

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

King C. Paramore, Jr. : CIVIL ACTION  
: :  
v. : 06-5316  
: :  
Pennsylvania State Police :

Joyner, J.

April 26, 2007

MEMORANDUM AND ORDER

Presently before the Court are Plaintiff King C. Paramore, Jr.'s Motion for Appointment of Attorney (Doc No. 4) and Defendant Pennsylvania State Police's Motion to Dismiss (Doc. No. 5).<sup>1</sup> For the reasons below, the Court DISMISSES WITH PREJUDICE Plaintiff's Complaint and DENIES his Motion for Appointment of Counsel.

**Background**

On December 5, 2006, Plaintiff initiated this action *pro se* by filing a motion to proceed *in forma pauperis*. See Doc. No. 1. The Court gave him permission to do so three days later. See Dec. 8, 2006 Order (Doc. No. 2). Plaintiff (that same day) then filed his present motion for appointment of counsel pursuant to 42 U.S.C. § 2000e-5(f)(1).

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<sup>1</sup> Plaintiff neither responded to nor acknowledged Defendant's Motion to Dismiss. And when that happens, the Court ordinarily will grant the party's uncontested motion to dismiss per this district's Local Rules of Civil Procedure. See Loc. R. Civ. P. 7.1(c). The Court, however, does not do so in this case because the resolution of Plaintiff's motion for appointment of an attorney depends upon the disposition of Defendant's motion to dismiss.

Plaintiff alleges that on May 9, 2005 the Pennsylvania State Police ("PSP") disqualified him as a candidate for appointment as a PSP Cadet. See Compl. ¶ 3. This disqualification allegedly resulted from inaccurate information that was submitted by a biased background investigator. See id. Plaintiff alleges that the background investigator did this intentionally and that "if [it is] allowed to stand unchallenged [it could] seriously diminish[] future opportunities [that he will have] for promotion and growth in [a] career in law enforcement." Id. Without specifying the legal bases for his claims, Plaintiff seeks to: (1) "reclaim [his] good name and reputation;" (2) have the Court order the PSP to rescind its rejection and "acknowledge[] their mistakes/actions;" and (3) have the Court require that an "in depth investigation as to the legalit[y] and fairness of [the PSP's] employ[ment] investigative procedures" take place in order to prevent a similar event like this from occurring. See id. at ¶ 4. Plaintiff additionally seeks compensatory damages for the costs he incurred bringing this suit. See id. Construing Plaintiff's claims liberally,<sup>2</sup> the Court finds that Plaintiff is attempting to obtain injunctive relief and recover damages from the PSP.

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<sup>2</sup> See, e.g., Alston v. Parker, 363 F.3d 229, 234 (3d Cir. 2004) ("Courts are to construe complaints so 'as to do substantial justice,' Fed. R. Civ. P. 8(f), keeping in mind that pro se complaints in particular should be construed liberally.") (citing Dluhos v. Strasberg, 321 F.3d 365, 369 (3d Cir. 2003)).

Defendant now moves to dismiss Plaintiff's Complaint pursuant to Rules 12(b)(1) (lack of subject matter jurisdiction) and 12(b)(6) (failure to state a claim) of the Federal Rules of Civil Procedure.

### **Discussion**

#### **A. What are Plaintiff's Claims?<sup>3</sup>**

Defendant characterizes Plaintiff's Complaint as stating claims under 42 U.S.C. § 1983 ("Section 1983") and Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e *et seq.* ("Title VII"). See Memorandum of Law in Support of the Motion of Defendant Pennsylvania State Police to Dismiss Plaintiff's Complaint. ("D. Memo.") at 3, 5. The Court agrees that Plaintiff's Complaint may be fairly read as stating a claim under Title VII. There was, after all, an EEOC right to sue letter appended to the Complaint and an allegation of bias. The greater difficulty is determining whether Plaintiff states a cause of action under Section 1983.

