

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

**YVETTE PEREPCHUK,
Plaintiff**

No: 3:CV-97-1988

v.

(Chief Judge Vanaskie)

**FRIENDLY'S ICE CREAM CORP.,
FRIENDLY'S RESTAURANT, and DAN
CORBETT,**

Defendants

MEMORANDUM

Plaintiff Yvette Perepchuk filed this employment discrimination action against defendants Friendly's Ice Cream Corporation ("Friendly's"), Friendly's Restaurant and Dan Corbett, asserting claims of age, sex and disability discrimination under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 et seq., the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., and the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Const. Stat. Ann. § 951 et seq. (Dkt. Entry 1.) Perepchuk also alleges retaliation by the defendants, as well as a state law claim of wrongful discharge. The defendants removed the case to federal court on December 31, 1997. (Dkt. Entry 1.) Pending before the court is defendants' motion for summary judgment. (Dkt. Entry 13.) Because Perepchuk has not produced a "right to sue" letter from the Equal Employment Opportunity Commission ("EEOC"), a non-jurisdictional prerequisite to an ADA suit, her ADA claims will be dismissed. Because Perepchuk's age discrimination claims concern matters that occurred in 1992 when she was employed at a Friendly's Restaurant in New York and she did

not file the administrative complaint that underlies this lawsuit until April of 1996, her ADEA claim will be dismissed as barred by the statutory 300-day limitations period. Because Perepchuk has not presented any evidence to suggest that she was terminated as a waitress at the Friendly's Restaurant in Dunmore, Pennsylvania in October of 1995 in retaliation for an employment discrimination complaint she pursued in 1992 while employed at a Friendly's Restaurant in New York, judgment will be entered in defendants' favor on her retaliation claim. Finally, because only state law claims remain, and interests of judicial economy, convenience, fairness and comity favor adjudication of those claims in state court, this action will be remanded to the Court of Common Pleas of Lackawanna County.

I. BACKGROUND

Plaintiff Yvette Perepchuk was hired by Friendly's in 1980 as a full-time cook at its restaurant in New Hyde Park, New York. (Def.'s Stat. Facts, Dkt. Entry 15 at ¶ 1.) In 1982, Perepchuk was made an assistant manager. (Perepchuk Aff., Dkt. Entry 28, Pl.'s Ex. "G" at ¶ 3). Some time during 1983-84, she was demoted to a full time cook. (Id. at ¶ 6-7.) Perepchuk contends that she was told by her manager that a man would do a better job in the assistant manager position. (Id.) At approximately the same time when Perepchuk resumed her cooking position, she also began waiting tables. (Id. at ¶ 8.) Until 1988, plaintiff contends that she received good evaluations and regular raises. (Id. at ¶ 9.)

In 1990-91, Perepchuk began having problems with alcohol and received inpatient treatment for alcohol abuse for approximately one week. (Def.'s Stat. Facts, Dkt. Entry 15, at ¶ 10-11.) Thereafter, Perepchuk attended Alcoholics Anonymous meetings. (Id. at ¶ 11.)

Perepchuk contends that Friendly's became aware of her alcohol problem because Perepchuk's friend called the restaurant to notify it that Perepchuk was in detoxification. (Perepchuk's Aff., Dkt. Entry 28, Pl.'s Ex. "G" at ¶ 11.)

Sometime in 1992, Perepchuk was laid off. (Def.'s Stat. Facts, Dkt. Entry 15, at ¶ 3.) Perepchuk states that she was told by the District Manager, Bob Biersack, that she was being laid off because there were too many cooks. (Perepchuk's Aff., Dkt. Entry 28, Pl.'s Ex. "G" at ¶ 14.) Perepchuk contends that Friendly's was pressuring older employees to quit by giving them demeaning jobs and criticizing their work. (Id. at 13.) She also contends that two younger cooks with less seniority were retained while plaintiff was laid off. (Id. at 15.) As a result, sometime during 1992, Perepchuk asserted a claim before the New York Human Rights Commission alleging sex and age discrimination. (Id. at 17.) Perepchuk's claim was resolved when Friendly's provided her with a job at another Friendly's restaurant in Albertson, New York in December of 1992. (Def.'s Stat. Facts, Dkt. Entry 15, at ¶ 5 ; December 4, 1992 Letter from Friendly's Regional Personnel Administrator to Nassau Human Rights Commission, Exh. "H" to Pl's Exhs. submitted in opposition to Def.'s Sum. Judg. Motion, Dkt. Entry 28.)

