2000 (as contained in Counts I, II, III, and IV). The city's motion is denied in all other respects because Lebofsky's remaining claims are not time-barred and he has alleged sufficient facts to survive a motion to dismiss his constructive discharge claim.

## 1. Legal Standard

The standard of review for a motion to dismiss is well established. Under Rule 12(b)(6) a complaint may be dismissed for failure to state a claim upon which relief can be granted. I must accept as true the facts and allegations contained in the complaint and all reasonable inferences drawn therefrom and view the facts in the light most favorable to the non-moving party. I may dismiss the complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. Thus, I set forth the facts as described in Lebofsky's amended complaint.

## 2. Factual Background

Lebofsky was hired by the law department as a deputy city solicitor in the special litigation unit on April 8, 1996. Lebofsky's primary responsibility was to defend the city of Philadelphia in discrimination and retaliation lawsuits. After a series of promotions, Lebofsky became the acting chief deputy city solicitor in December, 1999.

In March 2000, City Solicitor Kenneth Trujillo (thirty-nine (39) years old and newly appointed) announced the merger of the labor unit and the employment functions of the special litigation unit and the creation of a new department, the labor and employment unit. With this new unit came a new supervisory position, labor and employment chief deputy solicitor.

Lebofsky (age 50) and another law department attorney, Steve Atkins, chief deputy city solicitor and head of the labor unit (age 53), expressed interest in the labor and employment chief deputy position to Trujillo. In July 2000, Trujillo selected Peter Winebrake (age 34) for the position. Lebofsky claims that Winebrake had no prior experience in labor law, little experience in employment law, and no supervisory experience.

Shortly after his appointment, Winebrake informed Lebofsky that his goal was to staff the unit with young attorneys. At the time, the unit included several attorneys who were over forty. Lebofsky told Winebrake that this plan constituted age discrimination and was illegal. Two days later, Winebrake instructed Lebofsky to call his clients and inform them that he would no longer be practicing employment law.

Lebofsky reported Winebrake's comments and conduct to his supervisor, William R. Thompson, chair of litigation. No one ever responded. However, Lebofsky asserts that after he complained to Winebrake and Thompson about illegal age discrimination, he was removed from the labor and employment unit and was reassigned to a less favorable position assisting Trujillo develop a new unit, the affirmative litigation unit. Additionally, Lebofsky asserts that his supervisors and co-workers began subjecting him to discriminatory and retaliatory conduct including, but not limited to:

- a) re-assigning Lebofsky to undesirable cases that less senior attorneys refused to handle;
- b) removing Lebofsky's authority to settle cases and refusing on at least three separate occasions to reinstate him;
- c) allowing other employees to remove furniture from Lebofsky's office and refusing to replace it;
- d) moving Lebofsky to a smaller, less desirable office;
- e) barring Lebofsky from attorney staff meetings to which he had previously been invited;
- f) refusing to meet with Lebofsky when he requested meetings; and,
- g) denying Lebofsky the use of secretarial and paralegal staff.

In the summer or early fall of 2000, Lebofsky expressed interest in a new position created to head the affirmative litigation unit. Trujillo responded that he was considering appointing

someone from outside the law department. In November 2000, Lebofsky was informed that position was filled internally by Shelly Smith (a 36-year-old African American). Lebofsky asserts that Smith ranked below him within the law department, was less qualified, and had received negative feedback in a prior supervisory position with the law department. Despite his expressed interest in the position and his assistance in forming the new unit, Lebofsky was told that he had not been considered for the position.

In December 2000, Lebofsky was assigned a new title of special counsel to the chair of litigation. When he asked about his new responsibilities, he was told to just find something to do and if he complained he would lose his job. In January 2001, Lebofsky was demoted to the position of senior attorney, placing him on a lower-paying and non-supervisory career-track.

In March 2001, Lebofsky met with Trujillo and other supervisory staff to discuss his employment. Lebofsky requested an investigation of his complaints of discrimination and retaliation and advised that a refusal to respond would leave him no choice but to resign his position. No response or investigation resulted from this meeting. Lebofsky informed Trujillo that he had no other choice but to leave the employ of the law department. Thereafter, on a date not specified in the complaint, he sent Trujillo a memorandum advising that his last day of employment would be April 5, 2001. The law department still took no action on his complaints and Lebofsky left this employment on April 5, 2001.

### 3. Discussion

To pursue an employment discrimination claim under federal law, an employee must first file a complaint with the Equal Employment Opportunity Commission (“EEOC”) within 180 days of the violation, or within 300 days if proceedings with a state or local agency are initiated.

See 42 U.S.C. § 2000e-5(e)(1). This requirement is strictly construed and the failure to pursue the appropriate administrative remedies will bar judicial review. See *Woodson v. Scott Paper Co.*, 109 F.3d 913, 925 (3d Cir. 1997).

