1998 WL 57520
United States District Court, E.D. Pennsylvania.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
v.
PATHMARK INC.

No. CIV. A. 97–3994. | Feb. 12, 1998.

Opinion

MEMORANDUM

GILES, J.

***1** Lisa Edwards, an intervening third-party plaintiff, brings action against Pathmark Inc. (hereinafter "Pathmark") under the Pennsylvania Human Relations Act, Pa. Stat. Ann. tit. 43, § 962(c) (hereinafter "PHRA"), for retaliation (Count I), sex discrimination, race and ethnic intimidation, and hostile atmosphere (Count II), and constructive discharge due to retaliation and harassment (Count V). Edwards brings claims under Title VII of the Civil Rights Act of 1964 (codified as amended at 42 U.S.C. § 2000e *et seq.*(1994)) (hereinafter "Title VII"), for sex, race and ethnic intimidation, and hostile atmosphere (Count III), and constructive discharge due to retaliation and harassment (Count IV). In addition, Edwards brings a pendent state claim for breach of covenant of good faith and fair dealing (Count VI).

Now before the court is Pathmark's motion to dismiss Edwards' complaint. For the reasons which follow, Pathmark's motion is granted, in part, and denied, in part.

PLAINTIFF'S ALLEGATIONS

In December, 1988, Edwards, an African–American female, was hired by Pathmark as a customer service associate at its City Line store. (Compl.¶ 8).[1] Edwards was promoted to department head/manager of the seafood department in April, 1990. *Id.* On or about April 10, 1990, Edwards was transferred to a Pathmark store in Upper Darby as manager of its seafood department. *Id.*

[1] Unless otherwise indicated, all references to Complaint refer to Lisa Edwards' Complaint in Intervention.

At all times relevant, Edwards was a member of the United Food and Commercial Workers, Local 56, AFL–CIO, the collective bargaining representative for her bargaining unit at Pathmark. (Mot. to Dismiss ¶ 1). Section 2.6(d) of the collective bargaining agreement provides that:

There will be no discrimination ... by the Employer against any employee because of race, religion, sex, creed, color, national origin, or age as provided by law ... (Mot. to Dismiss Ex. B). Section 12.1 of the agreement covers an employee's right to challenge disciplinary action and discharge. Section 12.1(c) provides that:

> [An] employee shall have the right ... to appeal to the Union, whereupon the Union and the Employer *may* jointly investigate the reasons for such dismissal [or discipline].

Id. (emphasis added). Section 13.1 gives an employee the right to initiate grievance procedures, and gives the union the discretion to investigate and demand arbitration of the grievance if there is no acceptable resolution to the employee. Step 4 of § 13.1(a) states that:

> In the event that the Union and Employer officials fail to settle the grievance within two (2) weeks, the moving party shall then either submit the grievance to arbitration and give notice thereof to the other party, or the grievance shall be considered withdrawn.

Id. Section 13.1(c) further stated that:

> All grievances and/or complaints concerning the application or interpretation of the terms of this Agreement *must* be brought to the attention of the parties within two (2) weeks after their occurrence ...

***2** *Id.* (emphasis added).

While at work in the Upper Darby store, Edwards alleges that she was touched and fondled by a male Pathmark employee on at least three separate occasions between July and September of 1994. (Compl.¶ 13). Edwards complained to store management, and Pathmark transferred the male employee to another store in Delaware County. (Compl.¶¶ 13, 17).

According to Edwards, Pathmark employees and

managers of the Upper Darby store, who were friends of the transferred male employee, then began to harass, threaten, and intimidate her, at times calling her home or sending mail to the residence. (Compl.¶¶ 18, 25). Edwards claims that she was subjected to this harassment in front of supervisors, and that even though she repeatedly complained and reported these incidents to management during October 1994, no action was taken to rectify the situation. (Compl.¶¶ 19, 20, 24).