At the Albertson store, Perepchuk also worked as a cook and then as a waitress. (Id. at 7.) During her time at the Albertson store, Perepchuk again had a week of inpatient treatment for alcohol-related problems. (Id. at 12.) Plaintiff alleges that a doctor at the Queens General Hospital told her that cooking was too stressful and that she should refrain from cooking altogether. (Id. at 15.) While Perepchuk was at the Albertson restaurant, she began to work as a full-time waitress, and, according to plaintiff, she never received any complaints about her

work. (Perepchuk Aff., Dkt. Entry 28, Pl.'s Ex. "G" at ¶ 21, 22.)

In 1994, plaintiff interviewed for a position at the Friendly's Restaurant in Dunmore, Pennsylvania. (Def.'s Stat. Facts, Dkt. Entry 15, at ¶ 8.) According to Perepchuk, at the time she interviewed, she was told that her position would be a full time waitress position with full time benefits. (Perepchuk Aff., Dkt. Entry 28, Pl.'s Ex. "G" at ¶ 24.) However, soon after she began work at the Dunmore establishment, Perepchuk was given a part-time position, which did not include benefits. (Id. at 26.)

At the Dunmore restaurant, Perepchuk alleges that she was subject to harassment because of her sexual preference. According to Perepchuk, defendant Dan Corbett, manager of the Dunmore Friendly's location, would seat her tables all at one time and then tell Perepchuk that she was too slow and should return to cooking. (Perepchuk Aff., Dkt. Entry 28, Pl.'s Ex. "G" at ¶ 29.) Plaintiff also alleges that defendant Corbett made the following derogatory comments: (1) that if plaintiff hunted, she would probably hunt for does; and (2) that plaintiff probably dated Bullwinkle the Moose. (Id.) Perepchuk also contends that Chris Ackerman, the Assistant Manager, told her that Corbett did not like homosexuals. (Id. at 32.) Perepchuk admits that she is homosexual, but also acknowledges that she never informed anyone at the Friendly's Restaurant in Dunmore that she was homosexual. (Pl.'s Stat. Facts, Dkt. Entry 26, at ¶ 36-37.)

During her time waitressing at the Dunmore restaurant, Perepchuk was aware of customer complaints as to her service. (Perepchuk Aff., Dkt. Entry 28, Pl.'s Ex. "G" at ¶ 36.) Friendly's received complaints from customers that Perepchuk was rude and not friendly to customers, and that customers did not receive their food fast enough. (Def.'s Stat.

Facts, Dkt. Entry 15, at ¶ 22-23.) Perepchuk, however, contends that such complaints of other waiters and waitresses were not uncommon. (Perepchuk Aff., Dkt. Entry 28, Pl.'s Ex. "G" at ¶ 36.)

On October 19, 1995, Corbett informed Perepchuk that her performance as a waitress was inadequate and she was offered a position as a grill/prep worker. (Def.'s Stat. Facts, Dkt. Entry 15 at ¶ 26-27.) Plaintiff told management that she was not interested in a cooking position. (Perepchuk's Aff., Dkt. Entry 28, Pl.'s Ex. "G" at ¶ 42.) Friendly's management gave Perepchuk a week to make a decision about her position. (Def.'s Stat. Facts, Dkt. Entry 15 at ¶ 28.) On October 23, 1995, a second meeting was held with Corbett, Mr. Pacshinski (Friendly's District Manager) and Perepchuk, during which Perepchuk's performance problems were again discussed. (Id. at ¶ 30.) Plaintiff was again offered a cooking position. (Id.) At that meeting Perepchuk informed Corbett and Pacshinski that she was a recovering alcoholic and that the pressure of cooking might cause a relapse. (Perepchuk Aff., Dkt. Entry 28, Pl.'s Ex. "G" at ¶ 45.) Plaintiff claims that defendant Corbett was aware before that date that she could not cook because of her alcoholism.¹ Perepchuk also contends that Corbett told her that Perepchuk's alcoholism was not his problem. (Id. at ¶ 47.) On October 28, 1995, the management at the Friendly's restaurant in Dunmore not having changed its position, Perepchuk quit. (Id. at ¶ 48.)

¹ Plaintiff avers that she had told Ackerman, the Assistant Manager, about her alcoholism and that she believes that Ackerman relayed that information to Corbett. However, Perepchuk provides no support for this allegation. (Pl.'s Stat. Facts, Dkt. Entry 26 at ¶ 19.) The first time that she told Corbett directly about her alcoholism was at the October 23, 1995 meeting.

