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

SUNG TRAN	:	CIVIL ACTION
v.	:	
DELAVAU, LLC, et al.	:	NO. 07-3550

MEMORANDUM

Bartle, C.J. May 13, 2008

Plaintiff Sung Tran ("Tran") instituted this employment discrimination action against his former employer, Delavau L.L.C. ("Delavau") and Delavau's Human Relations Director, Alma Dickerson ("Dickerson"). He also brings claims against Warehouse Employees Union Local No. 169 ("Local 169" or the "Union"), which was his collective bargaining representative at Delavau, and against Andrew Montella ("Montella"), the President of Local 169 during the relevant time period. The Amended Complaint contains eight counts: (1) Count I for hostile work environment under Title VII of the Civil Rights Act ("Title VII"), 42 U.S.C. § 2000e, *et seq.,* against Delavau; (2) Count II for retaliation in violation of Title VII against Delavau; (3) Count III for violations of the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Stat. § 951, *et seq.*, against Delavau; (4) Count IV for intentional and/or negligent infliction of emotional distress against Delavau; (5) Count V for breach of contract against Local 169; (6) Count VII for breach of fair duty of representation

against Local 169; (7) Count VIII for civil conspiracy to interfere with civil rights against all defendants; and (8) Count IX under federal civil rights laws, 42 U.S.C. §§ 1981-1988, against all defendants.[1] Now pending before the court are the motions of Delavau, Dickerson, Local 169 and Montella to dismiss in whole or in part Tran's Amended Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

I.

Under Rule 12(b)(6), a claim should be dismissed only where it "appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would warrant relief." Cal. Pub. Employees' Ret. Sys. v. Chubb Corp., 394 F.3d 126, 143 (3d Cir. 2004) (citation omitted). All well-pleaded allegations in the complaint must be accepted as true, and all reasonable inferences are drawn in favor of the non-moving party. Id. The court may not assume the existence of facts that have not been pleaded. Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters, 459 U.S. 519, 526 (1983); City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 263 n.13 (3d Cir. 1998). In deciding a motion to dismiss, however, a court may consider "the allegations contained in the complaint, exhibits attached thereto, and matters of public record." Beverly Enterprises, Inc. v. Trump, 182 F.3d 183, 190 n.3 (3d

1. Plaintiff has withdrawn Count IV for intentional and/or negligent infliction of emotional distress. The Amended Complaint never contained a Count VI.

Cir. 1999); Pension Benefit Guar. Corp. v. White Consol. Indus. Inc., 998 F.2d 1192, 1196 (3d Cir. 1993). We also may take into account "document[s] integral to or explicitly relied upon in the complaint ... without converting the motion [to dismiss] into one for summary judgment." In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997) (emphasis removed) (quoting Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1220 (1st Cir. 1996)). The defendant bears the burden of showing that no claim has been stated. Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir.), cert. denied, 501 U.S. 1222 (1991).

II.

Tran, who is Asian, began working for Delavau as a machine operator in August, 1997 on a temporary basis. He was hired as an employee on September 28, 1998 and continued his employment there until he was laid off on March 30, 2005. During his time at Delavau, Tran was promoted three times and received completion and achievement certificates in a number of training courses. During all periods relevant to this action, Tran was also a member of Local 169. At the time of Tran's layoff in 2005, the terms of his employment were governed by a Collective Bargaining Agreement ("CBA") entered into between Delavau and Local 169.

Pursuant to the CBA, Tran filed a grievance in February, 2002, claiming that he was being paid less than a lower-level employee who was recently hired. Dickerson, finding

no contract violation, denied the grievance on behalf of Delavau on February 4, 2002.

A few months later, in July, 2002, Tran confronted a supervisor because Tran believed that the supervisor's wife had left a harassing telephone message on his home answering machine. An interaction between the two ensued, during which the supervisor physically threatened Tran. According to Tran, although he was immediately cleared of any wrongdoing, he was informed the next day that he would be suspended for three days because of the verbal confrontation with the supervisor.

Tran filed an administrative charge of employment discrimination on October 22, 2002 ("2002 charge"), in which he alleged that his three-day suspension was in retaliation for having made his February, 2002 grievance. He further asserted that Delavau had discriminated against him on the basis of his race with regard to pay and promotion. The 2002 charge was filed with the Pennsylvania Human Relations Commission ("PHRC"), where it was assigned Charge No. 200203846, and with the Equal Employment Opportunity Commission ("EEOC"), where it was assigned Charge No. 17FA360378. The PHRC dismissed the charge on November 22, 2005 "because the facts of the case [did] not establish that probable cause exist[ed] to credit the allegations of unlawful discrimination." It is unclear whether a notice of right-to-sue was ever issued by the EEOC on this 2002 charge. Tran alleges in the Amended Complaint that a Notice of Right-to-Sue was issued by the EEOC as to the 2002 charge, but the Notice

Tran identifies refers to a later administrative charge, not the 2002 charge. Pl.'s Am. Compl. at ¶¶ 8-9.

On March 30, 2005, Delavau gave Tran a layoff notice. Upon receiving the layoff notice, Tran asked to be transferred to a different position within the company, but the request was denied. Although the stated reason for his layoff was a decline in business orders, Tran alleges that a white male employee was subsequently placed in Tran's former position on a full-time basis. Tran contacted Local 169 "numerous times to ask that a grievance be filed on his behalf and to request reinstatement," but the Union each time denied his request. Pl.'s Am. Compl. at ¶ 57. A meeting took place on April 21, 2005 between Tran, Montella, and a representative from Delavau. At that meeting Montella purportedly asked Delavau to rehire Tran, but Delavau did not do so.

