

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

BERNICE SIKORA : CIVIL ACTION  
: :  
: :  
v. : :  
: :  
: :  
CITY OF PHILADELPHIA : No. 99-1301

**ORDER-MEMORANDUM**

AND NOW, this \_\_\_ day of August, 1999, plaintiff Bernice Sikora's motion to amend the complaint is granted. Fed. R. Civ. P. 15(a).<sup>1</sup>

On March 12, 1999, plaintiff filed a complaint alleging age discrimination under the Age Discrimination in Employment Act (ADEA). 29 U.S.C. §§ 621 *et seq.* She moves to amend the complaint to add a claim for retaliation based on events that occurred in June 1999. Specifically, plaintiff, a police cadet, asserts that after she had been approved by the medical office for admission to the city's Police Academy, the approval was revoked and she was ordered to undergo additional intrusive medical tests. Plaintiff's admission to the Academy was thereby delayed by one day. Defendant's actions resulting in the delay are alleged to have been in retaliation for her filing suit on March 12, 1999.

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<sup>1</sup> "[L]eave [to amend] shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Leave may be denied when amendment would be futile, as when the proposed new allegations fail to state a claim upon which relief can be granted. See Walton v. Mental Health Assn. of Southeaster Pa., 168 F.3d 661, 665 (3d Cir. 1999).

Defendant City of Philadelphia opposes the amendment arguing that plaintiff cannot make out a prima facie case of discrimination and therefore amendment would be futile. "Amendment of the complaint is futile if the amendment will not cure the deficiency in the original complaint or if the amended complaint cannot withstand a renewed motion to dismiss." Jablonski v. Pan American World Airways, Inc., 863 F.2d 289, 292 (3d Cir. 1988).

To establish a prima facie case of retaliation under the ADEA, plaintiff must show: "(1) that [she] engaged in protected conduct; (2) that [she] was subject to an adverse employment action subsequent to such activity; and (3) that a causal link exists between the protected activity and the adverse action." Barber v. CSX Distribution Serv., 68 F.3d 694 (3d Cir. 1995). Whether here the alleged delay constitutes an adverse employment action is disputed.

An adverse action "is not limited to cognizable employment actions such as discharge, transfer, or demotion." Dicks v. Information Tech., Inc., 1996 WL 528890, at \* 9 (E.D. Pa. Aug. 29, 1996) (citing Passer v. American Chem. Soc., 935 F.2d 322, 331 (D.C. Cir. 1991)); see also Clark v. Township of Falls, 890 F.2d 611, 618-19 (3d Cir. 1989) ("[A] wide panoply of adverse employment actions may be the basis of employment discrimination suits . . ."). To rise to the level of retaliatory action, defendant's alleged conduct must "alter [ ] the employee's compensation, terms, conditions, or privileges of employment, deprive [ ] him or her of employment opportunities, or adversely affect [ ] his or her status as an

employee." Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997) (citations omitted).

On the face of the motion, it is not clear as a matter of law that plaintiff cannot make out a prima facie case of retaliation. Accordingly, plaintiff's motion to amend is granted.<sup>2</sup> Plaintiff is allowed until September 8, 1999 within which to file an amended complaint. Whether the one-day delay that is alleged to have resulted from the asserted retaliation is sufficient to amount to an adverse employment action, or is de minimis, is not ruled on at this time.

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Edmund V. Ludwig, J.

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<sup>2</sup>Although defendant does not argue the point, defendant notes that plaintiff "did not file a retaliation claim with any administrative agency." Resp. ¶ 7. Neither the original complaint nor plaintiff's motion to amend alleges that her claims have been exhausted. However, upon telephone conference with counsel for the parties, plaintiff submitted proof of exhaustion of administrative remedies. Pl. praecipe, Aug. 9, 1999. The test for determining satisfaction of the exhaustion requirement is "whether the acts alleged in the subsequent [ADEA] action are fairly within the scope of the prior [administrative] complaint or the investigation arising therefrom." Antol v. Perry, 82 F.3d 1291, 1295 (3d Cir. 1996) (citing Waiters v. Parsons, 729 F.2d 233, 237 (3d Cir. 1984)). On the basis of the present pleadings, it is premature to determine the scope of the original administrative charge and investigation. Accordingly, leave to amend is granted without prejudice to the lack of exhaustion issue.