

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

<b>JOSEPH KHAZZAKA,</b>	:	
<b>Plaintiff</b>	:	<b>No. 3:01cv211</b>
v.	:	
	:	
	:	<b>(Judge Munley)</b>
<b>UNIVERSITY OF SCRANTON,</b>	:	
<b>Defendant</b>	:	

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**MEMORANDUM**

\_\_\_\_\_ Before the court for disposition is the defendant's motion to dismiss and/or strike portions of the plaintiff's employment discrimination complaint. The plaintiff is Joseph Khazzaka, a former associate professor for Defendant University of Scranton. The matter has been fully briefed and argued and is thus ripe for disposition.

**Background**

According to the plaintiff's complaint, the facts of this case are as follows: Plaintiff commenced employment with the defendant as an associate professor in June 1994. On February 7, 1997, plaintiff was approved for tenure. In November of 1996, Dr. Cathleen Jones filed a complaint with the Pennsylvania Human Relations Commission asserting that she had been discriminated against by the defendant based upon her sex and her ancestry or origin, that being Mexican. In February 1997, after receiving tenure, the plaintiff was asked to make a statement in favor of Jones, and he did so.

After demonstrating his support of Jones, plaintiff was subjected to a series of

harassing memorandums and numerous meetings, resulting in a hostile work environment. Defendant retaliated against the plaintiff by not re-appointing him as director of secondary education. Additional actions occurred that caused plaintiff's work environment to become extremely hostile. Finally, in February 1999, plaintiff was suspended because the defendant deemed him erratic, unusual and difficult. Plaintiff claims that his suspension was due to discrimination based upon his Lebanese origin and retaliation for backing Jones' position against the defendant. In September 1999, plaintiff's employment was terminated. Subsequently, the Plaintiff filed the instant six count complaint alleging as follows: Count I, discrimination in employment; Count II, age discrimination; Count III, breach of contract; Count IV, breach of covenant of good faith and fair dealing; Count V, violation of public policy; and Count VI, fraud, deceit and misrepresentation. Defendant has filed a motion to dismiss and/or strike the plaintiff's complaint pursuant to Fed. R. Civ. Pro. 12(b)(6), bringing the action to its present posture.

### **Standard of review**

When a 12(b)6 motion is filed, the sufficiency of a complaint's allegations are tested. The issue is whether the facts alleged in the complaint, if true, support a claim upon which relief can be granted. In deciding a 12(b)6 motion, the court must accept as true all factual allegations in the complaint and give the pleader the benefit of all reasonable inferences that can fairly be drawn therefrom. Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997).

### **Discussion**

The defendant's motion to dismiss raises five issues: statute of limitations; failure to exhaust administrative remedies; failure to state a claim with regard to public policy and fraud/misrepresentation; and improperly asserting a specific amount of damages in the complaint. We will discuss these issues *seriatim*.

### **I. Statute of limitations**

Plaintiff's first cause of action is asserted pursuant to Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment based upon, *inter alia*, national origin. Defendant's first argument is that plaintiff's Title VII claims should be dismissed on the basis of the statute of limitations. Before bringing suit in federal district court, a plaintiff must file a complaint with the Equal Employment Opportunity Commission, (hereinafter "EEOC"). The law provides that a plaintiff must file suit within ninety (90) days of the receipt of the EEOC's right-to-sue letter. 42 U.S.C. § 2000e05(f)(1). The ninety-day period starts to run when either the party or his attorney receives the right-to-sue letter, whichever is earlier. Irwin v. Department of Veterans Affairs, 498 U.S. 89, 92-92 (1990).

Defendant claims that the "right to sue" letter in the instant case was issued on December 4, 1999. Plaintiff did not file suit in federal court until February 1, 2001, which is well beyond the ninety (90) day limit. Plaintiff's position is that he did not receive the right to sue letter until November 6, 2000, and that, therefore, this case was timely filed in February 2001.

In the context of a motion to dismiss based upon a statute of limitations, we must determine whether the time alleged in the complaint's statement of the claim demonstrates

that the lawsuit was brought within the relevant time frame. Cito v. Bridgewater Twp. Police Dept., 892 F.2d 23, 25 (3d Cir. 1990). In the instant case, the plaintiff alleges in his complaint that he received a copy of the right-to-sue letter on November 3, 2000. Compl. ¶ 40. He claims that he never received the copy that the EEOC allegedly mailed out on December 14, 1999. Id. at ¶ 41.

Being that we have before us a motion to dismiss, we must accept the allegations in the plaintiff's complaint as true. Accordingly, we cannot dismiss the complaint at this point for failure to comply with the statute of limitations. In so doing, we note that the case upon which the defendant relies, Seitzinger v. Reading Hosp. And Medical Ctr., 165 F.3d 236 (3d Cir. 1999), dealt with a summary judgment motion, not a motion to dismiss.

