

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

ISAAC MENSAH	:	CIVIL ACTION
	:	
v.	:	
	:	
RESOURCES FOR HUMAN	:	
DEVELOPMENT, <u>et al.</u>	:	NO. 97-2517

**MEMORANDUM AND ORDER**

BECHTLE, J.

DECEMBER 23, 1997

Presently before the court are defendants Resources for Human Development ("RHD"), Rainbow Community Head Start ("Rainbow") and Mary Scott's ("Scott") (collectively, "Defendants") Motion To Dismiss Plaintiff's Complaint, Defendant's Motion to Strike or Dismiss Plaintiff's Amended Complaint, Rainbow's motion for summary judgment, plaintiff Isaac Mensah's ("Mensah") responses thereto and counter motion pursuant to Federal Rule of Civil Procedure 56(f). For the reasons set forth below, the court will deny the motion to dismiss the Complaint, grant in part and deny in part the motion to dismiss the Amended Complaint, deny the motion for summary judgment and deny Plaintiff's Rule 56(f) motion.

**I. BACKGROUND**

Mensah commenced this civil action against Defendants, seeking monetary damages under federal employment discrimination

law and related state law claims.<sup>1</sup> The facts, as alleged by Mensah in his Amended Complaint and viewed in a light most favorable to the plaintiff, are as follows.

Mensah is a black male of African origin. Rainbow and RHD are Pennsylvania corporations that employed Mensah.<sup>2</sup> Scott, as Director of Rainbow, was Mensah's direct supervisor. Mensah was hired as the Fiscal Officer at Rainbow. During the hiring and selection process, Scott made derogatory comments about Africans. Specifically, Scott told Rainbow's Policy Council that African men did not take instructions from female supervisors. She then recommended that the board offer the position for which Mensah was interviewing to other, less qualified candidates who were not African men. Despite Scott's comments, Mensah was hired for the position. Subsequently, Scott admitted to Mensah that she had reservations about hiring him and told him that he needed to put aside his African cultural background of male dominance and learn to take instructions from her.

In October 1995, Scott made additional derogatory statements to Mensah regarding his race, origin and color. According to Mensah, Scott stated that she received complaints

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1. This court has original jurisdiction over Mensah's claims because they arise under federal employment law. 28 U.S.C. § 1331. The court has supplemental jurisdiction over his state law claims because they form part of the same case or controversy as the federal claims. 28 U.S.C. § 1367(a).

2. The status of Rainbow and RHD is disputed in Rainbow's summary judgment motion. The parties' arguments and the evidence offered in support thereof will be addressed in the summary judgment section of the court's memorandum.

regarding his body odor and asked him to resign. After Mensah objected, Scott told him that his office smelled like a dead rat, and attributed it to African idiosyncrasies concerning hygiene. In the same conversation, she told him to tell his wife to keep his house clean so he would not have offensive body odor.

In December of 1995, Scott allegedly made additional derogatory comments to Mensah. Mensah asked Scott to meet in private to discuss matters regarding Rainbow's budget. Scott told Mensah that she was afraid of him and didn't want Rainbow to be another Rwanda. Mensah then objected to that comment, as well as the previous comments. After Mensah complained, he was suspended without pay for three days and placed on a sixty-day probation. After sending a letter to Scott objecting to his suspension, he was again suspended without pay pending an investigation by the Rainbow Policy Council. According to Mensah, Scott admitted to the Policy Council that she made the statements and also stated that she disliked talking to him because of his accent. She also mentioned his body odor and attributed it to his national origin. The Policy Council recommended that Mensah be retroactively paid for the time he was suspended. However, Scott and Michael DeNomme ("DeNomme"), the Associate Director of RHD, both wrote to Mensah informing him that he was still suspended without pay pending further investigation. At a meeting with the Rainbow Personnel Committee, DeNomme was told that the incident was going to be investigated by that committee. DeNomme allegedly stated that if

Scott wanted Mensah fired, they would find a way, including using an incident where Mensah was absent from work one day but did not call in sick. On April 24, 1996, Defendants terminated Mensah's employment by a letter on Rainbow letterhead and signed by Scott. Mensah was replaced by an individual who is neither black nor African.