On or about May 9, 2005, Tran filed a second administrative charge alleging employment discrimination ("2005 charge").[2] In this charge, Tran contended that his March, 2005 termination was in retaliation for his filing the 2002 charge. The 2005 charge was dual-filed with the PHRC, where it was assigned Charge No. 200406937, and with the EEOC, where it was assigned Charge No. 17-2005-62092. The EEOC issued a Notice of Right-to-Sue on July 13, 2007. A fact-finding conference with

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2. Though the Amended Complaint does not contain any such allegation, when considering a motion to dismiss, we may rely on matters of public record and documents integral to the complaint. Beverly, 182 F.3d at 190 n.3; In re Burlington; 114 F.3d at 1426.

respect to this charge was held before the PHRC on July 20, 2005. Dickerson, the Human Relations Director at Delavau, stated at that hearing that the company posted a notice of job opportunities suitable for Tran and that this notice was sent to Local 169 with the request that it forward the list to Tran. Tran denies having received any such posting. He maintains that he had a further conversation with Montella on November 16, 2005, during which Montella stated that Dickerson admitted to not having sent any job postings to the Union. The PHRC dismissed the 2005 charge on October 4, 2005. It found that the "facts of the case do not establish that probable cause exists to credit the allegations of unlawful discrimination."

The Amended Complaint also makes indirect reference to the filing of a union grievance with respect to his termination. Tran received a letter from the National Labor Relations Board ("NLRB") dated May 23, 2005 which informed him that it was declining to issue a complaint with respect to this matter as he had already filed a grievance and there was no impediment to proceeding with the grievance through the arbitration process outlined in the CBA. Tran later received a letter from Montella, dated January 5, 2006, informing him that the Union, in consultation with its attorney, would not take Tran's grievance to arbitration.

Tran filed his original Complaint with the court on August 23, 2007. He brought claims against Delavau for violations of Title VII, the PHRA, and for intentional and/or

negligent infliction of emotional distress, and a claim against Local 169 for breach of contract. He filed an Amended Complaint on November 15, 2007, in which he added a claim against Local 169 for breach of duty of fair representation, added defendants Dickerson and Montella, and brought claims against all defendants for conspiracy and violation of various civil rights laws.

III.

We begin by addressing Tran's allegations against Delavau, his former employer.

A.

Count I of the Amended Complaint alleges that Delavau violated Title VII of the Civil Rights Act by subjecting Tran to a hostile work environment. 42 U.S.C. § 2000e, *et seq.* Delavau contends that these allegations were not within the scope of Tran's administrative charges and thus must be dismissed for failure to exhaust his administrative remedies.

In this regard, our Court of Appeals has held:

> The causes of action created by Title VII do not arise simply by virtue of the events of discrimination which that title prohibits. A complaint does not state a claim upon which relief may be granted unless it asserts the satisfaction of the precondition to suit specified by Title VII: prior submission of the claim to the EEOC (or a state conciliation agency) for conciliation or resolution.

Hornsby v. U.S. Postal Service, 787 F.2d 87, 90 (3d Cir. 1986); Robinson v. Dalton, 107 F.3d 1018, 1022 (3d Cir. 1997). In other words, "suits in the district court are limited to matters of

which the EEOC has had notice and a chance, if appropriate, to settle." Anjelino v. N.Y. Times Co., 200 F.3d 73, 93 (3d Cir. 1999) (citation omitted). Whether the EEOC or state agency had notice of a claim depends on the contents of the administrative charge. Id. at 94. Thus, "[t]he parameters of a civil action in the District Court are defined by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination ...." Id. (citations and quotations omitted).

As noted above, Tran filed two administrative charges of employment discrimination with the PHRC and the EEOC, one in 2002 and another in 2005. We must determine whether either of these charges contained allegations such that an administrative investigator would have reasonably been led to investigate whether Tran was subjected to a hostile work environment. There can be no dispute that Tran's 2005 charge contains no such allegations. That charge was clearly limited to Tran's claim that he was laid off in retaliation for filing the 2002 administrative charge. This conclusion is confirmed by the PHRC's "Findings of Investigation" with respect to the 2005 claim, which pertain only to a charge of retaliation.

With respect to Tran's 2002 charge, we emphasize again that it is unclear whether Tran ever received a right-to-sue notice from the EEOC with respect to this charge. Receipt of such a notice is a prerequisite to bringing his employment discrimination claim in a court of law, and Tran has not

exhausted his administrative remedies unless and until such notice has been issued. Ruehl v. Viacom, Inc., 500 F.3d 375, 386 n.14 (3d Cir. 2007). Even crediting Tran's representation in the Amended Complaint that he has fully exhausted the administrative remedies with regard to this charge, we conclude that nothing in that charge would have reasonably led to an investigation of a hostile work environment. The charge, which Tran himself characterizes as "regarding unequal pay and retaliation," Pl.'s Resp. in Opp. to Delavau's Mot. to Dismiss at 1, contains Tran's allegations that Delavau suspended him for three days in retaliation for filing a grievance with Local 169, and that he, as an Asian, was being paid less than African-American employees who were hired after him and performed jobs similar to his. The charge makes no mention of a hostile work environment. It does contain one factual allegation that Tran confronted his supervisor and accused his supervisor's wife of leaving a harassing message on his answering machine, but this lone averment would not reasonably lead an investigator to probe the possibility that Tran was subjected to a hostile work environment.

Consequently, we will grant the motion of Delavau to dismiss Count I of the Amended Complaint since Tran has not exhausted his administrative remedies.

B.