## **II. ADEA Claim**

The plaintiff has also asserted a claim that the defendant violated the Age Discrimination in Employment Act, (hereinafter "ADEA"), 29 U.S.C. § 626 et seq. Under the ADEA, it is "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1) (1994). Plaintiff was forty-seven years of age at the time of his termination from employment. Compl. ¶ 60. Defendant argues that the plaintiff's claim under the ADEA must be dismissed because the plaintiff never filed a claim with the EEOC with respect to ADEA, which is a prerequisite to bringing suit. It cannot be disputed that as a condition precedent to filing suit under the ADEA, a plaintiff must first file a charge with the EEOC

within 180 days of the alleged discriminatory act. 29 U.S.C. § 626(d).

Plaintiff alleges that he attempted to amend his EEOC complaint on December 16, 1999 to include a claim of age discrimination. Compl. ¶¶ 33-34. Plaintiff did not receive a response to this attempt to amend. Id. at ¶ 38. Eventually, plaintiff retained counsel, as he was not receiving any responses from the EEOC. Id. at ¶ 39. The EEOC forwarded a copy of the right-to-sue letter to counsel on November 3, 2000. The EEOC apparently indicated that the letter was mailed for the first time on December 14, 1999. Id. at ¶¶ 40-41.

Once again questions of fact exist. Thus, we must accept the plaintiff's assertions as true and view the matter in the light most favorable to him. If the facts support the plaintiff that he never received a copy of the "right to sue" letter prior to November 3, 2000, it would be appropriate for him to attempt to amend the complaint prior to that date. If, however, the facts eventually reveal that plaintiff received notice of the EEOC's actions prior to his attempt to amend, he may in fact be barred from bringing the ADEA claim. Accordingly, dismissal of the ADEA claim is premature at this point.

### **III. Public Policy**

Count V of the complaint alleges that plaintiff's termination was in violation of the public policy of the Commonwealth of Pennsylvania because it was in retaliation for his backing and approving the case of Dr. Cathleen Jones. Therefore, plaintiff alleges that his termination restricted his freedom of speech. Compl. ¶¶ 88-89. Defendant asserts that this count should be dismissed, and we agree.

Pennsylvania is an at-will employment state. It does not allow a common law cause

of action for wrongful discharge of an at-will employee. In the absence of a contract, an employee can be terminated for any reason or no reason. Borse v. Piece Goods Shop, Inc., 963 F.2d 611, 614 (3d Cir. 1992). An exception to this general law exists where the employee's termination violates public policy. Id.

Plaintiff contends that his dismissal was contrary to public policy as it violated his constitutional right to free speech. The defendant, however, is a private actor, not a state actor, and in construing Pennsylvania law on this issue, the Third Circuit Court of Appeals has held as follows:

In light of the narrowness of the public policy exception of the Pennsylvania courts' continuing insistence upon the state action requirement, we predict that if faced with the issue, the Pennsylvania Supreme Court would not look to the First and Fourth Amendments as sources of public policy when there is no state action.

Id.

Accordingly, as there is no state action alleged in the instant case, we will dismiss Count V of the complaint alleging termination in violation of public policy based upon an infringement of the plaintiff's First Amendment right to free speech.

#### **IV. Fraud, Deceit and Misrepresentation**

Defendant also seeks the dismissal of Count VI of the plaintiff's complaint which asserts a cause of action for fraud, deceit and misrepresentation. Pennsylvania law provides that in order to prove fraud or misrepresentation a plaintiff must demonstrate the following: 1) a representation; 2) that is material to the transaction at hand; 3) made falsely or with knowledge of its falsity or recklessness as to whether it is true or false; 4) and made with the

intent of misleading another into relying upon it; 5) justifiable reliance; and 6) resulting injury. Gibbs v. Erns, 647 A.2d 882, 889 (Pa. 1994). The same elements make up the tort of intentional non-disclosure, but the party must intentionally conceal a material fact instead of making a material misrepresentation. GMH Associates, Inc. v. The Prudential Realty Group, 752 A.2d 889, 901 (Pa. Super. Ct. 2000).

Defendant claims that the instant case sounds in breach of contract, not in any kind of tort action such as fraud or misrepresentation.<sup>1</sup> The law in Pennsylvania provides that mere non-performance of a contract does not constitute a fraud; but, it is possible that a breach of contract also gives rise to an actionable tort of misrepresentation or fraud. To support a tort claim, however, the wrong ascribed to defendant must be the main part of the action and the contract merely a collateral matter. Bash v. Bell Tele. Co. of Pa., 601 A.2d 825, 829 (Pa. Super. Ct. 1992). Further, the breach of a promise to do something in the future is not a fraud, and an unperformed promise does not give rise to a presumption that the promisor intended not to perform when the promise was made. Id. at 832.

