13.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

TRAVIS V. MANGUM,

Plaintiff,

v.

POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, JOHN POTTER,

Defendant.

FILED
NOV 14 2003
IN THIS OFFICE
U.S. District Court
Greensboro, N. C.
By

1:02CV00561

MEMORANDUM OPINION

OSTEEN, District Judge

Plaintiff Travis V. Mangum filed this action against Defendant John E. Potter, the Postmaster General, alleging that Plaintiff was discriminated against in retaliation for assisting a fellow employee in filing a discrimination complaint in violation of section 704 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3. Plaintiff also asserts claims under 42 U.S.C. § 1981, as well as state law claims for intentional infliction of emotional distress, negligent infliction of emotional distress, and negligent supervision. This matter is now before the court on Defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment. For the reasons stated herein, Defendant's motion to dismiss will be granted.

I. FACTUAL BACKGROUND

Plaintiff Travis V. Mangum, a black male, was employed by the United States Postal Service as a distribution clerk in a Guilford County, North Carolina, facility. Plaintiff began his employment in April 1993. At various times during his employment, Plaintiff has served as a union steward for the American Postal Workers Union. Among his duties as union steward, Plaintiff was available to assist his fellow employees should they file an equal employment opportunity ("EEO") complaint.

In 1998, one of Plaintiff's co-workers filed an EEO complaint asserting discrimination claims against Bobby J. Thompson ("Thompson"), the supervisor of distribution operations at the plant. The complainant listed Plaintiff as her EEO representative. Prior to this event, Thompson was not Plaintiff's supervisor, but around this time Thompson petitioned the plant manager to reassign Plaintiff to his unit.

Plaintiff alleges that once he was under Thompson's supervision, Thompson began a program of harassment in retaliation for Plaintiff's assistance in the EEO complaint of his co-worker and for filing EEO complaints on his own behalf. Specifically, Plaintiff alleges that Thompson would not allow Plaintiff to use the restroom without his permission. Plaintiff also asserts that Thompson took Plaintiff's time card, demanded

that Plaintiff make perfect time card rings, and then chastised him when he failed to do so. Plaintiff also alleges that Thompson harassed him by refusing to answer his questions or give necessary directions for Plaintiff to perform his duties and avoid discipline.

Additionally, Plaintiff contends that Thompson refused to allow Plaintiff to wear tank top shirts to work while permitting other employees to do so. Moreover, Plaintiff asserts that he was prohibited from taking any breaks or scheduled breaks similar to that of other employees. Plaintiff further alleges that Thompson required Plaintiff to inform him of his location in the plant at all times, that Thompson spied on and watched Plaintiff, that Thompson physically escorted Plaintiff from place to place within the plant, and that Thompson would get in Plaintiff's way and invade his "personal space." (Compl. at 6.) Lastly, Plaintiff asserts that Thompson required Plaintiff to undergo a psychological evaluation "as a condition of returning to gainful employment." (Id.)

Beginning in April 1999, Plaintiff initiated a series of EEO complaints regarding most of these allegations. On February 22, 2002, an administrative law judge found for the postal service on all issues, and on April 8, 2002, the agency issued its notice of final action implementing that decision. Plaintiff commenced this action on July 9, 2002.

II. PLAINTIFF'S TITLE VII CLAIMS

A. Exhaustion of Administrative Remedies

Defendant moves to dismiss some of Plaintiff's claims pursuant to Federal Rule of Civil Procedure 12(b)(1) on the grounds that this court lacks subject matter jurisdiction because of Plaintiff's failure to timely exhaust his administrative remedies. When a defendant's motion to dismiss challenges a federal court's subject matter jurisdiction pursuant to Rule 12(b)(1), the plaintiff bears the burden of proving that such jurisdiction exists. Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982). A court should dismiss an action for want of subject matter jurisdiction "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." Evans v. B.F. Perkins Co., 166 F.3d 642, 647 (4th Cir. 1999) (quoting Richmond, Fredericksburg & Potomac R.R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991)). In ruling on a motion to dismiss for lack of subject matter jurisdiction, the court may consider materials beyond the bare pleadings. Evans, 166 F.3d at 647.

