

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL DIVISION

MARY HOROWSKI, :
 :
 Plaintiff :
 :
 Vs. : No. 13-0813
 :
 BLUE MOUNTAIN HEALTH SYSTEMS :
 and GNADEN HUETTEN CAMPUS :
 :
 Defendants :

Donald P. Russo, Esquire Counsel for Plaintiff
Vincent Candiello, Esquire Counsel for Defendant

MEMORANDUM OPINION

Matika, J. - November , 2013

This set of Preliminary Objections, filed by the Defendants, Blue Mountain Health System and Gnadden(sic) Huetten Campus, (hereinafter collectively "BMHS"), is the fourth set of challenges to the original complaint and three subsequent amended complaints filed by the Plaintiff, Mary Horowski (hereinafter "Horowski").¹ For the reasons stated herein, the Court grants these preliminary objections and dismisses Horowski's complaint in its entirety with prejudice.

¹ The first set of preliminary objections in the nature of a Motion to Dismiss was filed in federal court on November 9, 2012 after this case was removed from Lehigh County Court of Common Pleas to the United States District Court for the Eastern District of Pennsylvania on November 5, 2012. The other sets of preliminary objections have been filed since this case was returned to state court by Order of Court dated December 14, 2012.

FACTUAL AND PROCEDURAL BACKGROUND

On November 30, 2011, Horowski filed a praecipe for writ of summons in Lehigh County; on January 10, 2012, this writ was re-issued. Thereafter, on September 26, 2012, Horowski filed her original complaint in Lehigh County. In the complaint, Horowski alleged that BMHS acted in violation of: the Federal Age Discrimination in Employment Act,² Federal Americans with Disability Act,³ and the Pennsylvania Human Relations Act (PHRA).⁴ These claims all stemmed from the manner in which BMHS is alleged to have discriminated against Horowski due to her then age, sixty-one, and physical disabilities, that being, degenerative joint disease, arthritis of both hands, diabetes, heart and lung issues, and breast cancer. Horowski claims that BMHS's three (3) day suspension of her was a result of her age and physical disabilities, thus such suspension violated these various statutes.

On or about November 5, 2012, BMHS filed a notice of removal of this action from state court to the United States District Court for the Eastern District of Pennsylvania in accordance with 28 U.S.C.A. § 1446. Thereafter on November 9, 2012, BMHS filed a motion to dismiss in the form of a 12(b)(6)

² 29 U.S.C.A. § 621 et seq.

³ 42 U.S.C.A. § 12101 et seq.

⁴ 43 P.S. § 951 et seq.

motion, failure to state a claim upon which relief can be granted. See, F.R.C.P. 12(b)(6).

In response, Horowski filed her first amended complaint in federal court on November 26, 2012. As a result, the Honorable Judge Jan E. DuBois denied the motion to dismiss as moot since Horowski filed an amended complaint; however, since the amended complaint no longer alleged violations of any federal law, the matter was remanded to state court in Lehigh County.

Subsequently, on January 30, 2013, BMHS filed another set of preliminary objections to Horowski's first amended complaint. In these preliminary objections BMHS challenged Horowski's claims due to the legal insufficiency of both her age discrimination and disability discrimination claims. Additionally, BMHS challenged Lehigh County as the proper venue for this matter given the fact that Horowski resided in Carbon County and the Defendant, BMHS only regularly conducted business in Carbon County.

On February 19, 2013, Horowski filed a second amended complaint prior to the Lehigh County Court having an opportunity to address BMHS's preliminary objections. In count one of this two-count amended complaint, Horowski alleged that she was terminated from her employment due to her age, and at the same time referenced her age as the basis for the three (3) day

suspension levied against her. In the second count, Horowski claims that her physical disabilities also played a part in her suspension and termination.

BMHS, in reply, filed yet another set of preliminary objections on March 11, 2013. In this set of preliminary objections, BMHS claimed Horowski's complaint as to count I, a claim of age discrimination in violation of PHRA, should be dismissed on the basis that she, Horowski, did not exhaust her administrative remedies under the Act as it relates to her termination from employment, and further that this count should also be dismissed on the grounds of being legally insufficient. BMHS made the identical argument as it related to count II of the amended complaint. Additionally, Defendant reiterated its objection to Lehigh County being the proper county to preside over this matter.