On April 14, 1997, Mensah filed a Complaint with this court asserting claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., and under the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. § 951, et seq., against RHD and Rainbow. He also asserted claims under the common law theory of intentional infliction of emotional distress against RHD, Rainbow and Scott. On May 12th, 1997, Defendants filed a motion to dismiss the Complaint and, in the same document, Rainbow moved for summary judgment. On May 27, 1997, Mensah responded to the motions and filed a counter motion under Federal Rule of Civil Procedure 56(f). On that same day, Mensah filed an Amended Complaint alleging the same claims as the Complaint, but adding additional factual background. On June 19, 1997, Defendants filed a motion to dismiss or strike the amended complaint and, in the same document, Rainbow reasserted its motion for summary judgment. On July 3, 1997, Mensah filed a response to the motion to dismiss or strike the Amended Complaint and the reasserted motion for summary judgment.

For the reasons set forth below, the court will deny the motion to dismiss the Complaint, grant in part and deny in

part the motion to dismiss the Amended Complaint, deny the motion for summary judgment and deny Plaintiff's Rule 56(f) motion.

## II. DISCUSSION

### A. Motions to Dismiss

Defendants filed a motion to dismiss the Complaint. Mensah then filed an Amended Complaint. In response, Defendants filed a motion to dismiss or strike the Amended Complaint. Therefore, the court will deny the motion to dismiss as moot and will only address the motion to dismiss or strike the Amended Complaint.

For purposes of a motion to dismiss, the court must accept as true all well-pleaded allegations of fact in the plaintiff's complaint, construe the complaint in a light most favorable to the plaintiff and determine whether "under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665-66 (3d Cir. 1988), cert. denied, 489 U.S. 1065 (1989) (citations omitted). The court, however, need not accept as true legal conclusions or unwarranted factual inferences. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). If "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," the complaint will be dismissed. Conley, 355 U.S. at 45.

Defendants move to strike or dismiss Mensah's Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1),

12(b)(6) and 12(f). Specifically, Defendants argue that the court lacks subject matter jurisdiction over the discrimination claims, that the claims in the Amended Complaint are barred by judicial estoppel and that the intentional infliction of emotional distress claim is legally insufficient. These arguments will be addressed in that order.

**1. Subject Matter Jurisdiction**

Defendants argue that this court does not have jurisdiction over Mensah's claims because he did not exhaust his procedural remedies. Specifically, they argue that his charges filed with the Equal Employment Opportunity Commission ("EEOC") only allege discriminatory firing based upon his disclosure of financial improprieties, and that the claims of discrimination based upon race and national origin, as well as the retaliatory discrimination claim are barred. (See Def.s' Mem. Supp. Strike Am. Compl. at 8.)<sup>3</sup> The court disagrees.

Federal courts have no jurisdiction to hear discrimination claims unless a timely charge has been filed with the appropriate state agency and those agencies render decisions. A complainant must await the agency's determination and issuance of a Notice of Right to Sue letter prior to filing suit in

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3. The court notes that contrary to Defendants' characterization of the PHRC claim, the PHRC and EEOC only accept and consider complaints of illegal discrimination such as those based upon race, color, religion, ancestry, age, sex, handicap status or association with handicapped individuals. (See, e.g., Pl.'s Mem. Opp. Strike Ex. A at 1.) Thus, a claim based on the termination of his employment because he disclosed financial improprieties, alone, would not be accepted or considered by the agencies.

federal court. The action filed in federal court may include only issues that were within the scope of the agency's investigations, or those issues that could reasonably be expected to grow out of those charges. Ostopowicz v. Johnson Bronze Co., 541 F.2d 394, 398-99 (3d Cir. 1976) cert. denied, 429 U.S. 1041 (1977).

Mensah filed a discrimination claim with the PHRC and the PHRC forwarded the claim to the EEOC for its consideration as well. On the PHRC's IN-4 Form (General Questionnaire), Mensah checked the boxes indicating that his claim was for discrimination based on race, color, national origin and retaliation. (Pl.'s Mem. Opp. Strike Am. Compl. Ex. A at 2.) That form is signed by Mensah. Id. at 4. On the continuation page attached thereto he alleges that he was wrongfully fired and retaliated against. He claims that there were no specific reasons for the actions, and gives examples of Mary Scott's derogatory statements. (Pl.'s Mem. Opp. Strike Am. Compl. Ex. A at 4.) It is clear that he is claiming that the actions were taken because of his national origin, race and in retaliation for his complaints. On the IN-14 form (Retaliation Questionnaire), Mensah checked the same boxes and signed the form. Id. Ex. B at 2. The PHRC and EEOC complaints contains the same allegations as the forms. Id. Exs. C&D.