A federal employee must exhaust his administrative remedies before bringing a Title VII action in district court. Long v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc., 9 F.3d 340, 343 (4th Cir. 1993) (citing Brown v. General Servs. Admin., 425 U.S. 820, 832, 96 S. Ct. 1961, 1967 (1976)). First, an employee

is obligated to contact an EEO counselor within 45 days of any discriminatory acts and attempt to reach an informal resolution of the situation. 29 C.F.R. § 1614.105(a)(1). If the complaint cannot be resolved informally, the EEO counselor must conduct a final interview and inform the complainant of his right to file a formal complaint within 15 days of the notice. Id. § 1614.105(d). After this notice, the employee is required to further pursue the matter administratively before he can file a civil action. See 42 U.S.C. § 2000e-16(c).

These exhaustion requirements are more than mere technicalities; rather, they are an essential part of the congressional design for vesting in federal agencies and officials the "primary responsibility" for maintaining nondiscrimination in employment. Plowman v. Cheney, 714 F. Supp. 196, 199 (E.D. Va. 1989) (citing Kizas v. Webster, 707 F.2d 524, 544 (D.C. Cir. 1983)). Courts have consistently dismissed Title VII actions where the plaintiff failed to exhaust administrative remedies in a timely manner, reasoning that the failure to exhaust these remedies deprives the court of jurisdiction to adjudicate the Title VII claim. Davis v. North Carolina Dep't of Correction, 48 F.3d 134, 137, 140 (4th Cir. 1995); Woodward v. Lehman, 717 F.2d 909, 914 (4th Cir. 1983); see also Benford v. Frank, 943 F.2d 609, 612 (6th Cir. 1991).

Plaintiff has significant familiarity with the administrative procedures for pursuing discrimination claims.[1] Despite his experience, several of Plaintiff's claims were not raised through the administrative process. Defendant points to eight EEO filings made by Plaintiff in 1999 that contain a variety of allegations of discrimination. Four of the alleged acts of retaliation in Plaintiff's complaint do not, however, appear in any of these earlier EEO filings.[2] Plaintiff, who bears the burden of proof on jurisdictional matters, presents no evidence that he exhausted his administrative remedies as to these four allegations. As such, the court is without subject matter jurisdiction over these allegations and Defendant's motion to dismiss will be granted with respect to these claims.

B. Adverse Employment Action

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[1] For example, in March 2001, Plaintiff filed an action against Thompson and another manager, Nicholas Rinaldi, asserting claims similar to those presented in the instant case. Mangum v. Rinaldi, 1:01CV243, slip op. at 1 (M.D.N.C. Aug. 27, 2002). Although Plaintiff acknowledged his familiarity with the EEO administrative process, this court dismissed his claims for failure to exhaust his administrative remedies. Id. at 9-10.

[2] The four allegations from Plaintiff's complaint that do not appear in any EEO complaint are (1) that Thompson would refuse to answer Plaintiff's questions or give directions necessary for Plaintiff to perform his duties; (2) that Thompson would physically escort Plaintiff from place to place within the facility; (3) that Thompson would "spy upon, lear [sic] at and watch the plaintiff from a distance," (Compl. at 5); and (4) that Thompson would position himself in Plaintiff's path and "get in the plaintiff [sic] face and invade the plaintiff's personal space." (Id.)

Defendant further asserts that Plaintiff's remaining Title VII claims should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. A court should dismiss a case for failure to state a claim upon which relief can be granted "only in very limited circumstances." Rogers v. Jefferson-Pilot Life Ins. Co., 883 F.2d 324, 325 (4th Cir. 1989). When considering a motion to dismiss, the court must evaluate the complaint in the light most favorable to the plaintiff, accepting as true all well-pleaded factual allegations. Randall v. United States, 30 F.3d 518, 522 (4th Cir. 1994). Dismissal should not be granted "unless it appears certain that the plaintiff can prove no set of facts which would support its claim and would entitle it to relief." Mylan Labs., Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993).

To state a prima facie case of discriminatory retaliation under 42 U.S.C. § 2000e-3,[3] a plaintiff must prove (1) he engaged in a protected activity; (2) the employer took adverse employment action against him; and (3) a causal connection existed between the protected activity and the adverse action. Thompson v. Potomac Elec. Power Co., 312 F.3d 645, 650 (4th Cir. 2002);

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[3] Title 42 U.S.C. § 2000e-3(a) makes it unlawful for "an employer to discriminate against any of his employees . . . because [the employee] has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding or hearing under [Title VII]."

Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir. 1996).