On April 3, 2013, the parties stipulated that Lehigh County was not the correct forum to hear this case, and accordingly the Honorable Judge Douglas Reichley ordered the matter be transferred to Carbon County. On May 3, 2013, Carbon County assumed this matter.

By agreement on May 10, 2013, the parties stipulated to allow BMHS to file amended preliminary objections to the second amended complaint, which it did on May 20, 2013. In the amended

set of preliminary objections, BMHS simply eliminated its objection to venue as venue was no longer an issue, but again asserted that Horowski's amended complaint should be dismissed for failure to exhaust all administrative remedies and for failure to state claim upon which relief may be granted.

On June 27, 2013, this Court heard argument on Defendant's amended preliminary objections. At the argument, Plaintiff's counsel represented to the Court and opposing counsel that Plaintiff would no longer be pursuing an age discrimination claim, and consequently would be withdrawing count one of the second amended complaint. The Court, in response to Plaintiff's oral withdrawal of count one denied Defendant's preliminary objections to this count as moot.

In regards to Defendant's preliminary objections to count II, whereby BMHS argued that Plaintiff has failed to exhaust her administrative remedies with respect to her claim that her termination from employment was the result of discrimination based upon her physical disabilities, Plaintiff acknowledged, at the argument, that there was a typographical error in her second amended complaint. The complaint should have only alleged that her suspension by BMHS was a direct result of her perceived disability.⁵ In response, Defendant acknowledged that Plaintiff

⁵ Moreover, Plaintiff's counsel informed the Court that Horowski was never in fact terminated from her employment with BMHS, but actually recently retired.

did exhaust her administrative remedy for her claim that the suspension was based upon a discriminatory motive.

After the Argument, this Court granted Defendant's preliminary objection on the legal insufficiency issue of count II and directed that Plaintiff "file an amended complaint setting forth the necessary facts to support the cause of action she asserts."⁶

On August 5, 2013, Plaintiff filed her third amended complaint. This latest complaint, which is the subject of these preliminary objections, is now before the Court. Instead of withdrawing count I of the second amended complaint as she indicated she would, Horowski reasserted her age discrimination claim in the third amended complaint. As to count II, Plaintiff added six (6) paragraphs in the third amended complaint that read as follows:

37. Plaintiff had a mastectomy in January 2008 as a result of breast cancer, at which time she took a leave of absence of at least eight weeks.

38. In May 2008, Plaintiff began treatment of chemotherapy for the breast cancer. For that she also took a leave of absence from May 2008 to August 2008.

39. In mid to late 2009, she used her sick days for one month because she had a menial meniscus tear. She was receiving therapy for her knee.

⁶ See this Court's Order dated July 9, 2013. This Court Order also instructed Plaintiff to exclude count I as identified in her second amended complaint, an instruction Plaintiff failed to comply with.

40. Plaintiff believes and therefore avers, that Defendant perceived her as being disabled.

41. Plaintiff believes and therefore avers that because the Defendant perceived her as being disabled, the Defendant wanted her to leave her employment.

42. Plaintiff believes and therefore avers, that as a result of the aforementioned perception of her disabilities, the Defendant began to take steps to tarnish her otherwise good employment record, in order to encourage the Plaintiff to leave her employment.

Thereafter, on August 13, 2013, Defendant filed a responsive pleading in the form of preliminary objections that are now before the Court. This most recent set of objections are as follows:

- 1) Lack of proper verification, a violation of Pennsylvania Rule of Civil Procedure 1024;⁷
- 2) Lack of subject matter jurisdiction pursuant to Pennsylvania Rule of Civil Procedure 1028(a)(1); and
- 3) Legal insufficiency of both counts I and II pursuant to Pennsylvania Rule of Civil Procedure 1028(a)(4).

The Court held argument on this matter on November 1, 2013 and it is now prepared to properly dispose of these preliminary objections.

In its preliminary objections, Defendant argues that the allegations surrounding her claim of age discrimination, as set forth in count I, is not properly before the Court despite this

⁷ On August 12, 2013, Plaintiff filed a substitute verification thereby curing this defect and rendering this preliminary objection moot.

claim being included in this third amended complaint. The Plaintiff does not dispute this argument as she concurred in open court and has outlined such in her brief opposing Defendant's preliminary objections. Thus the preliminary objection to count I, dealing with a claim based upon age discrimination will be sustained and dismissed with prejudice.

