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

LISA HAYDT a/k/a LISA LUTZ a/k/a LISA ABRAHAM	:	CIVIL ACTION
v.	:	
DANIEL LOIKITS et al.	:	NO. 99-4342

O'NEILL, J. DECEMBER , 2000

MEMORANDUM

Plaintiff Lisa Haydt [1] brought suit against her employer alleging: Count I, sexual harassment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq.; Count II, violation of the Federal Equal Pay Act, 29 U.S.C. § 206(d); [2] Count III, violation of the procedures mandated under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001 et seq.; Count IV, violation of the Pennsylvania Human Relations Act ("PHRA"), 42 P.S. § 851 et seq.; and Counts V, VI, and VII, common law claims of slander, intentional infliction of emotional distress, and negligence. Presently before me is defendants' motion to dismiss Counts I, III and IV, and to dismiss a number of the business entities sued by plaintiff in

[1] For clarity plaintiff will be referred to as Lisa Haydt throughout this opinion.

[2] I am assuming this is the statute defendant is accused of violating. Plaintiff's amended complaint alleges a violation of the "Equal Pay Act, 29 § U.S.C. 2003." 29 § U.S.C. 2003, however, concerns employee polygraph protection and does not appear to be implicated by any of plaintiff's allegations.

this action.[3]

Plaintiff worked as an employee of defendant Daniel Loikits from January 1997 until November of 1998. On or around November 9, 1998, plaintiff filed a pro se complaint with the Equal Employment Opportunity Commission accusing Loikits of sexual harassment. [4] An amended charge was filed on or around March 1, 1999. Plaintiff's EEOC claim resulted in a letter issued on May 28, 1999, stating that the Commission had closed the file on her case. The letter contained a list of possible reasons for the EEOC's decision and an "x" had been placed next to the statement: "[h]aving been given 30 days in which to respond, you failed to provide information, failed to appear or be available for interviews/conferences, or otherwise failed to cooperate to the extent that it was not possible to resolve your charge." The letter also informed plaintiff that she could file a lawsuit within ninety days of receiving the notice. Plaintiff filed the instant action on August 27, 1999.

A. Title VII

Title VII requires that before bringing suit in federal court a plaintiff must file a timely

[3] Plaintiff's suit principally arises out the alleged actions of Daniel Loikits. Plaintiff has sued Loikits and his wife, Diana, individually and as officers and owners of PACE; Loikits Industrial Service, Inc.; Loikits Technologies, Inc.; Dynalene Heat Transfer Fluids; and Advanced Fluid Technologies. Plaintiff maintains that these various businesses are in fact one entity. In the remainder of this opinion Daniel Loikits and all proper defendants are referred to as "defendant" unless otherwise specified.

[4] Defendant disagrees as to when plaintiff filed her claim with the EEOC, maintaining that her complaint was filed on March 1, 1999. Plaintiff contends that she faxed a pro se charge of discrimination to the EEOC on November 9, 1998 and filed an amended charge on or about March 1, 1999. As it has no impact on determining the issues before me I need not resolve this dispute.

discrimination charge with the EEOC. See EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 110 (1988). Once filed the Commission has 180 days "to investigate individual charges of discrimination" and "to settle disputes through conference, conciliation, and persuasion before the aggrieved party is permitted to file a lawsuit." Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1976). Loikits contends that Haydt failed to exhaust her required administrative remedies before filing suit under Title VII and moves for dismissal for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). In Angelino v. New York Times Co., however, the Court of Appeals made clear that such motions are properly treated under Rule 12(b)(6), failure to state a claim upon which relief can be granted. See 200 F.3d 73, 87-88 (3d. Cir. 2000)("the District Court should have considered the exhaustion and timeliness defenses presented in this case under Rule 12(b)(6), rather than under 12(b)(1).")