Mensah's Amended Complaint alleges discrimination based on race, national origin and color. He alleges, inter alia, the following: during the hiring and selection process, Scott

recommended to the Rainbow Policy Council that other less qualified candidates should be given positions instead of Mensah because African men are too dominant and do not take instruction from female supervisors. (Am. Compl. ¶ 14.) It also alleges that she confronted him verbally and made several derogatory comments about his national origin, race and color. Id. ¶¶ 15-17. He alleges that she made derogatory comments about his hygiene and attributed it to his national origin. Id. ¶ 17. He also alleges that in retaliation for his objecting to her comments, he was suspended without pay for three days and then placed on 60-day probation. Id. ¶ 20. Mensah alleges that on January 24, 1996, Scott further retaliated after he confronted her with the inappropriateness of her actions and she suspended him without pay pending a termination decision. Id. ¶ 22.

Mensah's filings with the EEOC and PHRC encompass these events. He clearly alleged continuing retaliation by Defendants in those claims. (See Def.'s Mem. Supp. Strike Am. Compl. Ex. A at 3.) Further instances of retaliation can be expected to grow out of continuing retaliation. Defendants were on notice of the actions of which Mensah complained, including the continuing nature of the claims. The court will not require Mensah to return to the EEOC for every subsequent instance of retaliation. Therefore, the court will deny the motion to dismiss on this ground.

## 2. Judicial Estoppel

Defendants argue that the doctrine of judicial estoppel bars Mensah's claims in his Amended Complaint that he was discriminated against on the basis of race, color and national origin, and his claim of subsequent retaliation for his objections to such discrimination. Defendants point to a statement found in Mensah's original complaint and his filings with the EEOC and the PHRC. Specifically, they note that Mensah alleged in his original Complaint that "Defendants have engaged in a pattern of retaliating against Plaintiff for disclosures he made to the RCHS Policy Council and for information he has that demonstrates ongoing and significant discrepancies and mismanagement of funds. This was the underlying reason for the discriminatory treatment of Plaintiff." (Compl. ¶ 13). This language echos similar statements made in the EEOC and PHRC complaints. (Defs.' Mot. to Strike Am. Compl. Ex. A at 2; Ex. B at 3). Defendants argue that because Mensah stated that "whistle blowing" was the underlying reason for the discriminatory treatment, he is barred from asserting that racial, color or national origin discrimination occurred.

Defendants argues that McNemar v. The Disney Store, Inc., 91 F.3d 610 (3d Cir. 1996) supports the use of judicial estoppel in this case. In McNemar, the plaintiff stated in prior sworn statements to government agencies that he was totally disabled and unable to work so that he could receive disability benefits. Id. at 616. He then attempted to assert in an

Americans with Disabilities Act discrimination action that he was "qualified" to perform his job, a required showing for a prima facie case. Id. at 618. The district court ruled that he was judicially estopped from asserting that he was "qualified" when he had previously asserted he was totally disabled, and the Third Circuit affirmed. Id. at 619. Defendants argue that, under McNemar, Mensah should be judicially estopped from asserting what they call inconsistent positions. The court disagrees.

The Third Circuit has articulated a two part test for the application of judicial estoppel. The court must ask: "(1) Is the party's present position inconsistent with a position formerly asserted? (2) If so, did the party assert either or both of the inconsistent positions in bad faith--i.e., 'with intent to play fast and loose' with the court?" Id. at 618 (citing Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, at 361 (3d Cir. 1996)). The application of judicial estoppel depends on the application of the facts of each case and is left to the discretion of the District Court. Id. at 617. The court finds that the application of judicial estoppel is inappropriate under the facts of this case.

First, Mensah has not asserted inconsistent positions. If the language used in the original complaint is read in isolation, it may appear that Mensah is limiting the alleged discrimination to whistle blowing. However, it is clear from a reading of the entire complaint that he alleges other facts supporting a claim of Title VII discrimination. Specifically,

Mensah stated in the Complaint that Scott made derogatory statements based in part on his nationality. (Compl. ¶ 18.) It appears that his statement regarding his whistle blowing activity served as a backdrop against which the comments were made. The fact that Mensah's whistle blowing resulted in retaliation against him is not wholly inconsistent with an assertion that race, color or national origin discrimination also occurred. This is in direct contrast to McNemar, where the plaintiff asserted that he was totally disabled and unable to work and later asserted that he was qualified to perform the functions of a job. Those two positions directly contradict one another. In the case at hand, Mensah never denied that he was discriminated against on the basis of his race, color or national origin. To the contrary, Mensah has consistently asserted a Title VII claim.