Perepchuk filed a complaint with the Pennsylvania Human Relations Commission (“PHRC”) and the EEOC on April 23, 1996. (Corbett’s Aff., Dkt. Entry 18, Ex. “C”.) In the PHRA complaint, Perepchuk asserted that defendants had “harassed and retaliated against [her] in the terms, conditions and privileges of employment and [had] further discriminated against her based upon her age (46), sex (female) and disability (alcoholism).”

This action was filed in the Court of Common Pleas of Lackawanna County on November 5, 1997, and removed by defendants to this Court on December 31, 1997. Perepchuk is asserting age discrimination claims under both the ADEA and the PHRA (Counts I and V); disability discrimination claims under both the ADA and the PHRA (Counts III and IV); sex discrimination under only the PHRA (Count II); wrongful discharge (Count VI);² and retaliation (Count VII). While Perepchuk claims that she caused the PHRA complaint to be dual-filed with the EEOC, she has neither alleged that she had received nor has she produced a “right to sue” letter from the EEOC.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment should be granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

²Perepchuk labeled this claim as “constructive discharge,” but her brief in opposition to the summary judgment motion makes clear that she is relying on the Pennsylvania common law exception to the at-will employment doctrine that, in limited circumstances, affords a cause of action for termination of employment that offends important public policies. Nicholls v. Wilson Industries Inc., No. C.A. 98-6697, 1999 WL 1211656, at *3 (E.D. Pa. Dec. 10, 1999); Spierling v. First American Home Health Services Inc., 737 A.2d 1250, 1253 (Pa. Super. 1999).

genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). A fact is “material” if proof of its existence or non-existence might affect the outcome of the suit under the applicable law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). “Facts that could alter the outcome are material facts.” Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 197 (3d Cir.), cert. denied, 115 S. Ct. 590 (1994). “Summary judgment will not lie if the dispute about a material fact is ‘genuine,’ that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson, 477 U.S. at 248.

Initially, the moving party must show the absence of a genuine issue concerning any material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 329 (1986). All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party, and the entire record must be examined in the light most favorable to the nonmoving party. White v. Westinghouse Elec. Co., 862 F.2d 56, 59 (3d Cir. 1988); Continental Ins. Co. v. Bodie, 682 F.2d 436, 438 (3d Cir. 1982). Once the moving party has satisfied its burden, the nonmoving party “must present affirmative evidence to defeat a properly supported motion for summary judgment.” Anderson, 477 U.S. at 256-57. Mere conclusory allegations or denials taken from the pleadings are insufficient to withstand a motion for summary judgment once the moving party has presented evidentiary materials. Schoch v. First Fidelity Bancorporation, 912 F.2d 654, 657 (3d Cir. 1990). Rule 56 requires the entry of summary judgment, after adequate time for discovery, where a party “fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” Celotex, 477 U.S. at 322.

B. Friendly's Restaurant as a Proper Defendant

Perepchuk has named as a defendant "Friendly's Restaurant." As set forth in an affidavit submitted by Alex J. Orban, the Assistant Clerk of Friendly Ice Cream Corporation (Dkt. Entry 19), Friendly's Restaurant does not exist as a separate legal entity. Rather, all Friendly's Restaurants are corporately owned by Friendly Ice Cream Corporation. Plaintiff has failed to offer any evidence to rebut the defendant's contention. Thus, Friendly's Restaurant is not a proper defendant in this action, and all claims against it will be dismissed.

C. Dan Corbett as a Proper Defendant

The defendants also contend that plaintiff's ADA and ADEA claims against Dan Corbett must be dismissed because neither the ADA nor the ADEA provides for individual liability. Although the Third Circuit has not directly addressed the issue of individual liability under the ADEA or the ADA, it has held that employees are not individually liable under Title VII. Sheridan v. E.I. Dupont de Nemours and Co., 100 F.3d 1061, 1078 (3d Cir. 1996), cert. denied, 521 U.S. 1129 (1997). Notably, Title VII defines "employer" in virtually the identical manner as the ADA and ADEA. Furthermore, courts in other circuits, as well as district courts in this circuit, have held that individual employees are not liable under either the ADA or the ADEA. See Stults v. Conoco, Inc., 76 F.3d 651, 655 (5th Cir. 1996) (ADEA); Smith v. Lomax, 45 F.3d 402, 403 n.4 (11th Cir. 1995)(ADEA, Title VII); Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 519-511 (4th Cir.), cert. denied, 513 U.S. 1058 (1994)(ADEA); Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587-88 (9th Cir.), cert. denied, 510 U.S. 1109 (1994)(ADEA); Fullman v. Philadelphia Int'l Airport, 49 F. Supp.2d 434, 441 (E.D. Pa. 1999)(ADA); Metzgar v. Lehigh Valley Housing Authority, No. Civ. A. 98-CV-3304, 1999 WL 562756, at *3 (E.D. Pa.