Lebofsky filed his first charge of discrimination with the EEOC on September 28, 2001, 176 days after his last day of employment. His right to sue letter is dated August 22, 2006. Lebofsky filed his complaint in this court within the required ninety days, on November 17, 2006. His amended complaint was filed on January 17, 2007.

a. PHRA claim

Defendant asserts that Lebofsky did not meet the PHRC filing requirements because he did not file his charge until September 28, 2001 (which it contends is 207 days after he submitted his resignation and more than 300 days after he was denied promotion). In making this calculation, defendant argues that the last discriminatory and retaliatory act alleged by Lebofsky was his constructive discharge which it asserts took place on March 5, 2001, the date he submitted his resignation letter. See *Def.'s Mot.*, “*Ex. B*,” Pl.’s Resignation Memorandum. However, Lebofsky asserts his constructive discharge took place on April 5, 2001, his last day of employment with the law department. Lebofsky does not attach his resignation memorandum to his complaint or refer to the date of that memorandum in his complaint.

In this circuit, a limitations defense can be raised by a motion under Rule 12(b)(6), but only if “the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations.” See *Robinson v. Johnson*, 313 F.3d 128, 135 (3d Cir. 2002) (quoting *Hanna v. U.S. Veterans' Admin. Hosp.*, 514 F.2d 1092, 1094 (3d Cir. 1975)). “If the bar is not apparent on the face of the complaint, then it may not afford the basis for a

dismissal of the complaint under Rule 12(b)(6).” *Id.* (quoting *Bethel v. Jendoco Constr. Corp.*, 570 F.2d 1168, 1174 (3d Cir. 1978)).

A cause of action accrues and the statute of limitations begins to run on an employment discrimination claim when a plaintiff knows or has reason to know of the injury that is the basis for the action. *See Burkhart v. Widener Univ., Inc.*, 70 Fed. Appx. 52, 53 (3d Cir. 2003). The hostile workplace theory permits a plaintiff’s claim based on the cumulative effect of defendant’s actions, rather than on any one act of the defendant. *See O’Connor v. City of Newark*, 440 F.3d 125, 128 (3d Cir. 2006) (citing *AMTRAK v. Morgan*, 536 U.S. 101, 117-18 (2002)). Thus, the clock does not begin to run at the time of the first action, but at the point where the plaintiff determines that his working conditions are intolerable and it is at that point that he is constructively discharged. Lebofsky alleges a constructive discharge date of April 5, 2001, an assertion I must accept on a motion to dismiss. In the absence of any reference in his complaint or attachments to March 5, 2001, I cannot find that the statute of limitations bar is apparent on the face of his complaint. To the contrary, I can only conclude that his charge of discrimination was filed 176 days after his discharge and was therefore timely.<sup>1</sup>

b. Employment actions occurring prior to December 3, 2000

Lebofsky concedes that his claims for separate causes of actions for failure to promote him in 2000 are untimely and they have been withdrawn. These incidents, however, may still be considered as part of Lebofsky’s hostile work environment claim and are part of the events which led to his constructive discharge. *See Nat’l Rail. Pass. Corp. v. Morgan*, 536 U.S. 101, 122 (2002) (claims of a hostile work environment “will not be time barred so long as all acts which

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<sup>1</sup> Of course, defendant is free to raise this claim at a later stage in the proceedings.

constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period”).

c. Claims under 42 U.S.C. § 1981

Lebofsky also concedes that his § 1981 claim raised in Count V is barred by the applicable statute of limitations and it has also been withdrawn.

d. Constructive discharge

To establish constructive discharge, Lebofsky must demonstrate that the city “knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subjected to them would resign.” *Tanganelli v. Talbots*, 169 Fed. Appx. 123, 127 (3d Cir. 2006) (quoting *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 888 (3d Cir. 1984)). “Intolerability . . . is assessed by the objective standard of whether a ‘reasonable person’ in the employee’s position would have felt compelled to resign - that is, whether he would have had no choice but to resign.” *Id.* (quoting *Connors v. Chrysler Fin. Corp.*, 160 F.3d 971 976 (3d Cir. 1998)).

Defendant argues that Lebofsky’s constructive discharge claim should be dismissed because the conditions alleged by Mr. Lebofsky have not been shown to rise to the level of a constructive discharge. I disagree.

Claims of constructive discharge are highly fact-specific and depend upon the particular circumstances and evidence of each case. This makes claims of constructive discharge unsuitable for judgment on the pleadings. *See Hill v. Borough of Kutztown*, 455 F.3d 225, 232 n.7 (3d Cir. 2006) (disposition of constructive discharge claim is too fact-intensive to be decided in the context of a 12(b)(6) motion). These claims often include evidence of subtle coercion, demotions, and changes in job responsibilities. As set forth above, Lebofsky claims he was forced to endure

just such indignities by his co-workers and supervisors. I must credit Lebofsky's allegations and accept his assertion that he was constructively discharged at this stage in the proceedings.

An appropriate order follows.