The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the complaint. See Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). In deciding the motion I must "accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the [non-moving party]." Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). I should dismiss the complaint "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with [plaintiff's] allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

Loikits relies on the letter Haydt received from the EEOC to contend that she did not cooperate with the Commission and therefore she failed to exhaust her administrative remedies as required by Title VII. Plaintiff responds by submitting that the legal scheme established by

Congress "does not permit the EEOC to be the final arbiter of a person's civil rights under Title VII, or give it the power to prevent judicial resolution on the basis of a 'failure to cooperate.'" (Pl.'s Resp. to Def.'s Mot. to Dism. at 4). In two recent cases the defendant moved to dismiss plaintiffs' Title VII actions relying on a discharge letter sent by the EEOC identical to the one received by Haydt. See Wood v. Central Parking Systems of Pa., Inc., No. Civ. A. 99-3022, 2000 WL 873310 (E.D. Pa. June 23, 2000); Kozlowski v. Extendicare Health Servs., Inc., No. 99-4338, 2000 WL 193502 (E.D. Pa. Feb. 17, 2000). In each of these cases the court held plaintiff's failure to cooperate with the EEOC constituted a failure to exhaust their administrative remedies that was fatal to their Title VII claims. Quoting Kozlowski, the Wood court stated "if a plaintiff fails to cooperate with the EEOC during its 180-day investigation and conciliation period, the plaintiff is preventing the EEOC from even attempting to accomplish, much less actually accomplishing, its congressionally mandated purpose. . . ." Wood, 2000 WL 873310 at *4. See also McLaughlin v. State System of Higher Educ., No. Civ. A. 97-1144, 1999 WL 239408, *2 (E.D. Pa. Mar. 31 1999) granting defendant's motion for summary judgment on plaintiff's Title VII claims stating that "failure to cooperate in an EEOC investigation, no less than failure to file with the administrative agency, serves to thwart the purpose underlying the enactment of Title VII" (citations omitted).

While I note that all courts are not in agreement,[5] I find the reasoning in the above cases

[5] As plaintiff points out at least one other court in this district has disagreed with the reasoning in Kozlowski and similar cases. See Melincoff v. East Norriton Physician Health Serv., No. Civ. A. 97-4554, 1998 WL 254971 (E.D. Pa. Apr. 20, 1998)(denying defendant's motion to dismiss stating "it [would] seem[] contrary to the remedial purpose of. . . Title VII to allow a checked box on [the plaintiff's] right to sue letter, notifying him that his file has been closed, to form the basis for dismissing plaintiff's claim for failure to exhaust administrative remedies where that same letter advised him that he had a right to sue in this Court.")

persuasive. 42 U.S.C. § 2000e-5(b) requires the EEOC to make an investigation into any unlawful employment practice. Plaintiff's failure to cooperate with the EEOC rendered the Commission unable to investigate effectively her charge and carry out its congressional mandate. "To allow plaintiffs to bring their Title VII claims in federal court under such circumstances would be to allow them to 'emasculate Congressional intent by short circuiting the twin objectives of investigation and conciliation.'" McLaughlin, 1999 WL 239408 at *2 (citations omitted). The Wood court recognized that occasionally "there may be equitable circumstances that would pardon [a] plaintiff's failure to exhaust her administrative remedies because she did not cooperate with the EEOC's investigation of her charge," but found the excuse that plaintiff was unaware of EEOC requests for information because of a change of address did not constitute such a circumstance. 2000 WL 873310 at * 4. Haydt has not submitted any reason as to why she was unable to cooperate with the EEOC, leaving no equitable considerations before me weighing against defendant's motion to dismiss. Accordingly, I find that plaintiff has failed to exhaust her administrative remedies and will grant defendant's motion to dismiss plaintiff's Title VII claim.

B. PHRA Claim

At the time plaintiff filed her claim with the EEOC she requested that it be a dual filing with the Pennsylvania Human Relations Commission as a violation of the PHRA. Defendant moves for dismissal under Rule 12(b)(1) on two grounds: (1) in a dual filing a failure to cooperate with the EEOC is the equivalent of a failure to cooperate with the PHRC, and therefore a dismissal of the EEOC claim necessitates the dismissal of the PHRA claim; and (2) whether one relies on the March 1, 1999 or November 9, 1998 filing date plaintiff improperly filed this

suit within the PHRC's one year conciliation period. In response plaintiff states that she "does not oppose Defendants' Motion to Dismiss Count IV (PHRA), and requests that the Count be dismissed without prejudice. . . ." (Pl.'s Resp. to Def.'s Mot. to Dism. at 1 n.1).