An employment discrimination plaintiff need not, however, plead this prima facie case in order to survive a motion to dismiss. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515, 122 S. Ct. 992, 999 (2002). All that is required is a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), giving the opposing party "fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 103 (1957). Even under these relatively modest pleading standards, however, a court may 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." Hishon v. King & Spaulding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232 (1984). Here, Defendant asserts that no relief can be granted because Plaintiff has alleged nothing that rises to the level of an adverse employment action as a matter of law.

The Fourth Circuit has held that "an adverse employment action includes any retaliatory act 'if, but only if' that act adversely affected the 'terms, conditions, or benefits'" of a plaintiff's employment. Thompson, 312 F.3d at 650-51 (quoting Von Gunten v. Maryland 243 F.3d 858, 866 (4th Cir. 2001)). While adverse employment actions include more than ultimate employment

decisions (such as those to hire, fire, or promote), Von Gunten, 243 F.3d at 864-65, they do not include "ordinary workplace strife." Matvia v. Bald Head Island Mgmt., Inc., 259 F.3d 261, 272 (4th Cir. 2001); see also Murray v. City of Winston-Salem, 203 F. Supp. 2d 493, 499 (M.D.N.C. 2002) ("Title VII does not provide a remedy for every instance of verbal or physical harassment in the workplace.") (quoting Lissau v. Southern Food Serv., Inc., 159 F.3d 177, 183 (4th Cir. 1998)); Settle v. Baltimore County, 34 F. Supp. 2d 969, 989 (D. Md. 1999) ("[N]ot everything that makes an employee unhappy is an actionable adverse action.") (quoting Montandon v. Farmland Indus., Inc., 116 F.3d 355, 359 (8th Cir. 1997)).

Defendant argues that none of the alleged acts of discrimination pointed to by Plaintiff amount to an adverse employment action. Because none of the acts adversely affect the terms, conditions, or benefits of Plaintiff's employment, the court agrees.

The enforcement of a generally applicable employment policy is not an adverse employment action, because the terms, conditions, or benefits of employment usually do not include immunity from such policies. See Von Gunten, 243 F.3d at 869. Thus, when Thompson demanded that Plaintiff follow rules about what to wear, when to take his breaks, or how to make his clock rings, he was not subjecting Plaintiff to an adverse employment

action. The application of such general policies does not adversely affect the terms, conditions, or benefits of Plaintiff's employment. See Matvia, 259 F.3d at 272 (holding that the application of time record policies to employee was not an adverse employment action); Von Gunten, 243 F.3d at 869 (finding no adverse employment action when the employer closely scrutinized the employee's sick leave and demanded that she provide documentation for future absences). Because these claims do not reach the level of adverse employment action, they must be dismissed for failure to state a claim upon which relief can be granted.[4]

Plaintiff also alleges that Defendant retaliated against him by forcing him to undergo a psychological evaluation as a condition of returning to work. The Fourth Circuit has already decided, however, that a forced psychological evaluation, even in combination with other alleged acts of discrimination, does not rise to the level of an adverse employment action. Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 755 (4th Cir. 1996).

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[4] Plaintiff maintains that the manner in which Thompson implemented these policies constitutes an adverse employment action. He alleges that other employees were not subject to such restrictions on their breaks or attire. This disparate enforcement of the policies "might be evidence of pretext, but it is not evidence of adverse employment action." Von Gunten v. Maryland, 243 F.3d 858, 869 (4th Cir. 2001) (citing Delli Santi v. CNA Ins. Cos., 88 F.3d 192, 200 (3d Cir. 1996)); see also Matvia v. Bald Head Island Mgmt., Inc., 259 F.3d 261, 272 (4th Cir. 2001).

Plaintiff's claim that he was forced to undergo a psychological evaluation, therefore, is insufficient to state a claim upon which relief can be granted and must also be dismissed.[5]

Plaintiff describes numerous other job occurrences from 1999 which he asserts constitute adverse employment action. Among these allegations are claims that Thompson took Plaintiff's time card, that he refused to answer Plaintiff's questions, that he escorted Plaintiff from place to place in the facility or required Plaintiff to keep him informed of his whereabouts at all times, that he spied on and watched Plaintiff, and that he got in Plaintiff's way and invaded his personal space. These actions, however irritating to Plaintiff, do not rise to the level of adverse employment action because they do not adversely affect the terms, conditions, or benefits of Plaintiff's employment.