Count II of Tran's Amended Complaint alleges that Delavau retaliated against him "for protesting about unequal pay

and discriminatory treatment of Asian employees" in violation of Title VII of the Civil Rights Act. Pl.'s Am. Compl. at ¶ 67. Tran contends that the retaliation consisted of "subjecting him to disparate treatment[,] demotion, a hostile work environment and eventually termination." Pl.'s Am. Compl. at ¶ 68. Delavau concedes that Tran has exhausted his administrative remedies for this count insofar as he relies on claims of retaliatory termination as set forth in his 2005 charge with the EEOC and PHRA. Delavau maintains, however, that Count II must be dismissed to the extent that it alleges retaliation in the form of disparate treatment, demotion and a hostile work environment as Tran has failed to exhaust his administrative remedies with respect to these allegations.

As with our analysis of Count I of the Amended Complaint, we must determine whether "the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination" would have included an investigation of disparate treatment, demotion and hostile work environment. Anjelino, 200 F.3d at 94. We have already concluded that Tran's allegations in his administrative charges are insufficient to support a claim for hostile work environment. This includes the allegations of hostile work environment in Count II. Further, neither the 2002 nor the 2005 administrative charge contains even the remotest reference to any demotion Tran may have suffered. Thus, we determine that he has failed to exhaust his

administrative remedies as to any claim of retaliation by demotion.[3]

Finally, we consider whether the allegations in Tran's administrative charges potentially support a claim of retaliation by disparate treatment. We hold that both the 2002 and the 2005 administrative charges contain allegations which reasonably would invite an investigation of disparate treatment against Tran. Again assuming the accuracy of Tran's allegation in the Amended Complaint that he exhausted his administrative remedies with respect to the 2002 charge, that charge's allegations with respect to wage discrimination clearly state that Tran believed he was being paid less than similarly situated workers who were not Asian. Similarly, according to Tran's contentions in the 2005 charge, at the time he was laid off, a Caucasian employee with significantly less seniority retained his position.

Accordingly, we will dismiss Count II of the Amended Complaint to the extent that it relies on hostile work environment or demotion as its theory of retaliation. The motion to dismiss Count II will be denied insofar as it alleges retaliation in the forms of disparate treatment and termination.

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3. Tran's claim of retaliation by demotion also fails because the Amended Complaint does not contain any allegations that he was ever demoted in either job title or pay. The Amended Complaint states only that Tran was promoted three times during his employment with Delavau. Pl.'s Am. Compl. at ¶¶ 11, 13 and 19.

C.

Count III of the Amended Complaint asserts state claims against Delavau for employment discrimination in violation of the Pennsylvania Human Relations Act, 43 Pa. Stat. § 951, *et seq.* Specifically, Tran contends that "over protestation of [Delavau's] discriminatory treatment of Asian employees, it subjected Plaintiff to unequal pay, disparate treatment, hostile work environment and termination." Pl.'s Am. Compl. at ¶ 71. Delavau contends that Count III must be dismissed in part for failure to exhaust administrative remedies, that is, to the extent it alleges claims of discrimination based on anything but retaliatory termination.

The PHRA, like Title VII, requires that an individual alleging discrimination must exhaust administrative remedies before bringing suit. Clay v. Advanced Computer Applications, Inc., 559 A.2d 917, 919-20 (Pa. 1989); Bailey v. Storlazzi, 729 A.2d 1206, 1214 (Pa. Super. 1999).[4] The standard whether a claim has been raised by a plaintiff in an administrative charge under the PHRA is also the same as the standard in a Title VII case. "The parameters of a subsequent private action in the courts is defined by the scope of the agency investigation which can reasonably be expected to grow out of the charge of

4. A plaintiff's claim under the PHRA must be submitted administratively to the PHRC before he can bring an action with respect to those charges in court. If the PHRC dismisses the administrative complaint or fails to enter a conciliation agreement within one year of the filing of the complaint, the plaintiff may proceed with the action in a court of law.

discrimination." Bailey, 729 A.2d at 1215 (quoting Hicks v. ABT Assocs., Inc., 572 F.2d 960, 965 (3d Cir. 1978) (internal quotations and additional citations omitted).

As our inquiry with respect to whether Tran has exhausted his administrative remedies under the PHRA is identical to that under Title VII, we reach the same conclusion. Count III of the Amended Complaint will be dismissed insofar as it is based on hostile work environment. However, Tran's allegations of unequal pay were clearly alleged in the 2002 claim, his allegations of wrongful termination were clearly in the 2005 claim, and his allegations of disparate treatment can be found in both the 2002 and 2005 claims. Thus, the motion of Delavau to dismiss Tran's claims under the PHRA which are based on unequal pay, disparate treatment and termination will be denied.

IV.

We next turn to Tran's claims against his union, Local 169, under Counts V and VII of the Amended Complaint. In Count V, Tran brings a claim for breach of contract under state law. He alleges that Local 169 breached its obligations under the CBA when it failed to: (1) file a grievance on Tran's behalf; (2) take Tran's grievance to arbitration[5]; and (3) inform Tran of a job posting for which he qualified. In Count VII, Tran brings a claim for breach of duty of fair representation against Local 169

5. Though it is not entirely clear from the Amended Complaint itself on which grievance these allegations are based, it appears that they are referring to Tran's grievance disputing the grounds of his termination.

in Count VII of the Amended Complaint. Specifically, he alleges that:

> [B]oth the Union and employer conspired or cooperated together and allowed Plaintiff's unlawful layoff to stand, although there was no just cause for the layoff; and/or that the negotiations between Defendant employer and Defendant Union with respect to Plaintiff's grievance were spurious, carried on in bad faith, and deliberately designed to give Plaintiff the false impression that a sincere effort was being made by the Union Defendants to resolve the grievance by securing Plaintiff's reinstatement; and/or that unknown to Plaintiff, the officials and representatives of the Union Defendants who had promised to take Plaintiff's grievance to arbitration were secretly hostile to Plaintiff and for reasons of their own, wished to cooperate with the Defendant employer, and decided to acquiesce into Plaintiff's layoff.

Pl.'s Am. Compl. at [unnumbered ¶], Count VII.

Local 169 argues that Tran's claims under Counts V and VII are preempted by federal law. It then follows, Local 169 contends, that those claims are untimely under an applicable six month federal statute of limitations. Tran counters that his claims against Local 169 are state law claims and, in the alternative, that any applicable limitations period should be tolled. We first consider whether Tran's claims in Counts V and VII are preempted by federal law.

Local 169 contends that the claims Tran characterized as breach of the CBA should be considered under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), and that the claims Tran characterized as breach of the duty of fair

representation should be considered under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.* We do not agree that Tran's claims in Count V should be considered under the LMRA. Local 169 concludes without discussion that Tran's claims against it for breach of contract are a "pure" action under § 301. This is incorrect. Our Court of Appeals has stated that "[a] 'pure' section 301 action involves a *union* suing an *employer* for breach of a collective bargaining agreement." Serv. Employees Int'l Union Local 36, AFL-CIO v. City Cleaning Co., Inc., 982 F.2d 89, 94 n.2 (3d Cir. 1992) (emphasis added) (citing Int'l Ass'n of Machinists v. Allied Prods. Corp., 786 F.2d 1561, 1563 (11th Cir. 1986). In the instant case, an *employee* is suing his *union* for breach of the CBA. Local 169 does not explain how these facts fit within the definition of a pure § 301 action provided by our Court of Appeals. Further, though neither party addresses the matter, there is some doubt as to whether Tran may sue the Union at all for breach of the CBA as that agreement is a contract between Delavau and Local 169, to which Tran is not a party. See Carrion v. Enter. Ass't Metal Trades Branch Local Union 638, 227 F.3d 29, 34 (2d Cir. 2000). We have found no authority under which a plaintiff has successfully sued his union for breach of a collective bargaining agreement under the LMRA.

Instead, regardless of how Tran characterized his claims against Local 169, they are all, in substance, allegations that the Union breached its duty of fair

representation, and we will consider them as such. See Bechtel v. Robinson, 886 F.2d 644, 649 (3d Cir. 1989). Therefore, we will turn our attention to Local 169's argument that Tran's claims for breach of duty of fair representation are preempted by the NLRA.

It is well established that "state-law claims are presumptively preempted by the NLRA when they concern conduct that is actually or arguably either protected or prohibited by the NLRA." Pa. Nurses Ass'n v. Pa. State Ed. Ass'n, 90 F.3d 797 (3d Cir. 1996) (citing Belknap, Inc. v. Hale, 463 U.S. 491, 498 (1983)); see also San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243-45 (1959). The Supreme Court has twice had occasion to determine whether the NLRA preempts claims brought by an employee against his union for breach of the duty of fair representation for failure to take an employee's grievance to arbitration.

In Vaca v. Sipes, the plaintiff brought a claim against his union for breach of duty of fair representation. He alleged that he had been wrongfully discharged by his employer and that the union failed to take his grievance to arbitration as it was obligated to do under the collective bargaining agreement. 386 U.S. 171, 173 (1967). The Supreme Court determined that the union's duty of fair representation stemmed from the obligation placed on it by the NLRA "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith

and honesty, and to avoid arbitrary conduct." Id. at 177 (citing Humphrey v. Moore, 375 U.S. 335, 342 (1964)). It concluded that "it is obvious that [the employee's] complaint alleged a breach by the Union of a duty grounded in federal statutes, and that federal law therefore governs his cause of action." Vaca, 386 U.S. at 177 (citation omitted).

Similarly, in DelCostello v. International Brotherhood of Teamsters, the plaintiff sued his employer under the LMRA for wrongful discharge and sued his union for breach of its duty of fair representation when it failed to take his wrongful discharge grievance to arbitration. 462 U.S. 151, 154 (1983). The Court explained that the plaintiff's claim alleging breach of duty by the union was equivalent to an allegation of an unfair labor practice under the NLRA and thus should be treated as such. Id. at 164-65. The Court further stated that:

> Even if not all breaches of the duty [of fair representation] are unfair labor practices [under the NLRA], however, the family resemblance is undeniable, and indeed there is a substantial overlap. ... [D]uty-of-fair-representation claims are allegations of unfair, arbitrary, or discriminatory treatment of workers by unions - as are virtually all unfair labor practice charges made by workers against unions.

Id. at 170.

The instant case is no different. Like the plaintiffs in Vaca and DelCostello, Tran's allegations against Local 169 all revolve around his claim that the Union failed in its obligations to aid him in vindicating his rights against his

employer under the CBA, particularly with respect to the grievance and arbitration process. Tran's argument that he is asserting state law claims that are being asserted independently of the NLRA is unavailing. As stated earlier, when state law claims "concern conduct that is actually or arguably either protected or prohibited" by the Act, they are presumptively preempted by the NLRA. Belknap, 463 U.S. at 498-99. Belknap lays out two circumstances under which state law claims are not preempted. First, there is no preemption "if the behavior to be regulated is behavior that is of only peripheral concern to the federal law or touches interests deeply rooted in local feeling and responsibility." Second, no preemption exists if the behavior to be regulated falls within "state regulation and state-law causes of action concerning conduct that Congress intended to be unregulated." Id. at 498 (citations omitted). The Vaca and DelCostello cases clearly have determined that claims such as those Tran brings against Local 169 do not fall within either of those exceptions. Tran may not circumvent preemption through an attempt at artfully pleading his allegations as state claims.