Before filing a PHRA suit a plaintiff must file a complaint with the PHRC. See Wood, 2000 WL 193502 at *4. Once filed the PHRC has one year within which to attempt conciliation. See 43 Pa. Cons. Stat. § 962(c)(1). If a plaintiff brings suit for an alleged PHRA violation during the conciliation period then the plaintiff has not exhausted his remedies as required by the PHRA and is barred from asserting that claim. See Kozlowski, 2000 WL 193502 at *4. Haydt maintains she filed her suit with the EEOC and the PHRC on November 24, 1998. Her action in federal court was filed on August 27, 1999. This did not give the PHRC the opportunity to resolve her complaint through conciliation and is not properly before me. I will therefore grant plaintiff's request to dismiss her claim alleging a violation of the PHRA without prejudice to reinstate it in the absence of a proper administrative resolution.

C. Dismissal of Certain Named Corporate Entities

Plaintiff sued defendants Daniel and Diana Loikits individually and as officers and owners and trading as PACE; Loikits Industrial Service, Inc.; Loikits Technology, Inc.; Dynalene Heat Transfer Fluids; and Advanced Fluid Technologies, and maintains that these businesses are "all owned and/or manged by Daniel Loikits and/or Diana Loikits." (Pl.'s Am. Comp. ¶ 2).[6]

[6] Plaintiff includes "Loikits Distribution" in the caption on the front page of her amended complaint but then makes no mention of this company in her list of the parties or anywhere else in the complaint. As explained below plaintiff will be given leave to amend her complaint for clarification.

Plaintiff asserts that she was an employee for these "defendant corporations" during the period of alleged harassment. Id. at ¶14. Defendant responds that plaintiff was hired as an employee of Loikits Industrial Services alone. In support of this assertion defendant points to two documents: a letter outlining the benefits and salary that plaintiff would receive should she be offered a position with Loikits Industrial Services, and a non-disclosure, non-competition agreement between Loikits Industrial Services and Lisa A. Haydt. (Def. Ans. & Aff. Defs. Exs. A&B). Defendant alleges that the remaining corporate defendants were either improperly identified, not legal entities and/or improperly served and asks that I dismiss plaintiff's amended complaint against PACE, Loikits Technologies, Inc., Loikits Distribution, Loikits Industrial Services, Inc., Dynalene Heat Transfer Fluids, Inc., and Advanced Fluid Technologies, Inc. Defendant also asks for reasonable attorney fees and costs for defending this suit against these "frivolous," "baseless," and "legally insufficient claims." [7] (Def.'s Mot. to Dism.)

While defendant does not specify on what basis he moves for dismissal, in determining whether plaintiff has stated a cause of action against these defendants I will examine plaintiff's complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. For purposes of a 12(b)(6) motion I must accept all well pleaded allegations in the complaint as true and view them in the light most favorable to plaintiffs. See Angelastro v. Prudential-Bache Securities, Inc., 764 F.2d 939, 944 (3d Cir. 1985). Plaintiff's complaint is not to be dismissed unless she can prove no set of facts which would entitle her to relief. Id. Although Haydt offers no evidence that she was ever employed by any of the named business entities she has named as defendants, she states in her complaint that Daniel Loikits hired her as "Marketing Director for

[7] See infra n.8.

the defendant corporations." (Pl.'s Am. Comp. ¶¶ 14, 15). Under the federal system of notice pleading, "the threshold for stating a cause of action to survive a Rule 12(b)(6) motion is very low." Wisniewski v. Johns-Manville Corp., 759 F.2d 271, 274 (3d. Cir.1985). In her complaint plaintiff is simply required to "put the defendant on notice of the claims against him." Seville Industrial Machinery Corp. v. Southmost Machinery Corp., 742 F.2d 786, 790 (3d. Cir.1984). The process of discovery is intended to provide necessary detail regarding those claims. Id. Accordingly, defendant's motion to dismiss will be denied as will his request for fees and costs. Further, plaintiff will be allowed to amend her complaint in order to correctly identify those entities she contends served as her employer during the time period relevant to her claims. [8]