We find that the plaintiff has not sufficiently alleged misrepresentation or fraud. Plaintiff claims that the defendant misrepresented the following: that he “would be judged upon the basis of merit and ability in that Plaintiff would be given an opportunity to continue his permanent full time job without being discriminated against due to his origin. . .” (Compl. ¶ 93) and that he “would be judged on merit and ability and that Plaintiff would be

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<sup>1</sup>In fact, plaintiff’s complaint contains allegations regarding breach of contract that are not a subject of the defendant’s motion to dismiss.

given an opportunity to earn a fulltime job and be allowed to have the freedom of speech and to express his opinions without being discharged for the expression of his opinions”. Id. at ¶ 94. Further, plaintiff claims that the defendant had an affirmative duty to disclose that Defendant would terminate plaintiff, if plaintiff exercised his freedom of speech. Id. at 95.

Thus, nothing is alleged regarding the fourth element listed above, that is that the defendant made the misrepresentation with the intent to induce the plaintiff to accept the employment. The plaintiff cites Martin v. Hale Products, Inc., 699 A.2d 1283 (Pa. Super. Ct. 1997) in support of its position. That case is clearly distinguishable.

In Martin, the plaintiff interviewed for a job with the defendant, and during the interview asked whether there was the prospect a takeover of their company by another company. Id. at 1285. The interviewer told her there was not such a possibility when in fact he knew that the possibility of a takeover was being explored at the time. Id. at 1285-86. Several months after accepting the position, the plaintiff was terminated due to the takeover. Id. at 1286. She sued for fraudulent inducement, and the court held that she had made out a *prima facie* case because, *inter alia*, the employer had concealed a material fact. Id. at 1288.

The instant case is distinguishable. Plaintiff had an employment contract with the defendant, and the allegations in the complaint support merely a breach of contract, not a fraudulent inducement. No facts are alleged, as in Martin, that would support a claim for fraud. This case is more akin to Bash, supra, where the defendant had a contract to publish the plaintiff’s advertisements. For some reason, the advertisements were not published. The

plaintiff sued for breach of contract and fraud. The court found that plaintiff had not plead anything to demonstrate intent to induce on the part of the defendant. An unperformed promise does not give rise to a presumption that the promisor intended not to perform when the promise was made. Bash, 601 A.2d at 825.

The instant case can best be analogized to Bash. According to the complaint, the defendant made an implied promise to judge the plaintiff on nothing but merit, and the defendant broke this promise. All that appears, even when viewed in the light most favorable to the plaintiff, is a promise that went unperformed, and that does not give rise to the presumption that the promisor intended not to perform when the promise was made. Bash, supra. If we ruled otherwise, we would be holding that every employment discrimination case involving an employee with a contract is also a case of misrepresentation or fraud. As discussed above, this clearly is not the case under Pennsylvania law. Accordingly, Count VI of the plaintiff's complaint will be dismissed.

#### **V. Amount of Monetary Award Sought**

Counts I, III, IV, V and VI of the plaintiff's complaint state that the plaintiff is seeking in excess of \$150,000.00 in damages. Defendant claims that the paragraphs of the complaint asserting a dollar amount of damages should be dismissed. We agree.

In diversity cases, the plaintiff is allowed to make a statement of damages sought in order to establish that it has met the jurisdictional threshold. Local Rule 8.1. Otherwise, the plaintiff is not to plead the sum of money that he is seeking. In the instant case, jurisdiction is based not upon diversity but upon the presence of a federal statute that the defendant is

alleged to have violated. Accordingly, as the amount of damages being sought need not be pled, it shall be stricken from the complaint.

**Conclusion**

In conclusion, we find that the issues raised in the defendant's motion to dismiss with regard to Title VII and the ADEA are without merit and those counts (I and II) shall not be dismissed. We do, however, find merit to the motion to dismiss with regard to counts V and VI, and these counts shall be dismissed. An appropriate order follows.

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<b>Plaintiff</b>	:	<b>No. 3:01cv211</b>
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	:	
	:	<b>(Judge Munley)</b>
<b>UNIVERSITY OF SCRANTON,</b>	:	
<b>Defendant</b>	:	

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**ORDER**

\_\_\_\_\_ **AND NOW**, to wit, this 22nd day of October 2001, the defendant's motion to dismiss is hereby **GRANTED** in part. It is granted with respect to Counts V and VI. Further, it is granted with respect to the specific amounts of monetary demands of the plaintiff. In all other respects, the motion is **DENIED**.

**BY THE COURT:**

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**JUDGE JAMES M. MUNLEY**  
**United States District Court**

Filed: October 22, 2001