

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ELLIS BENJAMIN,)
)
Plaintiff,)
)
v.) Civil Action No. 01-303-SLR
)
E.I. DUPONT DE NEMOURS & CO.,)
)
Defendant.)

MEMORANDUM ORDER

I. INTRODUCTION

On March 30, 2001, plaintiff Ellis Benjamin filed a complaint in the Superior Court of Delaware alleging violations of the Age Discrimination in Employment Act ("ADEA"), 19 U.S.C. §621, et seq., and the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101, et seq. (D.I. 1, Ex. A) On May 8, 2001, defendant E.I. Dupont de Nemours & Co. removed the action to this court pursuant to 28 U.S.C. §§ 1331 and 1441(a). (D.I. 1) Currently before the court is defendant's motion to dismiss the complaint for failure to timely file a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). (D.I. 2) For the following reasons, defendant's motion is denied.

II. BACKGROUND

Plaintiff was born on May 25, 1946. (D.I. 1, Ex. A) Plaintiff was hired by defendant's Agricultural Products

Division in April 1988 and was terminated from his position as Senior Assistant Chemist on October 31, 1999. (Id.)

Plaintiff alleges that he noticed a "distinct change" in his female supervisor's attitude toward him around April 1, 1999, from "helpful, supportive and congenial" to "petty harassment, accusations, criticism and demeaning treatment."

(Id.) According to plaintiff, the Agricultural Products Division was notified on July 1, 1999 of an impending reduction in personnel, and plaintiff's supervisor was "tasked" to terminate either plaintiff or another "much younger" employee. (Id.) Plaintiff further alleges that, "because of his age and recent time missed for surgery, [he] was intentionally subjected to a humiliating and demeaning course of conduct" used to create inferior performance appraisals to justify his termination. (Id.) Plaintiff claims that the alleged discriminatory conduct began on April 1, 1999 and continued through August 31, 1999. (Id.)

Plaintiff alleges that he filed a charge of discrimination with the EEOC on or about January 13, 2000. (Id.) Plaintiff received a Notice of Right to Sue from the EEOC on January 2, 2001. (Id.)

III. STANDARD OF REVIEW¹

In analyzing a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court must accept as true all material allegations of the complaint and it must construe the complaint in favor of the plaintiff. See Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts, Inc., 140 F.3d 478, 483 (3d Cir. 1998). "A complaint should be dismissed only if, after accepting as true all of the facts alleged in the complaint, and drawing all reasonable inferences in the plaintiff's favor, no relief could be granted under any set of facts consistent with the allegations of the complaint." Id. Claims may be dismissed pursuant to a Rule 12(b)(6) motion only if the plaintiff cannot demonstrate any set of facts that would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The moving party has the burden of persuasion. See Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991).

IV. DISCUSSION

¹Lack of exhaustion and timeliness in discrimination cases are "in the nature of statutes of limitation" and not jurisdictional bars, therefore, they must be reviewed under Federal Rule of Civil Procedure 12(b)(6) and not 12(b)(1). Anjelino v. New York Times Co., 200 F.3d 73, 87 (3d Cir. 1999).

To state a viable claim of discrimination based on age or disability in Delaware, an aggrieved party must file a charge of discrimination with the EEOC within 300 days of the last alleged unlawful employment practice. See 29 U.S.C. §626(d)(2); 42 U.S.C. §12117(a); Davis v. Calgon Corp., 627 F.2d 674, 677 (3d Cir. 1980) (per curiam) (holding that plaintiff in deferral state, such as Delaware, is entitled to 300-day filing period, regardless of whether he has filed state administrative complaint within 180 days after alleged discrimination occurred).

In the case at bar, plaintiff claims that he filed a handwritten charge of discrimination on or about January 13, 2000, which was later "perfected" on August 21, 2000. Accepting plaintiff's allegations as true, the court finds that plaintiff provided adequate notice of his claims within 300 days of the last alleged discriminatory occurrence and, therefore, fulfilled the EEOC filing requirement.

V. CONCLUSION

Therefore, at Wilmington, this 22nd day of October, 2001;

IT IS ORDERED that:

1. Defendant's motion to dismiss (D.I. 2) is denied.
2. All motions to join other parties and amend the pleadings shall be filed on or before **December 21, 2001**.

3. All discovery shall be completed on or before **January 21, 2002.**

4. All dispositive motions shall be filed on or before **February 21, 2002.** Responses shall be filed on or before **March 7, 2002.** Reply briefs may be filed on or before **March 21, 2002.**

United States District Judge