D. Violations of the COBRA Provisions of ERISA

[8] There is a discrepancy between the proposed order attached to defendant's motion to dismiss and the points contained within the motion itself. Defendant maintains that plaintiff has no basis for asserting she was employed by a number of the corporate defendants she has brought suit against. Defendant's proposed order, however, does not ask for a dismissal of "Loikits Industrial Services Inc." as a party and indeed point 26 of his motion to dismiss states "the only employer that [plaintiff] has ever worked for is Loikits Industrial Services." However, immediately following point 27 defendant includes "Loikits Industrial Services Inc." in his list of defendants that I am to dismiss due to the "frivolous, baseless and legally insufficient" nature of plaintiff's claims. Defendant also maintains in point 25 the "Loikits Industrial Services Inc." is not a "legal entity" and was never plaintiff's employer but than immediately states thereafter that at all relevant times plaintiff was employed by "Loikits Industrial Services." While it is unclear what the status of "Loikits Industrial Services" is at this point and whether or on what basis Loikits objects to its inclusion as a defendant, any objections he has may be renewed following plaintiff's amendment of her complaint.

Defendant also maintains that none of the business entities were properly served or exist as legal entities. However, Daniel and Diane Loikits apparently do not contest that they were properly served as individuals and I note they were sued in both their individual capacities and as the officers and owners of the above corporations. Under Federal Rule of Civil Procedure 4(h)(1) service upon a corporation or association "shall be effected: . . . by delivering a copy of the summons and of the complaint to an officer. . . ." Any determination that these entities do not exist must await discovery and would be premature at this stage of the litigation.

Under the Consolidated Omnibus Reconciliation Act ("COBRA") provisions of ERISA following an employee's termination an employer must "provide notice to the covered employee . . .informing them that continued health care coverage under their current plan is an option." Fox v. Law Offices of Shapiro & Kreisman, No. Civ. A. 97-7393, 1998 WL 175865 *7 (E.D. Pa. Apr. 13, 1998). Plaintiff alleges after her termination on November 9, 1998 defendant "utterly failed and refused to notify plaintiff of her right to continue health coverage pursuant to the COBRA provisions of ERISA." (Pl.'s Am. Comp. ¶ 120). Defendant moves to dismiss this claim, again without stating on what basis, asserting that he has a copy of the COBRA notice letter mailed to plaintiff as well as a receipt for its delivery by certified mail signed by plaintiff. Plaintiff responds that the letter defendant alleges she received did not contain enough information to satisfy defendant's COBRA obligations. Further, plaintiff contends that the letter attached as exhibit "C" to defendant's answer, purporting to be a copy of the letter sent to her, is substantially different from the notice she actually received.

Evaluating this motion pursuant to Rule 12(b)(6) defendant's motion will be denied. Accepting all plaintiffs allegations as true she may establish a claim that her COBRA rights under ERISA were violated. Any dispute as to what sort of notice she received is a question of fact that should not be determined at this early stage of the litigation.

An appropriate Order follows.

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	:	
DANIEL LOIKITS et al.	:	NO. 99-4342
	:	

ORDER

AND NOW, this day of December, 2000, in consideration of defendant's motion to dismiss, plaintiff's response thereto and the reasons set forth in the accompanying memorandum, it is ORDERED:

1. Count I of plaintiff's amended complaint alleging violations of Title VII is DISMISSED WITH PREJUDICE.
2. Count IV of plaintiff's amended complaint alleging violations of the PHRA is DISMISSED WITHOUT PREJUDICE.
3. Defendant's motion to dismiss defendants Pace, Dynalene Heat Transfer Fluids, Inc., Advanced Fluid Technologies, Loikits Distribution and Loikits Technologies is DENIED. Defendant's request for attorney's fees and costs relating to the defense of these entities is also DENIED and plaintiff has leave to amend her complaint to properly identify any employer sued as a defendant in this case.
4. Defendant's motion to dismiss Count III of plaintiff's amended complaint alleging

violations of the COBRA provisions of ERISA is DENIED.

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THOMAS N. O'NEILL, JR., J.