Second, even if the statement were an inconsistent position, there is no evidence of bad faith. The fact that the Amended Complaint includes additional examples of discrimination while omitting the previous reference to the whistle blowing is the apparent result of the legitimate use of an Amended Complaint to clarify a claim and to include additional necessary information. Mensah has consistently alleged that Defendants discriminated against him in violation of Title VII. While the allegations in his Amended Complaint may vary from the original Complaint, the allegations are not inconsistent. Because there have not been inconsistent statements or a showing of bad faith, the court will not estop Mensah from raising these claims.

### 3. Intentional Infliction of Emotional Distress

Defendants ask the court to dismiss Mensah's claim for intentional infliction of emotional distress because the conduct he alleges is not sufficiently outrageous to constitute intentional infliction of emotional distress under Pennsylvania law. The Court agrees and will dismiss the claim.

In Pennsylvania, a plaintiff in an action for intentional infliction of emotional distress must show that the defendants, "by extreme and outrageous conduct, intentionally or recklessly caused the plaintiff severe emotional distress." Motheral v. Burkhart, 583 A.2d 1180, 1188 (Pa. Super. Ct. 1990). See also Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988). The plaintiff must also show medical evidence of physical injuries that resulted from the outrageous conduct. Great W. Life Assur. Co. v. Levithan, 834 F. Supp. 858, 862-63 (E.D. Pa. 1993). The court determines whether the alleged conduct is so extreme as to permit recovery. Id.

Conduct in the employment context will rarely rise to the requisite level of outrageousness. Id. Liability has only been found in cases where the conduct is so extreme in nature as to go beyond all possible bounds of decency. Id. The conduct of which Mensah complains includes offensive statements and retaliatory employment actions. While inappropriate, the alleged actions do not rise to the required level of outrageousness. See EEOC v. Chestnut Hill Hosp., 874 F. Supp. 92, 96 (E.D. Pa. 1995). See also Cox, 861 F.2d 395. The court

also notes that Mensah has failed to allege any physical harm resulting from the alleged conduct. The court will dismiss the claim.

**B. RAINBOW'S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Federal Rule of Civil Procedure 56(c), "summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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.'" Celotex Corp. Catrett, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)). A fact is material if it might affect the outcome of the suit under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). An issue is genuine only if the evidence is such that a reasonable jury could find for the non-moving party. Id.

In considering a motion for summary judgment, "[i]nferences should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true.'" Pastore v. Bell Tel. Co. of Pa., 24 F.3d 508, 512 (3d Cir. 1994) (quoting Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993)). Rule 56(e) does not, however, allow the non-moving party to rely merely upon bare assertions, conclusory allegations or

suspicious. Fireman's Ins. Co. v. DuFresne, 676 F.2d 965, 969 (3d Cir. 1982). The non-moving party must offer specific facts contradicting the facts averred by the movant which indicate that there is a genuine issue for trial. Lujan v. National Wildlife Fed'n, 497 U.S. 871, 888 (1990); Celotex, 477 U.S. at 322. When a non-moving party who bears the burden of proof at trial has failed, in opposition to a motion for summary judgment, to raise a disputed fact, summary judgment should be granted because "a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." Id. at 322-23.

Defendant Rainbow moves for summary judgment on the grounds that it is an entity not capable of being sued and not within the definition of employer under Title VII. Specifically, Rainbow alleges that it is "nothing more than a name [RHD] uses for administration of a particular federally funded program." In support of its motion, Rainbow has filed with its original brief an affidavit by defendant Scott and a Head Start policy manual. (Rainbow's Mem. Supp. Summ. J. Exs. 1; 2.) In Scott's affidavit, she states that RHD employed her as Director of Rainbow and that RHD employed Mensah as a fiscal officer for Rainbow. (Rainbow's Mot. Summ. J. Ex. 1 ¶ 2, 4, 5.) She states that Rainbow does not employ anyone and is not a corporation, partnership or association, but is only the name of a federally funded program. (Rainbow's Mot. Summ. J. Ex. 1 ¶ 4.) The Head Start policy manual appears to discuss Head Start programs in general, but

does not discuss Rainbow, its legal status or its relationship with RHD. (Rainbow's Mot. Summ. J. Ex. 2.)

