

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RONALD W. BREITIGAN,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 02-1333-GMS
)	
STATE OF DELAWARE, et al.,)	
)	
Defendants.)	

MEMORANDUM AND ORDER

I. INTRODUCTION

On July 29, 2002, Ronald W. Breitigan (“Breitigan”) filed the above-captioned action alleging age discrimination in violation of 29 U.S.C. § 623 *et seq.*, the Fair Labor Standards Act of 1938 (“FLSA”), 29 U.S.C. § 201 *et seq.*, and the Due Process Clauses of the Fifth and Fourteenth Amendments.¹ Specifically, Breitigan alleges that the New Castle County Police Department (“the Department”) and the New Castle County Employees’ Retirement System Board of Trustees (“the Trustees”) impermissibly forced him to retire at the age of fifty-five. He has also named the State of Delaware Board of Pension Trustees (“State Board”) as a defendant because he contends that its involvement is required to effectuate his remedy of choice.

Presently before the court are defendants’ motions to dismiss. For the following reasons, the court will grant these motions.

II. BACKGROUND

On June 27, 1988, Breitigan began his employment as a New Castle County Police Officer. He remained with the Department until his retirement on May 22, 2001, which was mandatory

¹Although this case was originally assigned to the Honorable Joseph Farnan, Jr., it was reassigned to the present court on April 9, 2003.

pursuant to New Castle County Code Section 26.04.106(A). Upon his retirement, he received a pension benefit based, in part, on his thirteen years of service with the Department.

Following his termination, he obtained employment with the Delaware Division of Alcohol and Tobacco Control. In this capacity, he is now a member of the State Employee's Pension Plan, which is managed and administered by the State Board. He maintains, however, that his current salary is significantly lower than what he earned as a county policy officer, and he has lost all service credit from his county police service. Thus, when he retires at age sixty-five, he will have thirteen years of pension credit under the county plan and ten years under the State Employees' plan. The present lawsuit seeks to redress this situation, in part, by requesting that his current membership in the State Employees' Plan be consolidated with his prior membership in the County Employees' Retirement System.

III. STANDARD OF REVIEW

The purpose of a motion to dismiss is to test the sufficiency of a complaint, not to resolve disputed facts or decide the merits of the case. *See Kost v. Kozakiewicz*, 1 F.3d 183 (3d Cir. 1993). Thus, in deciding a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court must "accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them." *Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir.1990). In particular, the court looks to "whether sufficient facts are pleaded to determine that the complaint is not frivolous, and to provide defendants with adequate notice to frame an answer." *Colburn v. Upper Darby Tp.*, 838 F.2d 663, 666 (3d Cir.1988). However, the court need not "credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss." *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3rd Cir. 1997). The court will only dismiss a

complaint if “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.”” *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 249-50 (1989) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)). Thus, in order to prevail, a moving party must show “beyond doubt that the plaintiff can prove no set of facts in support of his claim [that] would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

IV. DISCUSSION

A. New Castle County’s Motion to Dismiss

The County seeks to dismiss Breitigen’s first amended complaint because (1) service of process was improper; (2) the Department and the Trustees are non sui juris; and (3) the complaint fails to state a claim. Because the court concludes that the case must be dismissed on the first two grounds, it need not reach the third.

1. Insufficiency of Service

On October 30, 2002, Breitigan served the original complaint against the Department on the County Executive and Chief Administrative Officer. He served his amended complaint, which added the Trustees, on March 6, 2003. Apparently acting pursuant to Federal Rule of Civil Procedure 5, he served the amended complaint on the New Castle County Law Department, rather than on the parties themselves. The Department and the Trustees now maintain that the suit against them must be dismissed for improper service. For the following reasons, the court agrees that service was improper.

While Breitigan is correct that Federal Rule of Civil Procedure 5 permits certain papers and pleadings to be served on the party’s attorney, he must first have effected proper service pursuant to Federal Rule of Civil Procedure 4. He has failed to do so in the present case. Specifically, if, as

Breitigan argues, the Department is a suable entity in and of itself, service of the original complaint must have been effected on the Chief of Police as Chief Executive Officer for the New Castle County Police Department. There is no dispute that the original complaint was served only on the County Executive and Chief Administrative Officer. Accordingly, service of the amended complaint via certified mail to First Assistant County Attorney Megan D'Iorio is clearly improper.

