

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

Mary Valestine Miller-Turner : CIVIL ACTION  
v. :  
Mellon Bank, N.A. : NO. 97-3738

MEMORANDUM AND ORDER

Norma Shapiro, J.

June 20, 1997

The present action, Miller-Turner v. Mellon Bank, 97-3738, was filed as related to Miller-Turner v. Mellon Bank, N.A. and Veronica Betts, 1995 WL 298931 (E.D. Pa. 1995), Civil Action No. 94-5409. Pro se plaintiff alleged in the previous action that her employer, Mellon Bank, ("Mellon"), and her supervisor, Veronica Betts, discriminated against her because of her race, in violation of Title VII of the Civil Rights of 1964. 42 U.S.C. §2000(e).<sup>1</sup>

Miller-Turner, an African-American female, was first assigned to Mellon in January, 1991 as an employee of a temporary employment agency. Having had experience and training in accounting, she later applied to Mellon for an accounting position as a field examiner. She was not considered for the

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<sup>1</sup>Title VII of the Civil Rights Act of 1964 makes it " an unlawful employment practice for an employer. . .to discriminate against any individual . . .because of such individual's race, color, religion, sex or national origin. 42 U.S.C §2000 3-2(a)(1).

position. The prior record does not reveal if Mellon hired another person for the job.

Mellon did offer Miller-Turner a temporary position encoding and processing checks. In her first month of work, Turner was late on two occasions; Veronica Betts, her supervisor, gave her an oral warning. In June, 1991 a check encoding error by Turner caused a payment to be credited to the wrong account. The next day Tuner arrived late again. After these instances, Betts issued Turner a an "Early Performance Alert" (EPA). Tardiness was the only reason for the warning. While the defendant claimed another EPA cited poor work quality (Exhibit 11), the court accepted Miller-Turner's contention that it was not authentic.

On August 14, 1991, Betts served Miller-Turner with an "Update to EPA," citing Miller-Turner for seven more processing errors during the period of June 6 to August 12, and notified her that if her work quality didn't improve, the result could be "further corrective Disciplinary Action up to and including termination." Defendant's Ex. 12. Two of the listed errors were clearly established by the record. Finally, on September 15, 1991, Miller-Turner committed another encoding error. On September 18, she was confronted and subsequently fired. Miller-Turner applied for a Field Examiner's position again in October, 1991 and July, 1992 but did not get either job.

Miller-Turner, filing suit against Mellon for discrimination, cited her unsuccessful application for a field examiner position and her later discharge from the temporary

check encoding and processing position as the basis for her action. The court granted summary judgment for defendants in May, 1995. This decision was affirmed by the Court of Appeals. Miller-Turner v. Mellon Bank, N.A., 91 F.3d 124 (3d Cir. 1996).

The present pro se complaint makes related claims.<sup>2</sup> Plaintiff alleges she reapplied in June, 1995 for a field examiner position and that Mellon "retaliated against her and refused to consider her for the position because she had exercised her constitutional rights and filed a complaint of employment discrimination against them." Complaint at ¶ 1. Miller-Turner asserts a continuum of discrimination by the same defendant, concerning the same job position sought at a different time. Plaintiff also claims she was not considered for the 1995 field examiner position, for which she was qualified<sup>3</sup> in retaliation for the prior civil claim brought against the defendant.

Plaintiff has filed a motion to proceed in forma pauperis. 28 U.S.C. §1915. Plaintiff's affidavit in support of her motion states she is currently employed as a substitute teacher making \$94 a day but she anticipates a period of unemployment because the school year ends on June 17, 1997. She owns stock valued at

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<sup>2</sup>Plaintiff filed a complaint with the EEOC on February 21, 1997 and received a right to sue letter on February 27, 1997. Complaint was filed in District Court on May 29, 1997.

<sup>3</sup>The plaintiff informed the EEOC that her prior position was not the same as the position advertised in 1995 and she had not been working in her professional capacity in the prior position. Complaint at ¶ 3.

only \$100. It is unclear whether the plaintiff can pay the filing fee. Therefore, the court will grant the motion to proceed in forma pauperis but dismiss the claim as frivolous.<sup>4</sup>

Title 28 U.S.C. §1915 allows indigents to proceed in forma pauperis with filing fees waived. Leave to proceed in forma pauperis is a privilege granted only where the court, in its discretion, is persuaded that the action will survive a motion to dismiss. The court may dismiss an action if satisfied that the action is frivolous. 28 U.S.C. §1915(d); See, McTeague v. Sosnowski, 617 F.2d 1016, 1019 (3rd 1980); Fletcher v. Young, 222 F.2d 222, 224 (4th Cir.), cert. denied, 350 U.S. 916, 76 S.Ct. 201, 100 L.Ed. 802 (1955). If a claim on its face is utterly without legal merit, that complaint should be dismissed as frivolous. Lawson v. Prasse, 411 F.2d 1203, 1204 (3rd Cir. 1969).