As to count II, that being a claim of discrimination by BMHS against Plaintiff for her perceived disabilities, Plaintiff likewise acknowledges that despite the use of the word "termination" in count II, Horowski has failed to exhaust her administrative remedies that her termination of her employment was a direct result of BMHS discriminating against her. Therefore, the only true claim raised in count II of the amended complaint is a claim that the Plaintiff was given a three (3) day suspension as a result of her disabilities.

The question the Court is presented with is: whether or not, after being given several opportunities to do so, has the Plaintiff plead sufficient facts to support a claim for disability discrimination by BMHS.

LEGAL DISCUSSION

Pennsylvania Rule of Civil Procedure 1019(a) states that "[t]he material facts on which a cause of action or defense is based shall be stated in a concise and summary form." "Preliminary objections in the nature of a demurrer test the

legal sufficiency of the complaint." *Feingold v. Hendrzak*, 15 A.3d 937, 941 (Pa. Super. Ct. 2011). "Preliminary objections in the nature of a demurrer should be sustained only if, assuming the averments of the complaint to be true, the Plaintiff has failed to assert a legally cognizable cause of action." *Lerner v. Lerner*, 954 A.2d 1229, 1234 (Pa. Super. Ct. 2008) (citation omitted). Pennsylvania, being a fact pleading state, requires a complaint to provide a defendant with notice of what the plaintiff's claim is and the ground upon which it rests; additionally, the complaint shall formulate the issues by summarizing those facts essential to support the claim or claims asserted. *Zitney v. Appalachian Timber Products, Inc.*, 72 A.3d 281, 290 (Pa. Super. Ct. 2013).

In order to properly plead a *prima facie* case of discrimination based on disabilities pursuant to the Pennsylvania Human Relations Act, 43 P.S. § 951 et seq., the Plaintiff must show:

- 1) She belongs to a protected class;
 - 2) She was qualified for the position;
 - 3) She was subject to an adverse employment action; and
 - 4) The adverse actions occurred under circumstances that raise an inference of discriminatory action.
- Frinter v. TruePosition*, 892 F. Supp. 2d 699, 708 (E.D. Pa. 2012) (citing *Sarullo v. United States Postal Services*, 352 F.3d 789, 797 (3d Cir. 2003)).

The Court finds that Plaintiff has satisfied her burden with respect to the first three elements as follows:

- 1) She has alleged a variety of disabilities as outlined in her complaint thus making her a member of a protected class;⁸
- 2) She avers that she had been employed by BMHS for over twenty years as a registered nurse and is therefore qualified for that position; and
- 3) She complains that she was subject to an adverse employment action, to wit: A three (3) day suspension.⁹

The Court now turns to the fourth and most critical element: the casual connection between Plaintiff's disabilities and the adverse employment action taken by Defendant. In this Court's Order dated July 9, 2013, Plaintiff was ordered to file an amended complaint, and more specifically mandated to "[set] forth the necessary facts to support the cause of action she asserts" in count II. (Emphasis added). The basis for this, as outlined in the footnote thereto, was due to the failure of Plaintiff in her second amended complaint to prove that her disability was the "but for" cause of Defendant's adverse decision as required by *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 654 (2008). In other words, the complaint needed

⁸ See, 42 U.S.C.A. § 12102.

⁹ In finding that Plaintiff has met her burden for the first three elements, it is noted that for purposes of this motion Defendant did not contest these finding fact and conclusions of law.

to be amended to provide Defendant with a factual basis to support the conclusion that Plaintiff's disabilities were the determinative reason why Defendant suspended her for three (3) days.

As previously referenced, Plaintiff added six (6) paragraphs to count II of her third amended complaint. In the first three (3) of these additional paragraphs, Plaintiff identifies physical ailments and treatments thereto, along with facts indicative of her being required to take time off as a result thereof. In paragraph 40, Plaintiff alleged that she "believe[d] and therefore aver[red] that Defendant perceived her as being disabled." Even if the Court accepts this as true, as it must for purposes of these objections, this does not give rise to any causal connection between the Plaintiff's disabilities and Defendant's suspension of Plaintiff.

In paragraph 41, Plaintiff adds the statement that "because the Defendant perceived her as being disabled, the Defendant wanted her to leave her employment." This averment is prefaced with "Plaintiff believes" suggestive of Plaintiff's subjective thought that Defendant wanted her to leave her employment.