Additionally, the Trustees were not a party to the original complaint. Thus, there can be no dispute that service on their attorney pursuant to Federal Rule of Civil Procedure 5 in the first instance was improper.

2. Non-Suable Entities

Although the court has concluded that service was improper as to both the Department and the Trustees, its decision to dismiss the case against them need not rest solely on the lack of proper service. Rather, the court further finds that neither the New Castle County Police Department nor the Trustees are suable entities.

The question of a state entity's amenability to suit is governed by state law. FED. R. CIV. P. 17(b). Furthermore, "if the board or department is not a corporate body it cannot be sued as such, e.g., a police board, a board of workhouse directors, a board of park commissions, a housing authority, or a board of public works" 3 EUGENE MCQUILLAN, THE LAW OF MUNICIPAL CORPORATIONS, § 12.40 (1990).

In the present case, as is made clear by the New Castle County Code, the New Castle County Police Department and Trustees are not separate entities for purposes of suit, but rather, are distinct departments or entities of the County government itself. *See* DEL. CODE ANN. tit. 9, §§ 1331, 1332, 1384 (setting forth the duties and powers of the Department and the Trustees, but failing to list a

provision for suing or being sued); NCCC §§ 2.05.200, 2.05.505. Additionally, the court finds that neither the Department nor the Trustees took action to terminate Breitigan's employment. Indeed, the Trustees did not act until Breitigan voluntarily filed his pension application on October 31, 2001. The Trustees then processed this application in accordance with the terms of the County Code. The Trustees have no authority to deviate from the terms of the Code, and simply, as a ministerial matter, authorized Breitigan's pension application. Furthermore, Breitigan's employment was terminated by the New Castle County government as an administrative matter consistent with the terms of the current New Castle County Code, specifically, Merit System Rules Pension Plan, Div. 26.03.900 Separation and Disability, § 26.03.908 Retirement. Nothing on these facts even arguably demonstrates that the Department or the Trustees could be considered a corporate body separate and apart from the County government itself.

As the Department and Trustees are non sui juris, this action must be dismissed as to them. In so holding, however, the court expresses no opinion on the merits of this action were Breitigan to name the proper entity as a defendant.

B. The State of Delaware's Motion to Dismiss

The State Board controls and manages the Delaware Public Employees' Retirement System, which in turn controls and manages the funds for numerous public employee pension and retirement plans. *See* DEL. CODE ANN. tit. 29, § 8308. Included in its control are the State Employees' Pension plan, and the County and Municipal Police/Firefighter Retirement Fund. The State Board also manages the County and Municipal Employees' Retirement Fund, which covers all non-police county employees.

As Breitigan acknowledges, the crux of his complaint is "the wrongful conduct by the

County Defendants in terminating his employment and cutting off his salary and pension rights.” As redress for this alleged wrong, he seeks to consolidate his current membership in the State Employees’ Plan with his prior membership in the County Employees Retirement System. It is as a result of this desire to consolidate his retirement benefits that he seeks a declaratory judgment against the State Board. For the following reasons, however, the court concludes that Breitigan’s declaratory judgment claim must fail.

Article III, Section 2 of the United States Constitution requires the existence of an actual case or controversy before a federal court may exercise jurisdiction over a matter. In order to determine the difference between a hypothetical question and an actual controversy in an action for declaratory judgment, the “question is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). The Court of Appeals for the Third Circuit has formulated the following three-part test to determine whether sufficient “ripeness” exists for the purposes of a declaratory judgment: (1) whether the parties’ interests are adverse, (2) whether a judicial judgment would be conclusive as to rights; and (3) the practical help, or utility of that judgment. *Step-Saver Data Systems, Inc. v. Wyse Technology*, 912 F.2d 643, 647 (3d Cir. 1990).²

²In *Abbott Labs v. Gardner*, 387 U.S. 136 (1967), the Supreme Court established a two-part test for determining whether a prayer for a declaratory judgment is ripe. Specifically, the Court directed lower courts to consider (1) “the fitness of the issues for judicial decision” and (2) “the hardship to the parties of withholding court consideration.” *Id.* at 149. Contrary to Breitigan’s assertions, however, the Third Circuit’s *Step-Saver* test is not a separate and distinct test from that described in *Abbott Labs*, but is merely a refinement of the *Abbott Labs* test. See *Philadelphia Fed. of Teachers v. Ridge*, 150 F.3d 319, 323, n.4 (3d Cir. 1998) (explaining that the Third Circuit’s refinement simply alters the headings under which various factors are placed).