1999)(ADA); Brannaka v. Bergey's Inc., No. 97-6921, 1998 WL 195660, at *2 (E.D. Pa. Mar. 30, 1998)(ADA); Lantz v. Hospital of the University of Pennsylvania, Civ. A. No. 96-2671, 1996 WL 442795, at *6 (E.D. Pa. July 30, 1996)(ADEA). Consistent with this impressive body of precedent, I find that Dan Corbett cannot be held individually liable under either the ADA or ADEA.³ Therefore, summary judgment will be granted for defendant Dan Corbett on the two federal statutory claims (Counts IV and V).

D. Americans with Disabilities Act Claim

Friendly's poses three arguments with respect to Perepchuk's ADA claim. First, it asserts that Perepchuk's ADA claim should be dismissed because she failed to acquire a right-to-sue letter from the EEOC prior to filing suit. Second, Friendly's contends that any allegations of ADA discrimination arising during Perepchuk's employment at a Friendly's Restaurant in New York should be dismissed as untimely. Finally, Friendly's argues that plaintiff's ADA claim is without merit.

Title I of the ADA prohibits discrimination in employment on the basis of disability. A party suing under the ADA must follow the administrative procedures set forth in Title VII, 42 U.S.C. § 2000e-5. See 42 U.S.C. § 12117(a). Thus, prior to filing a lawsuit under the ADA, a plaintiff must timely file a charge of discrimination with the EEOC. See 42 U.S.C. § 2000e-5(e)(1). And before a plaintiff may proceed to court, she must receive a "right-to-sue letter" from the EEOC. 42 U.S.C. § 2000e-5(f); Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398 (3d Cir.), cert. denied, 429 U.S. 1041 (1977).

³Perepchuk concedes this point. See Brf. in Opp. to Sum. Judg. Motion at 29.

Although the right-to-sue letter is not a jurisdictional predicate for a lawsuit, the issuance of a right-to-sue letter is generally regarded as a condition that must be satisfied before suit is brought. Gooding v. Warner-Lambert Co., 744 F.2d 354, 358 (3d Cir. 1984); Holmes v. Pizza Hut of America, Inc., No. Civ. A. 97-4967, 1998 WL 564433, at *4 (E.D. Pa. Aug. 31, 1998); Charles v. Commonwealth of Pennsylvania, Civ. A. No. 87-3160, 1988 WL 11686, at *1 (E.D. Pa. Feb. 12, 1988). Failure to procure a right-to-sue letter has warranted dismissal of the federal statutory discrimination claims to which the Title VII administrative complaint process applies. Id.⁴

Although Perepchuk filed her complaint alleging disability discrimination with the PHRC on April 23, 1996, and has alleged that she caused the complaint to be dual filed with the EEOC, Perepchuk has not alleged that she obtained a right-to-sue letter from the EEOC prior to filing suit. While criticizing Friendly's for having raised the issue, Perepchuk has not produced a copy of a right-to-sue letter. Nor does Perepchuk allege that she attempted to procure a right-to-sue letter from the EEOC, but one had yet to be issued.⁵ Therefore,

⁴Congress articulated two reasons why the administrative agency should be given an opportunity to conduct an investigation before a plaintiff is allowed to sue in federal court: (1) “[a]dministrative tribunals are better equipped to handle the complicated issues involved in employment discrimination case” and (2) “the sorting out of the complexities surrounding employment discrimination can give rise to enormous expenditure of judicial resources in already heavily overburdened Federal district courts.” Moteles v. University of Pennsylvania, 730 F.2d 913, 917, (3d Cir.), cert. denied, 469 U.S. 855 (1984); Pearce v. Barry Sable Diamonds, 912 F. Supp. 149, 152 (E.D. Pa. 1996).