On or about November 1, 1994, Edwards was involved in a verbal altercation with another employee who allegedly had harassed her. (Compl.¶ 26). The incident was reported to management. *Id.* After an investigation, Edwards was "written up" for violating the sexual harassment policy of Pathmark. *Id.* No action was taken against the other employee. *Id.*

On or about November 10, 1994, Edwards's physician sent a letter to Pathmark stating that she would be out of work on medical leave due to the stress caused by the constant harassment and the incidents that occurred at Pathmark's Upper Darby store. (Compl.¶ 27). The complaint does not allege when the letter was received. Notwithstanding, on or about November 11, 1994, Edwards alleges that she was informed that she was being transferred to the City Line store, and demoted to the position of seafood department clerk due to the altercation on November 1, 1994. (Compl.¶¶ 28, 29). Edwards never returned to work at Pathmark. (Mot. to Dismiss ¶ 2).

Edwards never filed a grievance with her union concerning any of the incidents at the Upper Darby store. *Id.*

On December 8, 1994, Edwards filed a charge of discrimination against Pathmark with the Equal Employment Opportunity Commission (hereinafter "EEOC"), (Compl.¶ ¶ 4, 7), claiming that her demotion was the result of racial discrimination and/or retaliation for her having complained of sexual harassment. (Mot. to Dismiss ¶ 3). The complaint was dual-filed with the Pennsylvania Human Relations Commission. *Id.* On or about September 29, 1995, the EEOC found that Edwards was "retaliated against for making a complaint of being sexually harassed and was ... treated in a disparate manner because of her sex". (Compl.¶ 38).

On June 12, 1997, the EEOC filed a complaint in federal court for violations of Title VII. Edwards intervened in this action, claiming that Pathmark engaged in a continuing pattern and practice of discrimination against African–American females in its terms and conditions of employment. (Compl.¶ 9). Edwards also asserted that Pathmark, along with its employees and management, engaged in a continuing pattern of harassment, and ethnic and racial intimidation. (Compl.¶ ¶ 34, 39). In addition, Edwards alleged that she was transferred more frequently and denied the same overtime as other managers who were white males. (Compl.¶¶ 10, 11).

***3** Pursuant to Federal Rules of Civil Procedure 12b(1) and 12b(6), Pathmark has moved to dismiss Edward's complaint in intervention on the grounds that this court lacks subject matter jurisdiction over Edward's claims. Pathmark argues that Edwards was required to submit her claims to the grievance/arbitration procedure set out in the union contract and is foreclosed from proceeding in this court. Furthermore, it is argued that only the individual claims of race discrimination and retaliation were part of the EEOC charge or investigation, and that Edwards' other claims cannot be raised at this time. Finally, Pathmark contends that Edwards' state claim of breach of the covenant of good faith and fair dealing in the employment context is not recognized under Pennsylvania law and, in any event, is preempted by federal labor law.

ANALYSIS

I. Subject Matter Jurisdiction Where Union Contract Contains Arbitration Clause

Pathmark argues that this court lacks subject matter jurisdiction over Edwards' claims because she did not address those claims through the "mandatory" grievance/arbitration provisions set forth in the union contract. The defendant asserts that all employee grievances, including claims of discrimination cognizable under Title VII, are subject to resolution under the collective bargaining agreement.

Pathmark relies upon *Martin v. Dana Corp.,* 114 F.3d 421, 1997 WL 313054 (3d Cir. June 12, 1997), *withdrawn,* 114 F.3d 421 (1997), *vacated,* 114 F.3d 428.[2] In *Martin,* an African–American employee of the Dana Corp. filed a lawsuit against his employer and the union alleging racial discrimination in violation of Title VII. *Id.* at *1. The defendant corporation filed a motion to dismiss for Martin's failure to arbitrate his claims under the collective bargaining agreement. *Id.* The collective bargaining agreement provided for mandatory arbitration of statutory claims, and provided that both the employee and the union had the right to demand arbitration:

> *Any and all claims* regarding equal employment opportunity provided for under this Agreement or under any federal ... fair employment practice law shall be *exclusively addressed by an individual employee or*

[2] This decision will be the subject of reargument *en banc.*

> *the Union* under the grievance and arbitration provisions of this Agreement.
> *Id.* at *9(emphasis added). A majority of the panel believed that, based upon this encompassing language expressly giving the employee the right to compel arbitration of employment discrimination issues, Martin was required to submit his statutory claims to the arbitration process set forth in the collective bargaining agreement. *Id.*

In making its decision in *Martin,* the majority relied on *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991), in which the Supreme Court required an employee, who was a party to a mandatory arbitration provision in a privately negotiated employment contract, to litigate the discrimination claims in the arbitration forum instead of court. The court found that the employee individually agreed, by signing an employment contract, to submit federal equal opportunity claims to mandatory arbitration rather than a judicial forum. *Id.* at 23.