1. Adversity of Interests

In order for Breitigan to satisfy the adversity requirement of the ripeness test, he must show either (1) present adversity of legal interests between the parties; or (2) immediacy and reality of future harm. *See Moore Corp. Ltd. v. Wallace Computer Srvs., Inc.*, 898 F. Supp. 1089, 1095 (D. Del. 1995). In the present case, no adversity of legal interest exists between the State Board and Breitigan. He has not applied for eligibility for retirement pension benefits from his past New Castle County employment, nor from his current Delaware Division of Alcohol and Tobacco Control employment. Indeed, in his opposition brief, he states that, “[a]ssuming that the State Board takes the position that it should administer the State Employees’ Plan as written, it necessarily must take an adverse legal interest from the plaintiff regarding his pension rights.” *See* D.I. 46 at 6 (emphasis added). Therefore, Breitigan himself acknowledges that it is unclear at the present time how the State Board will act when called upon to determine his retirement benefits. Thus, any adversity between the parties on the facts of the present dispute is purely hypothetical at this point.

Finally, Breitigan has made no allegation that he has, or will, in the immediate future, apply for pension benefits from the State Board. Thus, there is no immediacy and reality of future harm.

2. Conclusivity of Judicial Decree

The second part of the *Step-Saver* test requires the court to consider whether any decision it makes will conclusively define and clarify the legal rights of the parties, or whether its decision would amount to no more than an advisory opinion. *See Step-Saver*, 912 F.2d at 648. For the following reasons, the court concludes that any decision in this case would be tantamount to an

impermissible advisory opinion.

Breitigan's requested declaratory judgment against the State Board would only determine his eligibility to a state pension based on the years he spent employed at his respective jobs to the present time. The court cannot account for all future contingencies that may occur between now and the day Breitigan retires from public service. As such, even were the court to find that the New Castle County Police Department had impermissibly forced Breitigan into retirement, and that the State Board should thus adjust his pension plan to account for County's actions, at the present time, there is no way of knowing how long Breitigan will actually remain in the employ of the State. It is apparent then, that for the court to entertain this declaratory judgment action would merely be advising Breitigan of his rights upon a hypothetical state of facts.

3. Utility

To satisfy the final *Step-Saver* prong, the court must find that its decree will be useful in the sense that it will affect the parties' plans or actions. *See Step-Saver*, 912 F.2d at 649, n.9. In the present case, the court finds that Breitigan's declaratory judgment action fails to satisfy this prong of the *Step-Saver* test as well. Specifically, Breitigan himself states in his opposition brief that, "[t]he main thrust of [his] claims is the wrongful conduct by the County Defendants in terminating his employment and cutting off his salary and pension rights. The State Board fails to discuss the fact that [his] separate claims against the County Defendants will continue with or without the State Board's involvement." D.I. 46 at 9. As Breitigan acknowledges that his action against the State Board will have little, if any, effect on the gravamen of his complaint, the court must find that no useful purpose would be served by entertaining a declaratory judgment action against the State Board at this time.

V. CONCLUSION

For the aforementioned reasons, IT IS HEREBY ORDERED that:

1. The New Castle County Police Department and Employees Retirement System Board of Trustees' Motion to Dismiss (D.I. 36) is GRANTED.
2. The State of Delaware Board of Pension Trustees' Motion to Dismiss (D.I. 42) is GRANTED.
3. With regard to his allegations against New Castle County, Breitigan shall amend his complaint to reflect suit against the proper entity within fifteen (15) days of the date of this order.
4. Should Breitigan fail to timely amend his complaint, the above-captioned action shall be dismissed, with prejudice.

Dated: July 16, 2003

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE