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

ELIZABETH JACKSON,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	NO. 99-CV-3069
MERCK & CO., INC.,	:	
Defendant.	:	

MEMORANDUM

ROBERT F. KELLY, J. OCTOBER, 1999

Presently before this Court is Defendant Merck & Company, Inc.'s ("Merck") Motion to Dismiss Plaintiff Elizabeth Jackson's ("Ms. Jackson") Title VII Class Claims and Individual Disparate Impact Claim. For the following reasons, Merck's Motion is granted.

I. BACKGROUND

Ms. Jackson, an African American female, worked as a Sales Representative for Merck from 1983 to 1988. Pl.'s Aff. at 1. During that time, Ms. Jackson contends that Merck discriminated against her on the basis of her race and sex. Id. She asserts that Merck failed to promote her to a management position even though her work performance was consistently superior to similarly situated white and male employees. Id. She also claims that her supervisors advised her to satisfy various requirements in order to secure a management promotion,

which white and male employees were not advised of or required to satisfy. Id. As a result of this alleged disparate treatment, Ms. Jackson filed a Charge of Discrimination against Merck with the Equal Employment Opportunity Commission ("EEOC") on September 2, 1998, in which she detailed the following alleged instances of discrimination against her by a variety of her Merck supervisors.

Ms. Jackson claims that immediately upon being hired in 1983 as a Professional Sales Representative with Merck, she informed her Regional and District Managers that she desired a promotion to the position of Business Manager. Id. She claims her managers advised her to "work hard" and "increase [her] sales figures." Id. As a result, Ms. Jackson claims to have accepted additional job responsibilities which were "not required of other new sales representatives in [her] region for promotion to Business manager." Id. Ms. Jackson insists that she repeatedly raised the issue of promotion to her managers over the next three years. However, her managers allegedly indicated that they did not believe she would be able to make the required move to corporate headquarters for training because she had a husband and children, despite Ms. Jackson's assurances that she was willing to make such a move if necessary. Id. at 1-2.

In 1991, Ms. Jackson was promoted to Senior Sales Representative, a promotion requiring unanimous approval by the Executive Team and a minimum yearly review rating of "very good"

in every category for three consecutive years. Id. at 2. Despite her Sales Representative performance, Ms. Jackson claims that Merck never considered further promoting her to Business Manager, even though two fellow employees, a black male and a white female, were promoted to similarly desirable management positions between 1990 and 1991. Id.

In early 1992, Ms. Jackson claims that due to her excellent performance, her manager at that time, Mr. Hallock, invited her to become a Sales Representative in a new hospital territory. Id. at 2-3. She claims that based on her performance in that position, Mr. Hallock promised to add her name to a company list identifying certain individuals as "management material," but that she was never informed that her name was added to the list. Id. at 3.

Ms. Jackson contends that in June, 1992, she once again inquired about a management position to Mr. Smith, her supervisor at that time. Id. Although Mr. Smith set up interviews for management positions for Ms. Jackson, he allegedly did not prepare her for the interview process, as was customary for many Merck managers to do for their subordinates. Id. When Ms. Jackson scored below the required level for a promotion,[1] she claims Mr. Smith informed her that she "did not have a 'corporate

[1] Ms. Jackson asserts that she scored a 7.75 in her interview, and that the required score for a promotion was 8.0. Id.

look' and needed to 'cut [her] hair and lose some weight.'" Id. Moreover, Ms. Jackson asserts that, despite Mr. Smith's alleged comments, she was one of only twenty-five Senior Sales Representatives throughout the region selected to join a new prostate health program. Id.

In November, 1993, Ms. Jackson claims to have once again inquired about a promotion to Business Manager during a discussion with Mr. Lyons, a Regional Director. Id. She claims Mr. Lyons told her that if she organized a national program for Merck, he would expedite her promotion without requiring her to go through the usual training process at Merck's headquarters. Id. at 3-4. However, after she developed the program, she contends that Mr. Lyons reneged on his promise and insisted that she would have to train at headquarters after all, although he never offered her the opportunity to do so. Id. at 4.

Ms. Jackson was promoted to Executive Sales Representative, the highest sales position at Merck, in January, 1994. Id. She claims that around this time, Merck promoted a white female employee to an entry-level management position, without ever informing Ms. Jackson of the opening. Id. She asserts that in late 1995, she called Mr. Hunt, one of her former regional managers, to discuss her difficulty in securing a promotion. Id. She claims Hunt informed her that she "did not have a chance" for a promotion because she had "baggage," which

Ms. Jackson claims was a reference to her status as a wife and mother. Id.

In April, 1996, Ms. Jackson claims that although Merck promoted a black male and a white female to management positions, she was given a new position as a Sales Representative in the Managed Care Department. Id. Ms. Jackson claims that on her first day in this position, Ms. Alfonso, a National Account Executive, told her that she would never have hired Ms. Jackson, but instead would have preferred Ms. Sellers.[2] Id. at 5. Ms. Jackson maintains that during her tenure at Managed Care, Ms. Alfonso continued to "treat [her] in a hostile manner" and refused to attend any of her presentations. Id. at 5-6.

Subsequently, in September, 1996, Merck hired Ms. Sellers as an additional Sales Representative in Managed Care. Ms. Jackson claims that although she had seniority over Ms. Sellers, Ms. Alfonso assigned Ms. Sellers to a "more desirable" territory than Ms. Jackson's, which required less travel. Id.

Mr. Griffin became Ms. Jackson's new supervisor in Managed Care in early 1997. Id. Ms. Jackson claims that Mr. Griffin began to humiliate her and unfairly scrutinize her work from the outset. Id. She elaborates that Mr. Griffin "sat in on [her] conference calls with other representatives, demanded extensive details about every aspect of [her] work, and required

[2] Ms. Sellers, another Sales Representative, is white.

[her] to rewrite [her] objectives and business plan." Id. Moreover, Ms. Jackson contends that Mr. Griffin favored Ms. Sellers over her by excluding her from Managed Care Operations meetings which Ms. Sellers was invited to attend. Id.

Ms. Jackson further maintains that in April, 1997, Merck canceled her corporate credit card without warning, forcing her to personally finance corporate luncheons that she hosted. Id. at 6-7. She claims that Merck also refused, despite her numerous requests, to assist her in reinstating her credit card for a period of eight months. Id. at 7. Despite this obstacle, however, Ms. Jackson claims that she won two quarterly regional performance awards during this period. Id.

In October, 1997, Ms. Jackson asserts that she once again requested a promotion to the position of Business Manager on her yearly Employment Development Worksheet, but that neither Mr. Griffin nor Mr. Hallock ever contacted her about this possibility. Id. at 7-8.

Ms. Cooke became Ms. Jackson's new supervisor in Managed Care in November, 1997. Id. at 8. Ms. Jackson claims that Ms. Cooke informed her that she would "never be a manager, and that anyone who said otherwise was just being nice." Id. When Ms. Jackson insisted on an explanation, Ms. Cooke allegedly responded, "[You] just don't get it." Id. Subsequently, on November 14, 1997, Ms. Cooke sent Ms. Jackson a memorandum,

stating that Ms. Jackson was not “on track” for a management position, and that Ms. Jackson had a “judgment problem” in her personal interactions and expense management. Id. Ms. Jackson also complains that the memorandum virtually ignored her efforts to “develop” herself by attending graduate school to pursue an Executive MBA. Id.

On March 18, 1998, Ms. Jackson alleges that she was humiliated and reprimanded in writing by Ms. Cooke, for, among other things, missing a business meeting. Id. at 9. However, Ms. Jackson claims that Ms. Cooke had previously given her permission to miss the meeting. Id. Ms. Jackson contends that Ms. Cooke memorialized the reprimand in writing and forwarded it to Mr. Hallock, who further reproached Ms. Jackson. Id. at 9-10. Ms. Jackson claims Ms. Cooke later acknowledged that Ms. Jackson was excused from attending the meeting,, but that Ms. Cooke refused to inform Mr. Hallock about the excused absence. Id. at 10.