***4** Edwards argues that this court has subject matter jurisdiction over her Title VII claims because the union contract, dated March 10, 1996, was not in effect during all times relevant to her employment at Pathmark. In addition, plaintiff argues that it would be premature for this court to rely on *Martin* and rule that it lacks subject matter jurisdiction over her Title VII claims when this case has been vacated and will be the subject of reargument *en banc.*

Even assuming the *Martin* rationale were to apply, this court finds that Edwards would not be compelled to submit her Title VII claims through the grievance/arbitration procedures of her collective bargaining agreement. The collective bargaining agreement does not provide that she had the right to compel arbitration of Title VII discrimination claims. Furthermore, Edwards did not negotiate the terms and conditions of her employment with Pathmark. Edwards, therefore, cannot be compelled to take her Title VII claims to labor arbitration.

As the dissent noted in *Martin,* it is doubtful that Congress intended to permit a collective bargaining agreement to waive an individual employee's rights to select a federal judicial forum under Title VII.1997 WL 303054, at *10 (Scirica, J., dissenting)(questioning whether Congress' 1991 amendment to Title VII encouraging arbitration permits a collective bargaining unit to prospectively waive an individual member's rights to select a federal judicial forum). The *Martin* dissent also observed that "absent individual consent [to arbitrate an employment discrimination dispute], the employee retains his right to statutory relief." *Id.* Consequently, "[b]ut for Martin's right to initiate and prosecute his grievance without union approval, this case would present an irreconcilable conflict between individual and group interests." *Id.* at *9.

Under the provisions of the Labor–Management Reporting and Disclosure Act, unions have a duty to fairly represent the collective rights of its members. 29 U.S.C.A § 411. Unions have the right to choose in good faith the grievances on which they will spend time and money to arbitrate. *See, Vaca v. Sipes,* 386 U.S. 171, 191–192, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). On the other hand, unions do not have the right to negotiate away statutorily created individual rights. For example, a union could not "collectively bargain" away employees' rights to have a wage rate that does not violate minimum wage laws. Unions have the right to collectively bargain but must do so under the banner of the "duty of fair representation." If a statutorily created individual right were taken from an employee by the collective bargaining agreement process, necessarily there would arise a claim of bad faith conduct on the part of the union and/or the employer, which claim would have to be resolved through a separate federal court action. *See Vaca v. Sipes,* at 195–196.

***5** Therefore, this court holds that it has subject matter jurisdiction over Edwards' Title VII claims since an employee cannot be compelled to arbitrate a federal statutory discrimination claim, absent her personal, explicit waiver of the judicial remedies in favor of binding arbitration.

II. Subject Matter Jurisdiction Where Plaintiff Did Not Exhaust Administrative Remedies With The EEOC

Pathmark argues that Edwards cannot bring claims under Title VII or the PHRA which were not previously included in her administrative charge with the EEOC. Pathmark asserts that Edwards never amended her original charge of race discrimination and retaliation with the EEOC to include her present claims of sex discrimination, ethnic intimidation, and constructive discharge. Furthermore, Pathmark argues that her allegations of pattern and practice of discrimination, religious discrimination, and disparate treatment in regards to overtime and transfers cannot be raised at this time since she failed to exhaust administrative remedies with regard to these claims.

Edwards argues that she exhausted her administrative remedies with the EEOC with respect to the present claims that were not included in her original charge. She claims that she filed a second charge with the EEOC on August 8, 1995, which included the aforementioned claims. Edwards also argues that these present claims were within the scope of the EEOC investigation and that the EEOC ruled upon the allegations in both charges.

The federal court lacks subject matter jurisdiction to hear Title VII claims unless the claims have been previously

filed with the EEOC, *Hicks v. Arthur,* 843 F.Supp. 949, 956 (E.D.Pa.1994), or were within the scope of the EEOC investigation. *Hicks v. Abt Associates, Inc.,* 572 F.2d 960, 966 (3d Cir.1978) (citing *Ostapowicz v. Johnson Bronze Co.,* 541 F.2d 394, 398–399 (3d Cir.1976)).