⁵Although the Third Circuit has noted that the issuance of a right-to-sue letter is subject to waiver when equity so requires, see Gooding v. Warner-Lambert Co., 744 F.2d at 358, this case does not warrant a finding of waiver. To waive the statutory requirement, plaintiff must show or allege that she made some effort to procure a right to sue letter or that she raised the failure to issue the letter with the EEOC prior to filing the court action. See Dollinger v. State Insurance Fund, 44 F. Supp.2d 467, 474 (N.D.N.Y. 1999); McCullough v. CSX Transportation

Friendly's will be granted summary judgment on this claim (Count IV).⁶

E. Age Discrimination in Employment Act Claim

Friendly's also asserts that Perepchuk's ADEA claim should be dismissed because she never received a right-to-sue letter. The ADEA, just as Title VII and the ADA, requires a plaintiff to file a charge with the EEOC before bringing suit in federal court. The discrimination claim must be filed with the EEOC within 180 days of the unlawful act, or, where a state has established agencies to monitor and correct employment discrimination, the claim must be filed with the EEOC within 300 days of the impermissible employment practice, or 30 days after the claimant's receipt of notice of the termination of state administrative proceedings, whichever is earlier. See 29 U.S.C. § 626(d); Colgan v. Fisher Scientific, 935 F.2d 1407, 1414 (3d Cir.), cert. denied, 502 U.S. 941 (1991). However, unlike Title VII and ADA claims, no right-to-sue letter is required prior to filing an ADEA claim in federal court. See Hodge v. New York College of Podiatric Medicine, 157 F.3d 164, 168 (2d Cir. 1998); Seredinski v. Clifton Precision Products Co., 776 F.2d 56, 63 (3d Cir. 1985); McNaboe v. NVF Co., No. 97-558-SLR, 1998 WL 661455, at *3 (D. Del. July 30, 1998). The ADEA merely requires that a plaintiff wait 60 days after filing the EEOC charge before proceeding to court. Id. Therefore, Perepchuk's failure to receive a right-to-sue letter from the EEOC prior to suing in federal

Railroad Co., No. Civ. A. 94-3102, 1995 WL 141494, at *4 (E.D. Pa. March 31, 1995); Styles v. Philadelphia Electric Co., No. Civ. A. 93-4593, 1994 WL 245469, at *1 (E.D. Pa. June 6, 1994). As noted above, plaintiff has not pled the existence of a right-to-sue letter, nor has she offered an explanation for why one was not requested.

⁶ Since the ADA claim will be dismissed on this basis, it is unnecessary to address either the timeliness or the merits of Perepchuk's ADA claim.

court is not grounds for dismissal of her ADEA claim.

Friendly's also contends that plaintiff's claim is untimely because it was filed with the EEOC more than 300 days after the alleged discriminatory act. According to the defendant, Perepchuk alleges that she suffered age discrimination because of her layoff from the New Hyde Park Friendly's Restaurant some time during 1992. Since plaintiff was laid off in 1992, but did not file her present claim with the EEOC until 1996, Friendly's argues that Perepchuk's ADEA claim is time-barred.

In response, Perepchuk claims her ADEA action is timely because she filed the EEOC claim within 300 days of her termination from the Dunmore Friendly's Restaurant. Perepchuk, however, has admitted that she is only alleging age discrimination during the time she was employed at the New Hyde Park, New York Friendly's location. (Pl.'s Stat. Facts, Dkt. Entry 26 at ¶ 41; Perepchuk's Dep. at 118.)⁷

In order to determine if Perepchuk's claim is timely, a court must calculate the 300 days

⁷Perepchuk testified:

Q: What do you base your contention that you were discriminated against on the basis of your age on?

A: I believe - - I don't believe that was for Dunmore. That was for Friendly's in New York.

Q: So with respect to your claims regarding your employment at the Dunmore store, that in your mind doesn't arise out of age discrimination?

A: No.