Ms. Jackson asserts that the aforementioned intolerable working conditions imposed upon her forced her to resign on March 31, 1998. Id. On April 8, 1998, Ms. Jackson claims that Patti Smith, a Regional Office Administrator, falsely informed her that Merck would withhold her last paycheck unless she signed a separation agreement releasing all potential legal claims against Merck. Id. She further claims that at the time of her March 31,

1998 resignation, Merck owed her a performance bonus check which she received in May, 1998, for less than half the amount she had earned. Id. Ms. Jackson also maintains that she received a letter from Mr. Griffin in June of 1998, explaining that the disparity in her bonus check was due to a change in Merck's method of evaluating her performance bonuses. Id. at 10-11. Ms. Jackson asserts that no one had ever discussed such a change with her, even though Merck's standard policy was to inform employees in advance of any changes in performance evaluation methods. Id.

Based on the above, Ms. Jackson asserts that she was constructively discharged in violation of 42 U.S.C. section 1981 and Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 1981; 42 U.S.C. § 2000 et seq. Id. at 1. She filed her complaint in this Court on June 17, 1999, alleging Class Discrimination, Disparate Treatment, and Disparate Impact. See Compl. Merck then filed the present Motion to Dismiss the Class Claims and Disparate Impact Claim pursuant to Fed. R. Civ. P. 12 (b)(6).

II. STANDARD

A motion to dismiss, pursuant to Fed. R. Civ. P. 12(b)(6), tests the legal sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). A court must determine whether the party making the claim would be entitled to relief under any set of facts that could be established in support of

his or her claim. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)(citing Conley, 355 U.S. at 45-46); see also Wisniewski v. Johns-Manville Corp., 759 F.2d 271, 273 (3d Cir. 1985). In considering a Motion to Dismiss, all allegations in the complaint must be accepted as true and viewed in the light most favorable to the non-moving party. Rocks v. City of Phila., 868 F.2d 644, 645 (3d Cir. 1989)(citations omitted).

III. DISCUSSION

In order to bring a civil action under Title VII, the aggrieved party must first file an administrative Charge of Discrimination with the EEOC. Hicks v. ABC Assoc., 572 F.2d 960, 963 (3d Cir. 1978)(citations omitted). Once the EEOC receives the charge, it must investigate the allegations to determine if there is reasonable cause to believe that the allegations are true. Id. If reasonable cause is found, conciliation proceedings are instituted. Id. If no reasonable cause is found, or if conciliation attempts fail, the EEOC issues to the complainant a notice of her right to bring a civil action. Id.

The purpose of endowing the EEOC with the authority to initially investigate employment discrimination claims is to promote administrative conciliation, rather than immediate resort to the court system. Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398 (3d Cir. 1976). Accordingly, once a charge is filed with the EEOC, the scope of the ensuing civil action "is 'defined

by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.'" Hicks, 572 F.3d at 966 (citations omitted). Therefore, the allegations in a Title VII complaint must be limited to only those of which the administrative charge provided reasonable notice. Guided by these principles, we address Ms. Jackson's challenged claims individually.

A. Class Discrimination Claims

Merck asserts that dismissal of Ms. Jackson's Title VII class claims is proper because her claims were never presented to the EEOC in her administrative charge and, therefore, were never investigated. In a class action suit, the named plaintiff must file a charge with an administrative agency, and class members are then permitted to "piggyback" on the charge of the plaintiff rather than filing individual charges. Howlett v. Holiday Inns, Inc., 49 F.3d 189, 192 (6th Cir. 1995). However, the original complainant's administrative charge must give the employer notice of the allegations of class discrimination. Lockhart v. Westinghouse Credit Corp., 879 F.2d 43, 52-53 (3d Cir. 1989) (upholding district court's refusal to join "opt-in" class member Age Discrimination in Employment Act ("ADEA") plaintiffs where original complainant's charge failed to provide employer with implicit or explicit notice of allegations of class-based discrimination); Lusardi v. Lechner, 855 F.2d 1062, 1078 (3d Cir.

1988) (holding plaintiff's ADEA charge gave defendant adequate notice of class discrimination claim since it alleged discrimination against "persons over forty years old as a class").[3] Moreover, "a charge will be adequate to support piggybacking under the single filing rule if it contains sufficient information to notify prospective defendants of their potential liability and permit the EEOC to attempt informal conciliation of the claims before a lawsuit is filed." Howlett, 49 F.3d at 195. Further, while the charge need not specifically designate that it is being brought on behalf of "others similarly situated," it must contain allegations of class issues in order to support a class action. Lusardi, 855 F.2d at 1077.