Title VII prohibits an employer, or potential employer from discriminating against a person because of race color, religion or national origin. A prima facie case for discriminatory retaliation under Title VII requires that: (1) the employee was engaged in protected activity; (2) the employer took adverse action against him or her; and (3) a causal connection existed between the protected activity and adverse employment action. Kachmar v. Sunguard Data Sys., Inc., No. 96-1119, 1997 WL 135897

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<sup>4</sup>When a plaintiff files a complaint pro se, motions to proceed in forma pauperis should be granted liberally. Urbano v. Calissi. 353 F.2d 196, 197 (3rd Cir. 1965); but see, §1915(d) which allows courts to dismiss a claim if frivolous.

(3d Cir. March 26, 1997), Tipton v. Canadian Imperial Bank of Commerce, 872 F.2d 1491, 1494 (11th Cir. 1989). If the plaintiff establishes a prima facie case, the defendant may rebut the plaintiff's allegations by producing a legitimate, nondiscriminatory, reason for discharge or non-consideration. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the defendant meets that burden and produces a legitimate reason, plaintiff is required to prove that defendant's proffered reason was pretextual and unlawful discrimination was the real reason for the defendant's conduct. See St. Mary's Honor Society v. Hicks, 125 L.Ed.2d. 407, 416 (1993).

This complaint lacks legal merit. The present action is related to a prior action assigned to this judge in which a summary judgment granted in favor of the defendant was affirmed by the Court of Appeals. Summary judgment was based on Mellon's evidence of legitimate nondiscriminatory business reasons for their failure to hire plaintiff: her record of errors in her temporary position with Mellon. Miller-Turner was unable to produce any evidence "from which a jury rationally could find that Mellon's reason for her termination, i.e., her total number of work errors, did not actually motivate the decision not to hire her as a Field Examiner or were post hac fabrications." Miller-Turner v. Mellon Bank. N.A. and Veronica Betts, 1995 WL 298931 (E.D. Pa. May 16, 1995), Civil Action No. 94-5409.

Issue preclusion, sometimes referred to as collateral estoppel, bars relitigation of an issue identical to that adjudicated in the prior action. In Re Graham, 973 F.2d 1089, 1097 (3rd Cir. 1992), Bradley v. Pittsburgh Board of Education, 913 F.2d 1064, 1070 (3rd Cir. 1990), Gregory v. Chehi 843 F.2d 111 (3rd Cir. 1988), if the prior decision is a final judgment on the merits by a court of competent jurisdiction. Gregory v. Chehi, 843 F.2d 111 (3rd Cir. 1988). The prior related action established that Mellon's proffered reason for the termination and non-consideration of Turner, her work errors, was not pretextual; the issue can not be relitigated. Therefore, Turner can not challenge Mellon's legitimate reasons for refusing to hire her as a Field Examiner. To allow the action to proceed would be futile.

This action will be dismissed as frivolous under 28 U.S.C. §1915(d), because plaintiff is collaterally estopped by the decision in Miller-Turner v. Mellon Bank, N.A., 91 F.3d 124 (3rd Cir. 1996). An application of the doctrine of issue preclusion is appropriate.

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

: CIVIL ACTION

Mary Valestine Miller-Turner :

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v.

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Mellon Bank, N.A.

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: No. 97-3736

**ORDER**

AND NOW, this        day of June, 1997, upon consideration of plaintiff's motion to proceed in forma pauperis and the complaint attached thereto, it is **ORDERED** that:

I. The plaintiff's motion to proceed in forma pauperis is **GRANTED** pursuant to 28 U.S.C. §1915(a).

II. Plaintiff's complaint is **DISMISSED** as frivolous pursuant to 28 U.S.C. §1915(d).

III. The clerk shall mark this case **CLOSED**.

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Norma L. Shapiro U.S.D.

J.