In support of the motion to strike/amend the Amended Complaint, which reasserts Rainbow's motion to dismiss, Rainbow has included a copy of a booklet outlining the RHD organization and its programs. (Defs.' Mot. to Strike Am. Compl. Ex. Ex. D at 1.) The exhibit states that RHD is a "collective of multiple service programs under one central non-profit 501(c)(3) status." Id. The exhibit also states that the head start programs RHD "sponsors" is funded with government grants. Id. The exhibit further states that "program creators, directors, and their work groups have maximum authority, creativity, and autonomy." Id. The exhibit additionally states that RHD "centralizes its financial management activities." Id. at 6. Finally, the exhibit refers to Rainbow as "a federal comprehensive developmental program" but does not address the legal status of Rainbow itself. Id. at 21.

In Mensah's responses to the motion for summary judgment, Mensah disputes Rainbow's assertion that it is not an entity capable of being sued and that it is not within the definition of employer under Title VII. In support, Mensah has filed with the court a copy of the termination letter he received, records of his unemployment compensation benefits forms and an affidavit by Mensah. The termination letter is signed by Scott, written on Rainbow letterhead and states that his "employment with Rainbow Community Head Start Program" was

terminated by approval of the Policy Council. (Pl.'s Mem. Opp. Summ. J. Ex. B at 2.) RHD and the Policy Council are listed as having received courtesy copies of the letter. Id. Mensah's records from his unemployment compensation and his affidavit appear to state that his employment was with Rainbow and RHD. (Pl.'s Mem. Opp. Summ. J. Ex. C; Pl.'s Mem. Opp. Strike Am. Compl. Exs. H, I, J.)

Rainbow argues that it is not a person and has no employees and so is not an employer under 42 U.S.C. 2000-e. However, Mensah has presented a termination letter on Rainbow letterhead signed by Scott, as Director of Rainbow. That letter purports to end his employment with Rainbow. Rainbow cites no authority to explain how Rainbow could terminate Mensah's employment if it were not his employer. Therefore, the court finds that the evidence before it creates a genuine issue of material fact as to whether Rainbow is an employer within the definition of Title VII. Furthermore, the court finds that the evidence before it creates a genuine issue of material fact as to whether Rainbow is an entity capable of being sued under Pennsylvania or federal law. The court will therefore deny the motion for summary judgment and will deny as moot Mensah's counter motion under Rule 56(f).

**V. CONCLUSION**

For the foregoing reasons, the court will deny Defendants' motion to dismiss the complaint, grant in part and

deny in part Defendants' motion to dismiss the Amended Complaint, deny Rainbow's motion for summary judgment and deny Mensah's Rule 56(f) motion.

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

ISAAC MENSAH	:	CIVIL ACTION
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v.	:	
	:	
RESOURCES FOR HUMAN	:	
DEVELOPMENT, <u>et al.</u>	:	NO. 97-2517

ORDER

AND NOW, TO WIT, this 23rd day of December, 1997, upon consideration of defendants Resources for Human Development, Rainbow Community Head Start and Mary Scott's ("Defendants") Motion To Dismiss Plaintiff's Complaint, Defendant's Motion to Strike or Dismiss Plaintiff's Amended Complaint, Rainbow's motion for summary judgment, plaintiff Isaac Mensah's response thereto and counter motion pursuant to Federal Rule of Civil Procedure 56(f), and all responses thereto, IT IS ORDERED that:

1. Defendants' motion to dismiss the complaint is DENIED as moot.
2. Defendants' motion to dismiss/strike the Amended Complaint is GRANTED IN PART and DENIED IN PART. The claim for intentional infliction of emotional distress is DISMISSED against all Defendants. Judgment is entered in favor of Mary Scott and against Plaintiff Isaac Mensah. The motion is denied with respect to all other claims.
3. Defendant Rainbow's motion for summary judgment is DENIED.
4. Mensah's counter motion pursuant to Rule 56(f) is DENIED.

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LOUIS C. BECHTLE, J.