In her Complaint, Ms. Jackson asserts that Merck subjected her and "class members" to a "continuous pattern and practice of racial discrimination." Compl. at 5. She alleges that this discrimination included racially derogatory statements, made to her and other class members, by Merck managers and

[3] The United States Court of Appeals for the Third Circuit ("Third Circuit") cases which directly address the notice requirements for class claims brought pursuant to the filing of an administrative charge with the EEOC involve "opt-in" class claims brought under the ADEA. However, in Newman v. GHS Osteopathic, Inc., the Third Circuit explained that since the ADA, ADEA, and Title VII all prohibit employment discrimination, "the methods and manner of proof under one statute should inform the standards under the others as well. . . . Indeed, we routinely use Title VII and ADEA caselaw interchangeably, when there is no material difference in the question being addressed." Newman, 60 F.3d 153, 157 (3d Cir. 1995).

supervisors. Id. at 6. She further alleges that Merck discriminated against black sales representatives with regard to hiring, compensation, promotion, and various other aspects of employment. Id. at 8.

However, Ms. Jackson's administrative charge does not contain any allegations of class discrimination. In fact, the affidavit does not provide a single mention of discrimination against any other employee. Instead, all of Ms. Jackson's allegations relate to discrimination by Merck supervisors solely against her. Significantly, the only mention of other employees in the EEOC charge is Ms. Jackson's assertion that during her employment with Merck, five other employees, two black males and three white females, were promoted. As such, the charge is devoid of any information which might have provided Merck with notice of her present, general allegations of class-wide racial discrimination against African Americans and females by Merck; it similarly lacks any information which would have invited a reasonable investigation of those claims by the EEOC. We therefore conclude that as Ms. Jackson's class action claims were never addressed in the administrative process, they must be dismissed.

B. Disparate Impact Claim

Merck next argues that Ms. Jackson's disparate impact claim must be dismissed because she failed to exhaust her

administrative remedies. In order to survive a motion to dismiss a disparate impact claim, the plaintiff must plead that a facially neutral practice adversely affects one group disproportionately. Powell v. Ridge, Nos. 98-2096, 98-2157, 1999 WL 643364 at *4 (3rd Cir. Aug. 25, 1999). In Powell, the Third Circuit, reversing the district court, held that the Title VI plaintiffs' allegations of disparities in defendants' educational funding of white schools compared to nonwhite schools were sufficient to put the defendant on notice of the plaintiffs' disparate impact claim.[4] Id. at *5. However, the Court emphasized that a plaintiff cannot meet its burden in a disparate impact case merely by proving circumstances raising an inference of discriminatory impact; rather, the plaintiff must prove the discriminatory impact. Id. at *4.

In the instant case, Ms. Jackson has not even succeeded in raising an inference of discriminatory impact. In fact, the only impact Ms. Jackson alleges is that of discriminatory actions taken by Merck managers against her. Rather than providing any information which would support a claim that Merck has a facially neutral employment policy which has a disparate impact upon African Americans or females, the administrative charge is

[4] The Powell court explained that the parties' burdens are the same in Title VI and Title VII disparate impact cases. Powell v. Ridge, Nos. 98-2096, 98-2157, 1999 WL 643364, at *3. (3rd Cir. Aug. 25, 1999).

replete with allegations that her supervisors intentionally flouted company policy and practice for the sole purpose of discriminating against Ms. Jackson. Further, even if Ms. Jackson had made some reference to an employment policy or practice, this mention would be diminished beyond significance by Ms. Jackson's admission that two black male and three white female employees were promoted instead of her.

Ms. Jackson's administrative charge lacks any information which would have provided Merck with notice of an ensuing disparate impact claim or invited an EEOC investigation of Merck's employment policies. Therefore, because Ms. Jackson has failed to exhaust her administrative remedies with respect to this claim, it is dismissed.

An appropriate Order follows.

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

ELIZABETH JACKSON,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	NO. 99-CV-3069
MERCK & CO., INC.,	:	
Defendant.	:	

ORDER

AND NOW, this day of October, 1999, upon consideration of Defendant's Motion to Dismiss Plaintiff's Title VII Class Claims and Individual Disparate Impact Claim, and Plaintiff's Response thereto, it is hereby ORDERED that the Motion is GRANTED. The other claims made by Plaintiff remain.

BY THE COURT:

Robert F. Kelly, J.