The record does not show that plaintiff amended her original charge with the EEOC. Further, plaintiff's present claims of ethnic intimidation and constructive discharge, her allegations of religious discrimination, pattern and practice of discrimination, and disparate treatment in regards to overtime, all are not within the scope of her EEOC charge, and could not have reasonably been expected to grow out of the original charge of race discrimination and retaliation. Accordingly, defendant's motion is granted as to these claims.

Plaintiff's claim of sex discrimination was not included in her original EEOC charge, but was within the scope of the EEOC investigation. The EEOC investigated an individual charge alleging sexual harassment and unlawful transfer and demotion. The EEOC concluded that there was sex discrimination, but individual discrimination, rather than pattern and practice, in the transfer attempt. The EEOC made a determination that Edwards "was retaliated against for making a complaint of being sexually harassed and was ... treated in a disparate manner because of her sex." (Memo in Opposition to Mot. to Dismiss Ex. B). Therefore, defendant's motion is denied as to this claim.

III. Edwards' State Law Claims Under the PHRA and for Breach of Covenant of Good Faith and Fair Dealing

***6** Pathmark argues that Edwards' state law claims under the PHRA and for breach of covenant of good faith and fair dealing, are preempted by § 301 of the Labor Management Relations Act. 29 U.S.C. § 185(a). Under § 301, "if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law ... is pre-empted" and the claim must be submitted to the grievance and arbitration procedure provided for in the collective bargaining agreement. *Lingle v. Norge Division of Magic Chef, Inc.,* 486 U.S. 399, 405–406, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988). Moreover, Pathmark asserts that under Pennsylvania law, there is no cause of action for the breach of an implied covenant of good faith and fair dealing which is separate from a breach of a contract action.

Edwards asserts that the union contract was not in effect during the time of her employment. Furthermore, she argues that her claim for breach of the covenant of good faith and fair dealing is not preempted by § 301. Plaintiff relies on *Somers v. Somers,* 418 Pa.Super. 131, 137, 613 A.2d 1211, 1213 (1992), asserting that Pennsylvania recognizes claims for breach of covenant of good faith and fair dealing in the employment context. However, the majority in *Somers* only stated that the general duty of good faith and fair dealing in the *performance* of a contract has been adopted in this Commonwealth, and that a party may bring a claim for breach of contract. *Id.* at 136–138, 613 A.2d 1211 (emphasis added). Pennsylvania does not recognize a claim for breach of covenant of good faith and fair dealing as an independent cause of action. While there may be an express or implied covenant of good faith in an employment contract, a breach of such covenant is a breach of contract action, not an independent action for breach of a duty of good faith and fair dealing. *See McGrenaghan v. St. Denis School,* 979 F.Supp. 323, 1997 WL 602825, at *5 (E.D.Pa. Sept.22, 1997).

This court holds that § 301 of the Labor Management Relations Act preempts Edwards' state law claims under the PHRA and for breach of covenant of good faith and fair dealing. Accordingly, Count VI of plaintiff's complaint, breach of covenant of good faith and fair dealing, and the state law claims under the PHRA (Counts I, II, and V), are dismissed.

CONCLUSION

Based upon the foregoing, defendant's Motion to Dismiss Edwards' Title VII claims of constructive discharge and ethnic discrimination, her allegations of pattern and practice of discrimination, religious discrimination, disparate treatment in regards to overtime and transfers, and the state claim of breach of the covenant of good faith and fair dealing is granted. The remaining contentions of defendant are denied.

ORDER

AND NOW, this day of February, 1998, upon consideration of defendant's Motion to Dismiss and plaintiff's response thereto, it is hereby ORDERED that:

***7** Defendant's Motion is GRANTED, in part, and DENIED, in part. The above-captioned matter is DISMISSED with prejudice as to all claims that were not included in plaintiff's administrative charge with the EEOC, and DISMISSED without prejudice as to the pendent state claim of breach of covenant of good faith and fair dealing. In all other respects, the Motion is DENIED.

Parallel Citations

158 L.R.R.M. (BNA) 2090