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[5] Even if Plaintiff's allegation did constitute an adverse employment action, Defendant would be entitled to summary judgment on this claim, because he presents evidence showing that there was a legitimate, nondiscriminatory reason for the action. Such a showing by Defendant rebuts Plaintiff's prima facie case and places the burden on Plaintiff to show that Defendant's proffered reasons are pretextual. Munday v. Waste Mgmt. of N. Am., Inc., 126 F.3d 239, 242 (4th Cir. 1997). Here, Plaintiff has presented no such evidence, even though he was on notice that Defendant's motion to dismiss might also be treated as a motion for summary judgment, both based on the language of Rule 12(b) and the caption of Defendant's motion. See Fed. R. Civ. P. 12(b) (allowing courts to treat motions under Rule 12(b)(6) as motions for summary judgment if the moving party presents evidence which the court accepts); Laughlin v. Metropolitan Washington Airports Auth., 149 F.3d 253, 261 (4th Cir. 1998) (holding that the court "does not have an obligation to notify parties of the obvious" when it will convert a motion to dismiss into a motion for summary judgment).

The Fourth Circuit has never held that Title VII exists to mandate civility in the workplace. Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999) ("Congress did not intend Title VII to provide redress for trivial discomforts endemic to employment."). For example, in Munday v. Waste Management of North America, Inc., the court concluded that an employer instructing its employees to ignore and spy on the plaintiff, in addition to her manager yelling at her, did not constitute adverse employment action since there was no evidence that the terms, conditions, or benefits of her employment were affected. 126 F.3d 239, 243 (4th Cir. 1997). In Von Gunten, the court held that Plaintiff had not demonstrated an adverse employment action, when, among other things, she asserted that another employee followed her around and questioned her activities. 243 F.3d at 869. Plaintiff has not suggested that his pay was reduced, that he was demoted, or that in any other way the terms, conditions, or benefits of his employment were adversely affected, and, as such, he has failed to state a claim upon which relief can be granted based on these assertions. See Thompson v. Potomac Elec. Power Co., 312 F.3d 645, 651-52 (4th Cir. 2002).

III. PLAINTIFF'S NON-TITLE VII CLAIMS

In enacting Title VII, Congress intended to create "an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination." Brown v. General Servs. Admin., 425 U.S. 820, 829, 96 S. Ct. 1961, 1967 (1976). Holding that Title VII was to be the exclusive remedy for discrimination claims arising from federal employment, the Court in Brown upheld the dismissal of the employee's non-Title VII claims. Id. at 832-33, 835, 96 S. Ct. at 1968, 1969. Based on the Supreme Court's holding in Brown, lower courts have dismissed state and federal law claims for discrimination brought by federal employees on the grounds that Title VII provides their exclusive remedy. See, e.g., Owens v. United States, 822 F.2d 408, 410 (3d Cir. 1987) (dismissing § 1983 claim as preempted by Title VII); Gibson v. Henderson, 129 F. Supp. 2d 890, 903 (M.D.N.C. 2001) (dismissing state claims of intentional and negligent infliction of emotional distress); Schroder v. Runyon, 1 F. Supp. 2d 1272, 1279 (D. Kan. 1998) (dismissing state law retaliation claim), aff'd, 161 F.3d 18 (10th Cir. 1998).

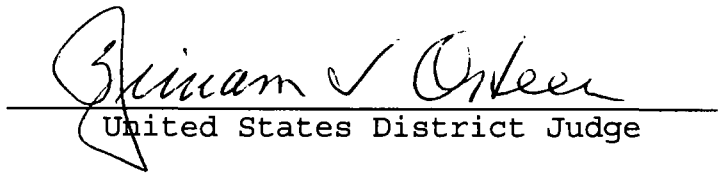
Here, Plaintiff makes no factual distinction between his Title VII claims and his non-Title VII claims under § 1981 and state law. Since Title VII provides the exclusive remedy for Plaintiff's claims of retaliation, the court lacks jurisdiction

over Plaintiff's remaining claims and will therefore grant Defendant's motion to dismiss these claims.

IV. CONCLUSION

For the reasons stated herein, the court will grant Defendant's Motion to Dismiss. A judgment in accordance with this memorandum opinion shall be filed contemporaneously herewith.

This the 14th day of November 2003.



United States District Judge