Thus, we must determine whether Counts V and VII are untimely under the applicable federal statute of limitations. On a motion to dismiss we may consider the issue of timeliness under Rule 12(b)(6) of the Federal Rules of Civil Procedure "where the complaint facially shows noncompliance with the limitations period and the affirmative defense clearly appears

on the face of the pleading." Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1385 n.1 (3d Cir. 1994). Tran does not dispute that the statute of limitations for NLRA claims is six months, as established in § 10(b) of the Act. 29 U.S.C. § 160(b); DelCostello, 462 U.S. at 171. Tran's original Complaint was filed on August 23, 2007. Thus, if Tran's cause of action for breach of duty of fair representation accrued before February 23, 2007, it would be untimely.[6]

An employee's cause of action against a union for breach of duty of fair representation accrues at the time the employee discovered, or in the exercise of reasonable diligence should have discovered, that the union will take no further action on his grievance. Albright v. Virtue, 273 F.3d 564, 566 (3d Cir. 2001). Here, Local 169 asserts that Tran's claim for relief accrued when he received the January 5, 2006 letter from Montella, Local 169's president, which stated unequivocally that

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6. The original complaint contained the allegations in Count V of the Amended Complaint but not those in Count VII. Rule 15(c)(1)(B) of the Federal Rules of Civil Procedure provides, however, that "[a]n amendment to a pleading relates back to the date of the original pleading when ... the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out - or attempted to be set out – in the original pleading ...." In determining whether allegations should relate back to an earlier pleading, "the court looks to whether the opposing party has had fair notice of the general fact situation and legal theory upon which the amending party proceeds." Bensel v. Allied Pilots Ass'n, 387 F.3d 298, 309-10 (3d Cir. 2004). Because Tran's allegations in Counts V and VII clearly arise out of the same conduct, transaction or occurrence, we conclude that the Union had fair notice of the allegations in the Amended Complaint such that they should relate back to the original Complaint filed on August 23, 2007.

the Union would not proceed to arbitration with respect to Tran's grievance. Tran counters that the limitations period should be tolled as to him because Montella ended his letter by stating: "[i]f I can be of assistance to you in seeking other employment, please do not hesitate to contact me."

Tran's argument fails. First, the Amended Complaint contains no reference to the offer of help on which Tran now bases his argument. We therefore cannot consider this factual allegation, as "it is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss." Commw. of Pa. ex rel. Zimmerman v. PepsiCo, Inc., 836 F. 2d 173, 181 (3d Cir. 1988) (quoting Car Carriers, Inc. v. Ford Motor Co., 745 F. 2d 1101, 1107 (7th Cir.), cert. denied, 470 U.S. 1054 (1984)). Nor may the court assume the existence of facts that have not been pleaded. Associated Gen. Contractors, 459 U.S. at 526. Further, even were we to take into account the portion of the letter to which Tran now cites, it is insufficient to toll the limitation's period. Under the "rays of hope" doctrine set forth by our Court of Appeals, "[i]f ... a union purports to continue to represent an employee in pursuing relief, the employee's duty of fair representation claim against the union will not accrue so long as the union proffers 'rays of hope' that the union can remedy the cause of the employee's dissatisfaction." Bensel v. Allied Pilots Ass'n, 387 F.3d 298, 305 (3d Cir. 2004) (citation omitted). In the instant matter, Montella's statement clearly cannot be interpreted to mean that

the Union was continuing to represent Tran in pursuing relief. Moreover, Montella's alleged offer of assistance with other employment cannot possibly serve to remedy the cause of Tran's dissatisfaction – his termination by Delavau.

Accordingly, Tran's claim for relief against Local 169 for breach of duty of fair representation accrued in January, 2006, some eighteen months before the filing of his original complaint. Counts V and VII of the Amended Complaint will be dismissed against Local 169 as untimely.

V.

Tran brings two additional claims against all of the defendants. In Count VIII, he alleges that defendants civilly conspired to interfere with his civil rights, and in Count IX, he alleges violations of various federal civil rights laws, specifically, 42 U.S.C. §§ 1981, 1985(3), 1982 and 1986.

A.

Plaintiff sets forth his claim of civil conspiracy against defendants as follows:

> By willfully and intentionally conspiring to do the aforesaid civil violations and tortious acts in violations [sic] of the laws of the United States, defendant Lt. union [sic] and Mr. Montella, is [sic] also civilly liable to Plaintiff for *civil conspiracy* by and for acting in concert with defendant Delavau and Ms. Dickerson, or with two or more persons including herself, to violate 42 U.S.C. 1981-1988 et seq., see above, all incorporated herein by reference. Defendants owned [sic] Plaintiff a legal duty to obey-but failed to comply with-federal and state laws, supra, and to not

violate Plaintiff's federal civil rights and other statutory rights.

Pl.'s Am. Compl. at [unnumbered ¶], Count VIII.

Under the pleading requirement imposed by Rule 8(a)(2) of the Federal Rules of Civil Procedure, an allegation of civil conspiracy can withstand a motion to dismiss if it contains "a short and plain statement of the claim showing that the pleader is entitled to relief" such that the pleading "give[s] the defendant fair notice of what the claim is and the grounds upon which it rests." Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)); see also Rose v. Bartle, 871 F.2d 331, 366 n.60 (3d Cir. 1989) (citing 5 C. Wright & A. Miller, § 1233 at 181). The Supreme Court has noted that, though a claim need not include "detailed factual allegations" to survive a motion to dismiss under Rule 12(b)(6), "[w]ithout some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." Bell Atlantic, 127 S. Ct. at 1964 (citing 5 C. Wright & A. Miller § 1202, at 94, 95).