(Perepchuk. Dep. at 118.) In paragraph 41 of her response to Defendant's Statement of Material Facts, Perepchuk admitted that her "age discrimination claims are based upon incidents which occurred in the Friendly's store in New York and not on any incidents which occurred at the Dunmore store," but added that "this provides insight into Defendants' ongoing discriminatory practices."

from the time of the alleged discriminatory act.⁸ Since the plaintiff does not contend that her termination from the Dunmore store was a result of age discrimination, the October 1995 termination date cannot serve as the “discriminatory act” that triggers the ADEA limitations period for filing a complaint with the appropriate administrative agency. Instead, the discriminatory act must be considered to be the date of Perepchuk’s layoff from the New Hyde Park store in 1992.⁹ Therefore, in order for plaintiff’s complaint with the EEOC to be timely filed, she must have filed it with the EEOC within 300 days of her layoff from the Friendly’s

⁸The time limitations set forth under the ADEA are in the nature of statutes of limitations which are subject to equitable tolling where the case permits. See Oshiver, 38 F.3d at 1387 (tolling may be appropriate (1) where the defendant has actively misled the plaintiff respecting the plaintiff’s cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum). Perepchuk clearly does not fall under any of the situations which would warrant equitable tolling. Plaintiff does not contend that she was misled in any way by the defendants. Nor can she state that she was prevented from asserting her rights because, based on her own testimony, she filed a claim with the New York Human Rights Commission shortly after her layoff in 1992. That claim was resolved to the extent that she was rehired by Friendly’s Ice Cream Corporation at a different restaurant location. Finally, plaintiff does not contend that she asserted her rights in the wrong forum. Therefore, there are no facts in this case to suggest that the time limitations should be tolled.

⁹This is not an instance of a continuing violation. Under the “continuing violation” theory, a plaintiff must demonstrate first that at least one act took place within the statutory period and that there was a continuing pattern of discrimination rather than the occurrence of isolated or sporadic acts of intentional discrimination. In determining whether a continuing violation has been demonstrated, the courts consider: (1) subject matter, or whether the alleged acts involve the same type of discrimination; (2) frequency, or whether the alleged acts are recurring; and (3) the degree of permanence, or whether the act has the degree of permanence which should trigger an employee’s awareness of and duty to assert his or her rights. See Rush v. Scott Specialty Gases, Inc., 113 F.3d 476, 481 (3d Cir. 1997)(continuing violation under Title VII); Bishop v. National Railroad Passenger Corp., 66 F. Supp.2d 650 (1999)(same). Perepchuk does not allege a continuing pattern of age discrimination throughout the length of her employment at Friendly’s. Rather, Perepchuk’s claim of age discrimination focuses solely on the allegations that she was laid off from her cooking job in 1992 because of age discrimination. Plaintiff has acknowledged that no instances of alleged age discrimination occurred during the time she worked at the Dunmore location.

restaurant in 1992.

Although Perepchuk states that she filed a complaint with the New York Human Relations Commission, she has not produced a copy of that filing.¹⁰ Nor has she specified the exact date of her layoff from the Friendly's Restaurant in New Hyde Park, or the exact date of her filing with the New York Commission. Without a copy of that filing, it is impossible to determine that the original filing with the New York Commission was timely, whether it was dually filed with the EEOC, and what claims were alleged in the complaint. It is the plaintiff's burden to demonstrate that she properly followed the administrative procedures. Plaintiff merely argues that her claim was timely filed because she filed it within 300 days of her termination in 1995. Since plaintiff has failed to present any evidence that a claim was filed with the EEOC within 300 days of her layoff from the New Hyde Park store in 1992, her filing with the EEOC on April 23, 1996, exceeded the 300 day filing requirement set forth in under 29 U.S.C. § 626(d), making her claim untimely. See Martinez v. Capital Cities/ABC-WPVI, 909 F. Supp. 283, 285 (E.D. Pa. 1995)(filing claim with EEOC in 1993 for discriminatory acts committed from 1980 to 1986 was untimely, warranting dismissal). Therefore, defendant's motion for summary judgment on Count V will be granted.¹¹

¹⁰New York, like Pennsylvania, has a state agency with the authority to address charges of employment discrimination. Therefore, the statute of limitations for filing with the EEOC is 300 days. Naval v. Fernandez, No. 97-CV-6800, 1998 WL 938942 (E.D. N.Y. Nov. 20, 1998).

¹¹Plaintiff has provided with her opposition papers a list of employees at the Dunmore Friendly's Restaurant as of October 27, 1995, along with their respective ages, which she contends supports a claim of age discrimination at the Dunmore Friendly's Restaurant. (Exh. "I" in opposition to Def's Motion for Sum. Judg., Dkt. Entry 28.) Perepchuk alleges that Exhibit "I" evidences that "age was definitely a factor in my harassment and forced resignation."

(continued...)