Lastly, in paragraph 42, Plaintiff inserted verbiage that read, "Defendant began to take steps to tarnish her otherwise good enrollment record, in order to encourage the Plaintiff to leave her employment." The prelude to this averment was

"Plaintiff believes," and thus is likewise indicative of what Plaintiff thought the Defendant was trying to do to her, that being terminate her because of her disabilities.

Most importantly, nowhere in these six additional paragraphs does Plaintiff make the connection between Plaintiff's disabilities and the adverse employment action taken by BMHS. These additional averments are Plaintiff simply conjecturing to what the reasons were for her suspension. She provides no factual basis, such as examples of types of conduct engaged in by Defendant, to demonstrate that BMHS either forced her to leave her employment or encourage her to leave her employment. In fact the only reference to any connection between Defendant's conduct and a basis for Plaintiff's suspension is contained in paragraphs twelve and thirteen where it is averred that Horowski made a comment about a co-worker being able to take a lunch break and she was not, and thus that comment, uttered in the presence of a state inspector was "part" of the reason she was suspended.¹⁰ No other references to facts connecting "point A," Plaintiff's disabilities, to "point B," suspension, were ever plead.

Plaintiff also alleged that she should be permitted to establish this requisite "but for" causal connection through

¹⁰ Furthermore, the Court notes that the tone of these two averments go towards establishing an age discrimination claim rather than a disability claim as evident by Plaintiff's statement that "younger employees [] were allowed to take lunch that day."

appropriate discovery. This argument, however, is meritless. While Pennsylvania Rule of Civil Procedure 4003.8 allows "[a] plaintiff [to] obtain pre-complaint discovery where the information sought is material and necessary to the filing of the complaint," Plaintiff has made no such request of discovery upon Defendant. Instead, Horowski filed the original complaint after simply requesting the issuance of a writ of summons.

Even despite filing three amended complaints, Plaintiff has never sought pre-complaint discovery. Now, after four failed attempts at establishing a *prima facie* case she is praying to this Court for an opportunity to conduct post-pleading discovery to establish this *prima facie* case after the fact. This, however, the Court is not willing to do so. The time to establish a *prima facie* case is not during post-pleading discovery, but rather during the pleading stage and most notably in the complaint. Plaintiff in her complaint was required, but failed, to plead the necessary facts to allege a cognizable cause of action based upon a claim of disability discrimination. The Court agrees that post-pleading discovery would be appropriate for Horowski to conduct to bolster or support her cause of action, but not to establish her claim.

Absent a factual basis to satisfy the final element of the McDonnell Douglas analytic model, the Court will not take the giant leap Plaintiff desires it to take in connecting her

perceptions and beliefs that Defendant discriminated against her based on her disabilities and the adverse employment action she suffered. Plaintiff's complaint is devoid of the necessary facts to support her argument.

Lastly, the Court agrees with Defendant insofar as Plaintiff has had numerous attempts to rectify the deficiencies in her complaint. "The right to amend should not be withheld where there is some reasonable possibility that amendment can be accomplished successfully." *Tucker v. Philadelphia Daily News*, 848 A.2d 113, 136 (Pa. 2004) (quoting *Otto v. American Mutual Ins. Co.*, 393 A.2d 450, 451 (Pa. 1978)). Where allowance of an amendment would, however, be a futile exercise, the complaint may be properly dismissed without allowance of amendment. *Nationwide Mutual Ins. Co. v. Barbera*, 277 A.2d 821 (Pa. 1971). Here, Horowski has filed four complaints and in each complaint she has unsuccessfully plead sufficient facts to meet her low threshold burden of establishing a cognizable cause of action. Normally, three strikes and a batter is out; here, Plaintiff had four and shall not be afforded any more.

CONCLUSION

Based on the foregoing the Court enters the following Order accordingly:

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Donald P. Russo, Esquire Counsel for Plaintiff
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ORDER OF COURT

AND NOW, this day of November, 2013, upon consideration of Defendant's amended preliminary objections to Plaintiff's third amended complaint and brief in support thereof, Plaintiff's answer and accompanying brief, and after argument thereon, it is hereby **ORDERED** and **DECREED** that Defendant's preliminary objections in the nature of demurrer is **GRANTED** and Plaintiff's complaint is **DISMISSED** with **prejudice**.

BY THE COURT:

Joseph J. Matika, J.