Our Court of Appeals has held that a conspiracy claim must be supported by factual allegations that are "sufficient to describe the general composition of the conspiracy, some or all of its broad objectives, and the defendant's general role in that conspiracy." Rose, 871 F.2d at 366 (citation and internal

quotations omitted). At a minimum, to comply with the standard under Rule 8(a), a complaint averring conspiracy must set forth "a valid legal theory and ... adequately state[] the conduct, time, place, and persons responsible." Adams v. Teamsters Local 115, 214 Fed. Appx. 167, 175 (3d Cir. 2007) (citations and internal quotations omitted). Of course, "[a]greement is the sine qua non of a conspiracy," Panayotides v. Rabenold, 35 F. Supp. 2d 411, 419 (E.D. Pa. 1999) (citing Spencer v. Steinman, 968 F. Supp. 1011, 1020 (E.D. Pa. 1997)). A "mere incantation of the words 'conspiracy' or 'acted in concert' does not talismanically satisfy the Rule's requirements." Loftus v. Se. Penn. Transp. Auth., 843 F. Supp. 981, 987 (E.D. Pa. 1994); Adams, 214 Fed. Appx. at 175.

Tran's allegations with respect to his claim of civil conspiracy read as follows:

> 70. It is with information and belief that Mr. Montella and Ms. Alma Dickerson conspired and violated Mr. Tran's rights under the CBA and his right to remain free from retaliation and from racial discrimination.
>
> 71. It is with information and belief that Mr. Montella and Ms. Dickerson agreed to 'Play' [sic] Tran in that each party blamed the other for violating Mr. Trans [sic] rights.
>
> 72. Pursuant to this plan, Mr. Montella and the Union arbitratorily [sic], capriously [sic] and/or in a discriminatory manner refused to submit Mr. Tran's grievance to arbitration.
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> 73. Ms. Alma Dickerson and Delavau benefitted from this conspiracy as they were

> successful in no longer having Mr. Tran, someone who was a thorn in their sight [sic], due to him complaining about unequal pay and racial discrimination etc. [sic] no longer working for their company.

Pl.'s Am. Compl. at ¶¶ 70-74.

Tran's conclusory allegations fall short of even the lenient pleading standard established in Rule 8(a). He fails to identify the objectives, time and place of the conspiracy. He makes no allegations as to the roles of the defendants, and, with respect to defendants Delavau and Local 169, makes no allegations as to their culpable conduct, or even that they made any agreement with the other alleged co-conspirators. Additionally, his allegations pertaining to defendants Delavau and Dickerson violate the intra-corporate conspiracy doctrine, which states that an entity cannot conspire with one who acts as its agent unless that agent is acting in a purely personal capacity for her sole benefit at the time. Gen. Refractories Co. v. Fireman's Fund Ins. Co., 337 F.3d 297, 313 (3d Cir. 2003). Finally, Tran has failed to provide the defendants fair notice of what the claim against them is. It is unclear from the complaint which civil rights Tran claims were violated by the defendants. In sum, Tran's conspiracy allegations, as set forth in the Amended Complaint, neither allow the court to determine if Tran stated a valid claim for relief for civil conspiracy nor give the defendants fair notice of Tran's allegations. Rose, 871 F.2d at 366 n.60.

Tran provides the court with no law or argument in response to defendants' contentions that the allegations in the Amended Complaint are insufficient to make out a claim of conspiracy. Instead, he appears to attempt to modify and supplement the allegations of the Amended Complaint in his Memorandum in Opposition to Local 169's Motion to Dismiss. We will not consider these submissions because, as noted previously, "it is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss." Ex rel. Zimmerman, 836 F. 2d at 181.

Consequently, we will grant the motions of all defendants to dismiss Count VIII of the Amended Complaint.

B.

Finally, we come to Tran's claims in Count IX that all defendants violated his rights under federal civil rights law, namely, 42 U.S.C. §§ 1981, 1982, 1985(3), and 1986.

Tran first maintains that "Defendants Union, Employer, Ms. Dickerson and Mr. Montella treated him differently than other person [sic] of different race, ethnicity and/or nationality in pay, promotion, terms of employment, subjected him to harassment, retaliation, unfair layoff, and failure to rehire" in violation of 42 U.S.C. § 1981. Pl.'s Am. Compl. at [unnumbered ¶], Count IX. Section 1981(a) provides that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit

> of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The Supreme Court has held that the "right to make and enforce contracts" under § 1981 provides a federal remedy against discrimination on the basis of race in private employment. Johnson v. Railway Exp. Agency, Inc., 421 U.S. 454, 459-60 (1975).

Defendants Delavau and Dickerson contend that this claim must be dismissed against them because it was not brought within the applicable statute of limitations. According to these defendants, this court should borrow Pennsylvania's two-year statute of limitations applicable to personal injury actions and apply it to Tran's allegations under § 1981. See id. at 462; Goodman v. Lukens Steel Co., 482 U.S. 656, 662 (1987).

We do not agree. In Jones v. R.R. Donnelley & Sons Co., the Supreme Court re-considered its holding in Goodman in light of the congressional enactment of a catchall four-year statute of limitations for actions arising under federal statutes enacted after December 1, 1990, 28 U.S.C. § 1658. 541 U.S. 369, 371 (2004). The plaintiffs in Jones brought an action under § 1981 for wrongful termination, refusal to transfer and hostile work environment. Citing to its previous opinion in Patterson v. McLean Credit Union, 491 U.S. 164 (1989), the Court

determined that such causes of action were unavailable under § 1981 as it was originally enacted but could be brought under § 1981 as amended by the Civil Rights Act of 1991. Id. at 372-73. The Court noted that Congress had responded to the Court's holding in Patterson by, inter alia, adding a subsection (b) to § 1981 which stated that: "[f]or purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." Id.; 42 U.S.C. § 1981(b). Thus, the question before the Jones court was whether the causes of action at issue "arose under" § 1981, or the Civil Rights Act of 1991. Id. at 373. If the former, the plaintiffs' causes of action would be governed by a borrowed state statute of limitations for personal injury actions. If the latter, those causes of action would be subject to the federal four-year catchall statute of limitations in § 1658 because the amendments were enacted after December 1, 1990.

The Jones court concluded "that a cause of action 'arises under an Act of Congress enacted' after December 1, 1990 – and therefore is governed by § 1658's 4-year statute of limitations – if the plaintiff's claim against the defendant was made possible by a post-1990 enactment." Id. 382. Because the Jones plaintiffs' claims clearly were made possible only by the amendments to § 1981 by the Civil Rights Act of 1991, which extended the language of § 1981 to include "the making,

performance, modification, and termination of contracts," the Court held that those claims were subject to the federal four-year catchall period in § 1658. Id.; 42 U.S.C. § 1981(b)

Similarly, here, under the Court's decisions in Patterson and Jones, Tran's claims regarding "pay, promotion, terms of employment, ... harassment, retaliation, unfair layoff, and failure to rehire" brought under § 1981 could not have been brought under the original statute, only the statute as amended. The Patterson court held that § 1981's applicability to the right to "make and enforce [employment] contracts" did not include "postformation conduct by the employer relating to the terms and conditions of continuing employment." Patterson, 491 U.S. at 179-80. The Jones court confirmed that "hostile work environment, wrongful termination, and failure to transfer claims [arise] under the 1991 Act in the sense that [those] causes of action [are] made possible by that Act." Jones, 541 U.S. 369, 383 (2004) (internal quotations omitted); see also Rivers v. Roadway Exp., Inc., 511 U.S. 298, 304 (1994). Because Tran's claims under § 1981 each regard "postformation conduct" and "conditions of continuing employment," they arise under the 1991 Act and are subject to the federal four-year catchall statute of limitations as set forth in § 1658. Though it is unclear from Tran's Amended Complaint exactly when each of his allegations under § 1981 occurred, any of his claims brought within the four-year limitations period against Delavau and Dickerson are timely.

Furthermore, with respect to Tran's § 1981 claim, defendants Local 169 and Montella contend that Tran fails to set forth facts necessary to establish his claim against those defendants. We first note that, contrary to defendants' assertions, plaintiff's civil rights claims are not subject to a heightened pleading requirement and are instead to be considered under the general notice pleading rule of Rule 8(a) of the Federal Rules of Civil Procedure. Alston v. Parker, 363 F.3d 229, 233 (3d Cir. 1994) (citing Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) and Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513 (2002)); see also Loftus, 843 F. Supp. at 984-85. As described earlier, Rule 8 requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Allston, 363 F.3d at 233; Fed. R. Civ. P. 8(a)(2). A plaintiff need only supply enough detail in his allegations that the defendant is provided with fair notice of the claims against him. Loftus, 843 F. Supp. at 986. The amount of detail required for fair notice is commensurate with the substantive complexity of the cause of action, such that "the more substantively complex the cause of action, the greater the mandate for detail under [Rule 8]." Id.

In the instant matter, Tran does not supply any detail, either factual or otherwise, as to how Local 169 or Montella discriminated against him "in pay, promotion, terms of employment [or] subjected him to harassment, retaliation, unfair

layoff, and failure to rehire." As with Tran's conspiracy claim, his only response to defendants' arguments in this regard is an inappropriate attempt to modify and supplement the allegations of the Amended Complaint. See Ex rel. Zimmerman, 836 F. 2d at 181. As a result, we will grant the motion of Local 169 and Montella to dismiss Tran's § 1981 claims against them.

Next, we consider Tran's allegations under 42 U.S.C. § 1982. Section 1982 provides that: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." In his complaint, Tran contends that his property rights "to his job and to the contract he entered into with his job and the union pursuant to the Collective Bargaining Agreement" are protectable under § 1982. Pl.'s Am. Comp. at [unnumbered ¶], Count IX.

A claim under § 1982 must be based on a property interest of the type protected by the statutory language. City of Memphis v. Greene, 451 U.S. 100, 123-24 (1981). This court has routinely held that employment interests such as plaintiff here asserts are not "property" for purposes of § 1982 which, by its terms, is limited to discrimination with respect to real and personal property. Logrippo v. County of Montgomery, 2002 WL 79405 at *2 (E.D. Pa. Mar. 14, 2002); Altieri v. Pa. State Police, 2000 WL 427272 at *15 (E.D. Pa. Apr. 19, 2000); Schirmer

v. Eastman Kodak, 1987 WL 9280 (E.D. Pa. Apr. 9, 1987), aff'd 86 F.2d 591 (3d Cir. 1989). Since Tran does not allege any impairment of his right to "inherit, purchase, lease, sell, hold, [or] convey real [or] personal property," he has failed to state a claim under § 1982.

Tran then brings a claim against all defendants under § 1985(3), which provides that:

> If two or more persons in any State or Territory conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws ...[,] the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Tran alleges that:

> The defendants conspired and violated Mr. Trans [sic] right to the protection of the U.S. Constitution and federal law against racial and other kinds of discrimination. The [sic] also conspired and violated his right to contract. Mr. Tran alleges if he had been a white male or a black American male he would have been paid more money, he would have received promotions and he would not have been laid off.

Pl.'s Am. Compl. at [unnumbered ¶], Count IX.

Our Court of Appeals has described § 1985(3) as "provid[ing] a cause of action under rather limited circumstances against both private and state actors." Brown v. Philip Morris Inc., 250 F.3d 789, 805 (3d Cir. 2001). To state a claim under § 1985(3), a plaintiff must allege four things:

> (1) a conspiracy; (2) motivated by a racial or class based discriminatory animus designed to deprive, directly or indirectly, any person or class of persons of the equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to person or property or the deprivation of any right or privilege of a citizen of the United States.

Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238, 253-54 (3d Cir. 1999) (citation and internal quotations omitted). Section 1985(3) does not itself create any substantive rights. Instead, it "serves only as a vehicle for vindicating federal rights and privileges which have been defined elsewhere." Brown, 250 F.3d at 805 (citing Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 376 (1979)). In particular, where, as here, a plaintiff brings a § 1985(3) claim for a private conspiracy, he must allege, inter alia, "that the coconspirators intended to deprive the victim of a right guaranteed by the Constitution against private impairment." Id. (citing Spencer v. Casavilla, 44 F.3d 74, 77 (2d Cir. 1994).

Under this standard, Tran's allegations under § 1985(3) are deficient in several respects. At the outset, as we have already determined, Tran fails properly to allege the existence of a conspiracy, which is also fatal to his claim under § 1985(3). Ridgewood, 172 F.3d at 253. Moreover, Tran does not allege that the conspirators intended to deprive him of a right guaranteed by the Constitution. None of his purported grounds under § 1985(3) can legitimately support such a claim.

A plaintiff cannot base a § 1985(3) claim against private actors on any statutory rights, including claims under Title VII, § 1981, and § 1982, or on contract and property rights. Great Am., 442 U.S. at 378 (Title VII); Brown, 250 F.3d at 805-06 (§ 1981, § 1982, contract, property). In fact, "in the context of actions brought against private conspirators, the Supreme Court has thus far recognized only two rights protected under § 1985(3): the right to be free from involuntary servitude and the right to interstate travel." Brown, 250 F.3d at 805 (citations omitted). Because Tran has not stated a claim under § 1985(3), we will dismiss Count IX of the Amended Complaint to the extent that it relies on that statutory provision.

Similarly, we will dismiss Count IX of the Amended Complaint insofar as it seeks to bring a claim under 42 U.S.C. § 1986. It states, in relevant part, that:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented.

42 U.S.C. § 1986. Here, Tran alleges that "[a]ll of the defendants conspired, knew that Mr. Tran would be, was and continuously [sic] being discriminated and retaliated against but did not do anything to aid in [sic] him [sic] being treated

differently on the basis of his race, and nationality." Pl.'s Am. Compl. at [unnumbered ¶], Count IX.

Tran's § 1986 claim will be dismissed for two reasons. First, under the express terms of the statute, a plaintiff's cause of action under § 1986 is dependent on his ability to bring a claim under § 1985. Rogin v. Bensalem Township, 616 F.2d 680, 696 (3d Cir. 1980), cert. denied, 450 U.S. 1029 (1981). As we have already held that Tran has failed to state a claim under §1985, he cannot maintain his § 1986 cause of action either. Second, the statute provides that "no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued." 42 U.S.C. § 1986. The last factual allegation contained in the Amended Complaint concerned the letter from Montella to Tran dated January 5, 2006, which informed Tran that Local 169 would not proceed to arbitration with his grievance. As the Amended Complaint, in which Tran's claim under § 1986 was raised for the first time, was not filed until November 15, 2007, Tran's claim is plainly untimely. Further, even if Tran's allegations under § 1986 relate back to his original complaint they are still untimely as that complaint was filed on August 23, 2007.

Tran argues that the limitations period should be tolled but offers no legal support for his position. In advancing his position, he references only material which was

not included in the Amended Complaint. Accordingly, his claim under § 1986 will be dismissed against all defendants.

VI.

In sum, we will dismiss the following claims: (1) Count I for hostile work environment under Title VII against Delavau; (2) Count II for retaliation in violation of Title VII against Delavau insofar as it is based on claims of demotion or hostile work environment; (3) Count III for violations of the PHRA against Delavau insofar as it is based on claims of hostile work environment; (4) Count V for breach of contract against Local 169; (5) Count VII for breach of fair duty of representation against Local 169; (6) Count VIII for civil conspiracy to interfere with civil rights against all defendants; and (7) Count IX insofar as it seeks to bring a claim under § 1981 against Local 169 and Montella, under § 1982 against all defendants, under § 1985(3) against all defendants, and under § 1986 against all defendants. Remaining in the action are: (1) Count II for retaliation in violation of Title VII against Delavau insofar as it is based on claims of disparate treatment or termination; (2) Count III for violations of the PHRA against Delavau insofar as it is based on claims of unequal pay, wrongful termination and disparate treatment; and (3) Count IX insofar as it seeks to bring a claim under § 1981 against Delavau and Dickerson.

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

SUNG TRAN	:	CIVIL ACTION
v.	:	
DELAVAU, LLC, et al.	:	NO. 07-3550

ORDER

AND NOW, this 13th day of May, 2008, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the motion of defendant Delavau, LLC ("Delavau") to dismiss in part is GRANTED in part and DENIED in part;

(2) the motion of defendant Delavau to dismiss is GRANTED as to the following claims in the Amended Complaint:

(a) Count I;

(b) Count II insofar as it is based on claims of demotion or hostile work environment;

(c) Count III insofar as it is based on claims of hostile work environment;

(d) Count VIII; and

(e) Count IX insofar as it seeks to bring a claim under §§ 1982, 1985(3) and § 1986.

(3) the motion of Delavau to dismiss is otherwise DENIED;

(4) the motion of defendant Alma Dickerson to dismiss is GRANTED in part and DENIED in part;

(5) the motion of defendant Alma Dickerson is GRANTED as to the following claims in the Amended Complaint:

(a) Count VIII; and

(b) Count IX insofar as it seeks to bring a claim under §§ 1982, 1985(3) and § 1986.

(6) the motion of defendant Alma Dickerson is otherwise DENIED; and

(7) the motion of defendant Warehouse Employees Union Local No. 169 and Andrew Montella to dismiss is GRANTED. Counts V, VII, VIII and IX against Warehouse Employees Union Local 169 are dismissed and Counts VIII and IX against Andrew Montella are dismissed.

BY THE COURT:

/s/ Harvey Bartle III
C.J.