Section 1983 provides a cause of action for "any person who has been deprived of rights secured by the Constitution or laws of the United States by a person acting under color of law." Curley v. Klem, 298 F.3d 271, 277 (3d Cir. 2002). For the

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<sup>3</sup> With the exception of the attached EEOC right to sue notice, Plaintiff's Complaint does not contain a single citation to any statutes, regulations or cases upon which he bases his claims.

purpose of this opinion, the Court assumes (without deciding) that Plaintiff has sufficiently alleged that a person acting under the color of law (i.e. a state actor) deprived him of his rights under either the Constitution or federal law. And therefore his Complaint contains a Section 1983 claim.

### ***B. Standards of Review***

#### *1. Motion to Dismiss pursuant to Rule 12(b)(6)*

In considering a Rule 12(b)(6) motion to dismiss, the district courts must "accept as true the factual allegations in the complaint and [draw] all reasonable inferences" in favor of the plaintiff. Allah v. Seiverling, 229 F.3d 220, 223 (3d Cir. 2000)(internal quotations omitted).<sup>4</sup> A motion to dismiss may be granted only where the allegations fail to state any claim upon which relief may be granted. See Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997). Dismissal is warranted only "if it is certain that no relief can be granted under any set of facts which could be proved." Klein v. General Nutrition Companies, Inc., 186 F.3d 338, 342 (3d Cir. 1999) (internal quotations omitted).

#### *2. Motion to Dismiss pursuant to Rule 12(b)(1)*

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<sup>4</sup> Although the primary focus is on the pleadings when deciding a motion to dismiss, it is permissible for a district court to "consider matters of public record, orders, exhibits attached to the complaint and items appearing in the record of the case." Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1394 n.2 (3d Cir. 1994); PBGC v. White, 998 F.2d 1192, 1196 (3d Cir. 1993) (same).

A party may raise either a facial or factual challenge as to whether the district court properly has subject matter jurisdiction. See Gould Elec. Inc. v. United States, 220 F.3d 169, 176 (3d Cir. 2000). When a defendant's Rule 12(b)(1) motion presents a facial challenge, as in this case, the court must treat the allegations of the complaint as true and draw all favorable inferences in favor of the plaintiff. See, e.g., NE Hub Partners, L.P. v. CNG Transmission Corp., 239 F.3d 333, 342 (3d Cir. 2001). A court may properly dismiss a plaintiff's complaint only if it concludes that the claims "'clearly appear[] to be immaterial and made solely for the purpose of obtaining jurisdiction or . . . [are] wholly insubstantial and frivolous.'" Kehr Packages v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991) (quoting Bell v. Hood, 327 U.S. 678, 682 (1946); see also Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666 (1974) (to warrant dismissal claim must be "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy"). Because a court need not find a claim wholly frivolous or insubstantial in order to dismiss it under Rule 12(b)(6), the threshold to withstand a Rule 12(b)(1) motion to dismiss is correspondingly lower than that under Rule 12(b)(6). See Kehr Packages, 926 F.2d at 1409 (quoting Lunderstadt v.

Colafella, 885 F.2d 66, 70 (3d Cir. 1989)).<sup>5</sup>

***C. Should the Court appoint Plaintiff counsel?***

Before Defendant filed its motion to dismiss, Plaintiff had requested that the Court appoint him an attorney. Although he does not have a statutory or constitutional right to an attorney in a civil case, the Court has the authority to appoint him one under Title VII. See 42 U.S.C. § 2000e-5(f)(1)(B). Deciding whether counsel should be appointed is a two-step process. First, a court must determine whether the plaintiff's claims have some merit in fact or law. See Parham v. Johnson, 126 F.3d 454, 457 (3d Cir. 1997); Welch v. Summers, 2003 U.S. Dist. LEXIS 1292, at \* 4 (E.D. Pa. Jan. 7, 2003) (Pollak, J.). If the plaintiff's claims meet this test, a court must then evaluate a set of non-exhaustive factors (including plaintiff's ability to bring her own case; complexity of legal issues; need for expert witnesses, etc.) to determine whether appointment of counsel is appropriate. See Parham, 126 F.3d at 457; Tabron v. Grace, 6 F.3d 147 (3d Cir. 1993). As the Court explains below, however, Plaintiff's claims have no basis in law because they are barred by either the Eleventh Amendment or administratively deficient. And so there

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<sup>5</sup> This, of course, does not relieve Plaintiff (as the party invoking the jurisdiction of this Court) of his burden to show that this action is properly in federal court. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992); Samuel-Bassett v. Kia Motors America, Inc., 357 F.3d 392, 396 (3d Cir. 2004).

is no justification for appointing Plaintiff an attorney. See, e.g., Welch, 2003 U.S. Dist. LEXIS 1292, at \* 5 ("To warrant appointment of council [sic], a plaintiff's claims may not be 'baseless' or 'frivolous,' but, instead, must present 'some arguable merit in fact and law.'") (citing Montgomery v. Pinchak, 294 F.3d 492, 499 (3d Cir. 2002)).

***E. The Potential Section 1983 Claim***

Defendant argues that this Court does not have subject matter jurisdiction over Plaintiff's Section 1983 claim because state agencies are immune from liability under the Eleventh Amendment. See D. Memo. at 3-4. The Court agrees. The Supreme Court has held repeatedly that the Eleventh Amendment bars actions by private citizens against States or its agencies, unless the State has explicitly consented to suit. See, e.g., Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984) ("It is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment.") (citations omitted); Edelman v. Jordan, 415 U.S. 651, 663 (1974). Pennsylvania has explicitly withheld its consent from suit. See 42 Pa. C.S.A. § 8521(b). And there is no question that the PSP is a state agency. See 71 P.S. § 61. Thus, the Eleventh Amendment bars Plaintiff from suing the PSP under Section 1983. This is true even though Plaintiff is seeking some form of

injunctive relief. See, e.g., Cory v. White, 457 U.S. 85, 91 (1982) (“[T]he Eleventh Amendment by its terms clearly applies to a suit seeking an injunction, a remedy available only from equity. To adopt the suggested rule, limiting the strictures of the Eleventh Amendment to a suit for a money judgment, would ignore the explicit language and contradict the very words of the Amendment itself.”). And seeing that Plaintiff has not named any individual state officials as defendants, he also does not have recourse under the Ex parte Young doctrine. See, e.g., Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (“[Ex parte Young] has no application in suits against the States and their agencies, which are barred regardless of the relief sought . . . .”) (citations omitted).

Because Pennsylvania has specifically withheld its consent from suit, the Eleventh Amendment bars Plaintiff’s Section 1983 claim. The Court is therefore without subject matter jurisdiction over Plaintiff’s Section 1983 claim. See, e.g., Blanciak v. Allegheny Ludlum Corp., 77 F.3d 690, 694 n. 2 (3d Cir. 1996) (Since the Eleventh Amendment is a jurisdictional bar, a motion to dismiss is properly treated as a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1)).

***F. The Potential Title VII claim(s)***

As for any possible claims under Title VII, the Court

concludes that these claims are time barred. Title VII requires a prospective plaintiff to satisfy certain administrative (i.e. jurisdictional) prerequisites before seeking relief in federal court. Among those prerequisites is the requirement that a plaintiff file within "one hundred and eighty days after the alleged unlawful employment practice occurred" a timely charge of discrimination with the EEOC.<sup>6</sup> 42 U.S.C. § 2000e-5(e)(1) ("Section 2000e-5(e)(1)").<sup>7</sup> Failure to file timely with the EEOC precludes a plaintiff from bringing suit under Title VII. See, e.g., Bahar v. Northwestern Human Servs., 2007 U.S. Dist. LEXIS 6372, at \* 7 (E.D. Pa. Jan. 27, 2007) (citing West v. Philadelphia Elec. Co., 45 F.3d 744, 754 (3rd Cir. 1995)).