F. Retaliation

Perepchuk also alleges a claim of retaliation under the ADEA, claiming that her eventual termination from the Friendly's Restaurant in Dunmore resulted from her filing of an age discrimination claim while working at the Friendly's Restaurant in New Hyde Park, New York in 1992. To present a prima facie claim of retaliation under the ADEA, plaintiff must show (1) that she was engaged in a protected activity; (2) her employer took an adverse employment action against her either after or contemporaneous with the employee's protected activity; and (3) there was a causal link between the protected activity and the adverse employment action. Nelson v. Upsala College, 51 F.3d 383, 386 (3d Cir. 1995); Tumolo v. Triangle Pacific Corp., 46 F. Supp.2d 410, 413 (E.D. Pa. 1999); Sylvester v. Unisys Corp., No. 97-7488, 1999 WL 167725, at *11 (E.D. Pa. March 25, 1999).

Even though Perepchuk has offered evidence to show that she engaged in a protected activity, *i.e.*, filed an employment discrimination complaint, and that an adverse employment

¹¹(...continued)

(Perepchuk Affidavit, Exh. "G" in opposition to Def's Motion for Sum. Judg., Dkt. Entry 28.) Based on this allegation, Perepchuk appears to be claiming that the employee list serves as a basis for age discrimination under "disparate impact" theory. Disparate impact theory involves employment practices that are facially neutral in their treatment of different groups, but result in one group being treated more harshly. See DiBiase v. Smith Kline Beecham Corp., 48 F.3d 719, 726 (3d Cir. 1995), cert. denied, 516 U.S. 916 (1995). Disparate impact is often proven using statistical information. However, the fact that most of the employees working at the Friendly's Restaurant in Dunmore are younger than age 40 is not alone sufficient evidence to raise an inference of discrimination under disparate impact theory. See E.E.O.C. v. MCI Int'l, Inc., 829 F. Supp. 1438, 1481 (D.N.J. 1993)("While recognizing that under certain facts and circumstances, statistics can be useful, here, where plaintiff has not raised a genuine issue of fact that any claimant was discriminated against on the ground of age, plaintiff's statistics, with or without their apparent flaws, simply do not make a difference.") Furthermore, Perepchuk has failed to aver any specific employment policy which could serve as a basis for her age discrimination claim.

action was taken, i.e., her termination, she has failed to proffer any evidence to establish a causal link between the two events. The fact that Perepchuk's termination occurred subsequent to her filing of the EEOC complaint in 1992 is not sufficient to establish causation, especially since three years elapsed between the filing of her complaint and her subsequent discharge. See Robinson v. City of Pittsburgh, 120 F.3d 1286, 1302 (3d Cir. 1997)("mere fact that adverse employment action occurs after a complaint will ordinarily be insufficient to satisfy the plaintiff's burden of demonstrating a causal link between the two events"); Krouse v. American Sterilizer Co., 126 F.3d 494, 503 (3d Cir. 1997)(passage of time of 19 months militated against a finding of causation); Tumolo, 46 F. Supp.2d at 413 (no causation between employee's complaint to management and her termination sixteen months later);

When temporal proximity is missing, evidence of retaliatory animus occurring during the intervening period can serve to establish a causal link. See Krouse, 126 F.3d at 504. In this case, it was incumbent upon Perepchuk to proffer evidence that the Friendly's decision-maker, Corbett, was aware of her 1992 age discrimination charge and took adverse employment action against her in retaliation for her having pursued that complaint. Although Perepchuk alleges that her hours were cut, and that she was harassed by Corbett, she has failed to present any evidence that suggests that those actions were related to her filing of the New York discrimination complaint. She contends that Corbett, her supervisor, had to have been aware of her prior discrimination complaint because he wanted to transfer her to a cooking position, the job she was performing in 1992. But Perepchuk has produced no direct evidence that Corbett was aware of her prior age discrimination complaint, and Corbett has denied having such knowledge. The fact that in October of 1995 Corbett offered Perepchuk a

cooking position is insufficient to support a reasonable inference that Corbett was aware of her age discrimination complaint pursued in 1992. Absent direct evidence of knowledge or circumstantial evidence that would permit a reasonable inference of Corbett's knowledge of the prior age discrimination charge, Perepchuk is not entitled to a jury trial on her retaliation claim. Furthermore, even if Corbett was aware of Perepchuk's prior complaint, there is no evidence in the record which would suggest that his decision was based on that awareness. Since Perepchuk has failed to present any evidence reasonably suggesting that the Friendly's decision-maker knew of her prior complaint and acted with retaliatory animus, summary judgment will be granted as to Perepchuk's retaliation claim (Count VII).

