

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

WILLIAM L. HARPER, JR,
Plaintiff,

v.

PLUMBMASTER, INC.,
Defendant.

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CIVIL ACTION

NO. 98-CV-415

M E M O R A N D U M

BUCKWALTER, J.

July 15, 1998

Plaintiff, William L. Harper Jr. ("Harper") filed this Title VII action against his former employer, defendant Plumbmaster, Inc. ("Plumbmaster") alleging that he was subjected to a racially hostile work environment. Presently, Plumbmaster seeks dismissal of the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1), for lack of jurisdiction and 12(b)(6), for failure to state a claim. For the following reasons, Plumbmaster's motion will be denied.

First, Plumbmaster argues that Harper's EEOC charge did not meet the requirements of 29 C.F.R. § 1601.9 as it was not verified and therefore his present complaint must be dismissed under 12(b)(1) for failure to exhaust administrative remedies. Section 1601.9 provides simply that "[a] charge shall be in writing and signed and shall be verified." Under section

1601.3(a) "the term 'verified' shall mean to or affirmed before a notary public, designated representative of the Commission, or other person duly authorized by law to administer oaths and take acknowledgments, or supported by an unsworn declaration in writing under penalty of perjury." The last sentence of Harper's EEOC charge reads "I swear or affirm under penalty of perjury that I have read the above charge and that it is true to the best of my knowledge, information, and belief." Thus, Harper's charge is verified in accordance with sections 1601.6 and 1601.3(a).

Second, Plumbmaster challenges the timeliness of Harper's filing. Although listed by Plumbmaster as grounds for dismissal pursuant to 12(b)(1), a motion to dismiss for failing to file a timely EEOC claim is not a jurisdictional attack, but rather an affirmative defense. See Zipes v. Trans World Airlines, Inc., 445 U.S. 385, 393 (1982). Therefore, the issue of the timeliness of Harper's charge is reviewed in context of Rule 12(b)(6), for failure to state a claim. See Robinson v. Dalton, 107 F.3d 1018, 1021-22 (3d Cir. 1997); see also, Hornsby v. United States Postal Service, 787 F.2d 87, 89 (3d Cir. 1986).

Based on the record, and Harper's allegations, Harper's initial charge was received by the EEOC on August 1, 1995. Formal charges were subsequently filed on November 21, 1996 and Harper's complaint was dual-filed with the Pennsylvania Human Relations Commission. On October 28, 1997 the EEOC issued a

right to sue letter and the instant action was filed within the 90 time limit on January 26, 1998.

Because it was dual-filed with the PHRC, to be considered timely, Harper's charge must have been filed within 300 days "after the alleged unlawful employment practice occurred." See 42 U.S.C. § 2000e-5(e). Plumbmaster contends that because his charge identifies October 5, 1994 as the last day an allegedly discriminatory act took place, Harper's August 1, 1995 EEOC charge was untimely -- it was filed on the 301st day. Yet, Harper's charge identifies June 10, 1995 as the date on which he was constructively discharged, an unlawful employment practice under Title VII. See 42 U.S.C. § 2000e-2(a)(1). Therefore, as it was filed within two months of his resignation, Harper's EEOC charge is timely.

Finally, because Harper has adequately pled claims under both Title VII and the Pennsylvania Human Relations Act, Plumbmaster's motion for 12(b)(6) dismissal for failure to state a claim is meritless.

Accordingly, Plumbmaster's motion for dismissal pursuant to 12(b)(1) and/or 12(b)(6) will be denied. An appropriate Order follows.

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| | : | |
| | : | |
| PLUMBMASTER, INC., | : | |
| Defendant. | : | |

O R D E R

AND NOW, this 15th day of July, 1998, upon consideration of Defendant's motion to dismiss (Dkt. No. 3) and Plaintiff's response (Dkt. No. 4), it is hereby ORDERED that Defendant's motion is **DENIED**.

BY THE COURT:

RONALD L. BUCKWALTER, J.