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<sup>6</sup> The jurisdictional prerequisites to filing a Title VII claim are: (1) timely filing of a charge with the EEOC; (2) receipt of the EEOC's notice of the right to sue; and (3) instituting suit within 90 days of receiving the right to sue notice. See Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398 (3d Cir. 1976); 42 U.S.C. § 2000e-(5)(f)(1) (90-day rule). The PSP does not challenge that Paramore did not either properly receive a right to sue notice from the EEOC or initiate this suit within the 90-day window.

<sup>7</sup> If a plaintiff "initially instituted proceedings" with the appropriate "State or local agency," Section 2000e-(5)(e)(1) allows her to file the necessary charge of discrimination with the EEOC "within three hundred days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1); e.g., Major v. Plumbers Local Union No. 5, 370 F. Supp. 2d 118, 126 (D.D.C. 2005). That longer filing period is, however, inapplicable here because Plaintiff never alleges that he filed a charge of discrimination with the appropriate state or local agency. And even if he did, the 300-day filing period still offers him no salvation because he filed his charge of discrimination with the EEOC 308 days after the unlawful employment practice allegedly occurred.

In this action, Plaintiff alleges that the adverse employment action took place on May 9, 2005. He did not, however, file a charge of discrimination (i.e. administrative complaint) with the EEOC until 308 days later on March 13, 2006. See Plaintiff's Request for Appointment of Attorney (Doc. No. 4). Indeed, the EEOC closed its file on Plaintiff's complaint because it was not timely filed. See Compl., EEOC Right to Sue Notice (attached) dated Sept. 26, 2006. Because Plaintiff did not file a complaint with the EEOC within 180 days of the adverse employment action, he is barred from proceeding in federal or state court.

Third Circuit precedent requires, however, that when dismissing a complaint for failing to state a claim, a district court should give the plaintiff leave to amend unless it "conclud[es] that any amendment would be futile." Shane v. Fauver, 213 F.3d 113, 116 (3d Cir. 2000) (citing Borelli v. City of Reading, 532 F.2d 950 (3d Cir. 1976)). In this case, it is obvious that any amendment to Plaintiff's Title VII claim(s) would be futile because the Court has already concluded that any such claims are time barred. In other words, Plaintiff cannot amend his Complaint in a manner that would suddenly resurrect as timely any potential claims he has under Title VII. Accordingly, the Court DISMISSES WITH PREJUDICE Plaintiff's potential claims under Title VII. See, e.g., Gen. Refractories v. Fireman's Fund

Ins., 337 F.3d 297, 303 n.1 (3d Cir. 2003) (Dismissal pursuant to Fed. R. Civ. P. 12(b)(6) is warranted "if it is certain that no relief can be granted under any set of facts which could be proved.").

### **Conclusion**

For the foregoing reasons, the Court concludes: (1) that it lacks subject matter jurisdiction over Plaintiff's potential Section 1983 claims; and (2) that any claims Plaintiff might have under Title VII arising from the PSP's allegedly adverse employment action of May 9, 2005 are time barred. An appropriate Order follows.

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	:	
Pennsylvania State Police.	:	

**ORDER**

AND NOW, this 26th day of April, 2007, upon consideration of the Plaintiff's Motion for Appointment of Attorney (Doc. No. 4) and Defendant's Motion to Dismiss (Doc No. 5), it is hereby

**ORDERED** as follows:

1. Plaintiff's Motion for Appointment Counsel is **DENIED**.
2. Defendant's Motion to Dismiss Plaintiff's Complaint is **GRANTED** and Plaintiff's Complaint is **DISMISSED WITH PREJUDICE**.
3. The Clerk of Court is to **CLOSE** this matter.

BY THE COURT:

s/J. Curtis Joyner  
J. CURTIS JOYNER, J.