G. State Claims

In light of the dismissal of plaintiff's ADA and ADEA claims against all of the defendants, it is appropriate to consider whether supplemental jurisdiction over Perepchuk's remaining state law claims should be declined. See 28 U.S.C. § 1367(c)(3).¹² After dismissal of all federal claims, a district court may decline to exercise supplemental jurisdiction over the remaining state law claims in a removed case, and remand the case to state court if it finds that the parties will not be prejudiced and that "dismissal of the pendent claims best serves the principles of judicial economy, convenience, fairness and comity." See

¹² Section 1367(c)(3) provides that the district courts may decline to exercise supplemental jurisdiction over a claim that is so related to claims in the action within the district court's original jurisdiction that they form part of the same case or controversy if "the district court has dismissed all claims over which it had original jurisdiction." In this case, the ADA and ADEA causes of action were the only federal claims in the complaint. Moreover, there is not complete diversity between the parties. As such, the dismissal of the ADA and ADEA claims eliminates the predicate for this Court's original jurisdiction.

Annulli v. Panikkar, 200 F.3d 189, 202 (3d Cir. 1999); see also Hedges v. Musco, No. 99-5111, 2000 WL 202393, at *12 (3d Cir. Feb. 22, 2000)(where claims of original jurisdiction have been dismissed before trial, the “district court must decline to decide the pendent state claims unless consideration of judicial economy, convenience and fairness to the parties provide an affirmative justification for doing so”). When a case was originally filed in state court, but was then removed to federal court, the court has the discretion to either dismiss the state law claims or remand them to state court. Carnegie-Mellon University v. Cohill, 484 U.S. 343 (1987); Jones v. Montgomery Hospital, Civ. A. No. 92-6809, 1993 WL 12836, at *3-4 (E.D. Pa. Jan. 15, 1993).

There are five remaining claims in plaintiff’s complaint, all arising under Pennsylvania state law. Although the parties have already completed discovery, there is no impediment to their use of such discovery in state court, and the matter is in a posture to proceed to a final disposition. There is no reason to believe that the final decision in this case will be significantly delayed by remanding this matter. Perepchuk will not have to re-file her action in state court, thus obviating any statute of limitations issue with respect to the period of time that this action has been pending in federal court. Friendly’s will not sustain any cognizable prejudice by having the state courts adjudicate the state law claims. State court was Perepchuk’s preferred forum, a factor entitled to some weight. Furthermore, interests of comity are advanced by having the Pennsylvania state court resolve the remaining issues, especially where some of the issues raised by Perepchuk are unsettled under Pennsylvania

law.¹³ Therefore, plaintiff's state claims will be remanded to the Court of Common Pleas of Lackawanna County.

III. CONCLUSION

For the reasons set forth above, summary judgment is granted in favor of all defendants on the ADA and the ADEA claims. The remaining state law claims will be remanded. An appropriate Order is attached.

Thomas I. Vanaskie - Chief Judge
Middle District of Pennsylvania

¹³For example, Pennsylvania law is unsettled as to when individual liability can be imposed under the PHRA "aiding and abetting" clause. See Goodwin v. Seven-Up Bottling Co. of Philadelphia, No. Civ. A. 96-CV-2301, 1996 WL 601683, at *6 (E.D. Pa. Oct. 18, 1996).

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

YVETTE PEREPCHUK,
Plaintiff

No: 3:CV-97-1988

v.

(Chief Judge Vanaskie)

FRIENDLY'S ICE CREAM CORP.,
FRIENDLY'S RESTAURANT, and DAN
CORBETT,
Defendants

ORDER

NOW, THIS 28th DAY OF MARCH, 2000, for the reasons set forth in the
accompanying memorandum, **IT IS HEREBY ORDERED THAT:**

1. Friendly's Restaurant is dismissed from this action.
2. Defendants' Motion for Summary Judgment (Dkt. Entry 13) is **GRANTED** on Counts IV (ADA) and V (ADEA).
3. The Clerk of Court is directed to enter judgment in favor of defendants on Counts IV and V.
4. The Clerk of Court is directed to remand this matter to the Court of Common Pleas of Lackawanna County for adjudication of Counts I, II, III, VI and VII, and to mark this case in this Court **CLOSED**.

Thomas I. Vanaskie - Chief Judge
Middle District of Pennsylvania

Filed: March 28, 2000

