IP 04-0914-C T/K Sullen v Midwest ISO
Judge John D. Tinder Signed on 07/27/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CHRISTOPHER SULLEN,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 1:04-cv-00914-JDT-TAB
	)	
MIDWEST ISO,	)	
KENT SHOYER,	)	
BARABA NUTTER,	)	
	)	
Defendants.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CHRISTOPHER G. SULLEN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	1:04-cv-0914-JDT-TAB
	)	
MIDWEST ISO,	)	
	)	
Defendant.	)	

ENTRY ON MOTION TO DISMISS (DKT. NO. 32)[1]

The Plaintiff, Christopher G. Sullen, has brought federal civil rights and state tort law claims against his former employer alleging unlawful employment practices on the basis of racial discrimination and retaliation. The case is before the court on the Rule 12(b)(6) motion to dismiss of the Defendant Midwest Independent Transmission System Operator, Inc. ("Midwest ISO"). The Defendant contends that Counts II, III, V, VI, VIII, and IX[2] of the Amended Complaint are not supported by sufficient allegations. Additionally, Midwest ISO argues that events occurring prior to November 30, 2002 for the state law claims, Counts V, VI, VIII, and IX, are barred by the statute of limitations. The Plaintiff opposes the motion.

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[1] This Entry is a matter of public record and will be made available on the court's web site. However, the discussion contained herein is not sufficiently novel to justify commercial publication.

[2] The Amended Complaint includes an unnumbered count of negligent hiring, which has been referred to as Count IX by the Defendant. The court does the same. The Defendant has withdrawn its motion to dismiss with respect to Count VII - Negligent Supervision. (Dkt. No. 41).

I. BACKGROUND

On November 30, 2004, the Plaintiff, an African American, filed the Amended Complaint alleging several state law and federal claims. The Amended Complaint makes the following allegations:

The Plaintiff was employed at Midwest ISO starting on August 1, 2001. (Am. Compl. ¶ 9.) Upon joining Midwest ISO, the Plaintiff was harassed by Kent Shroyer on numerous occasions with racial comments. (*E.g.*, *id.* ¶¶ 12, 17, 30.) The Plaintiff notified Midwest ISO's management regarding Mr. Shroyer's alleged racial comments. (*Id.* ¶¶ 18, 21, 31.) Midwest ISO management, aware of the unlawful racial discrimination and harassment, failed to investigate (*id.* ¶¶ 27, 28, 31), in violation of Midwest ISO's "Anti-Harassment Policy and Complaint Procedure." (*Id.* ¶¶ 27, 29.)

In September 2003, the Plaintiff filed his first charge against the Defendant with the Equal Employment Opportunity Commission ("EEOC") for racial discrimination and harassment. (*See* Mot. Am. Compl., Ex. C.) Since the filing of that original charge, Midwest ISO retaliated against the Plaintiff and continued to harass him through intimidation and taunting by Mr. Shoyer and Barbara Nutter. (Am. Compl. ¶¶ 37, 39.) A second complaint was filed with the EEOC by the Plaintiff in February 27, 2004, charging the Defendant with continued harassment and retaliation for filing a previous claim. (Mot. Am. Compl., Ex. C.) Finally, he filed a third EEOC complaint on April 22, 2004, claiming that he was still being harassed because of his race and retaliated against for filing his EEOC charge. (Mot. Am. Compl., Ex. E.) The Plaintiff claims that

he was denied promotions that were given to less experienced employees and prevented from performing the duties of his job. (Am. Compl. ¶¶ 33, 34, 35, 40, 41.)

Among several claims in the Amended Complaint filed on November 30, 2004, the Defendant is seeking a dismissal of the following: (1) Count II - 42 U.S.C. § 1985; (2) Count III - 42 U.S.C. § 1986; (3) Count V - Intentional Infliction of Emotional Distress; (4) Count VI - Negligent Infliction of Emotional Distress; (5) Count VIII - Wrongful Termination; and (6) Count IX - Negligent Hiring. Midwest ISO contends that these claims are not supported by the allegations. Additionally, it argues that the state law claims based on events that occurred prior to November 30, 2002 are barred by the statute of limitations. The Plaintiff filed a nonresponsive brief with the court opposing this motion.[3]

II. DISCUSSION

Midwest ISO moves under Rule 12(b)(6) to dismiss Counts II, III, V, VI, VIII and IX. For a Rule 12(b)(6) motion, dismissal can be granted when the complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Lekas v. Briley*, 405 F.3d 602, 606 (7th Cir. 2005). A plaintiff is required to only specify the "bare minimum facts necessary to put the defendant on notice of the

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[3] The Plaintiff filed a response to the motion to dismiss requesting that "all state claims against Defendant employees be dismissed without prejudice to be pursued in state court." (Pl's Br. ¶ 7.) This response is not relevant because the cause of action against the employees, Ms. Nutter and Mr. Shoyer, already was *dismissed with prejudice* on October 26, 2004. Thus, presently there are no state claims against any Defendant employees in this case. Because all claims over which the court has original jurisdiction have not been dismissed and the state claims are neither novel nor complex, the court declines the Plaintiff's invitation not to exercise supplemental jurisdiction over the state law claims.

claim so that he can file an answer." *Higgs v. Carver*, 286 F.3d 437, 439 (7th Cir. 2002). "A complaint that complies with the federal rules of civil procedure cannot be dismissed on the ground that it is conclusory or fails to allege facts." *Id.* A plaintiff is not required to plead legal theories. *Id*. The court accepts the well-pleaded factual allegations and all resulting reasonable inferences from them are drawn in favor of the plaintiff. *Flannery v. Recording Indus. Ass'n of Am.*, 354 F.3d 632, 637 (7th Cir. 2004). Thus, a Rule 12(b)(6) motion can be granted only when "there is no possible interpretation of the complaint under which it can state a claim." *Id*. The court is not "required to ignore facts alleged in the complaint that undermine the plaintiff's claim." *Wroblewski v. City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1992).

A. Statute of Limitations for State Law Claims

Regarding the statute of limitations for the Plaintiff's state law claims, Indiana statute requires that an "action relating to the terms, conditions, and privileges of employment except actions based upon written contract . . . must be brought within two (2) years of the date of the act or omission complained of." Ind. Code § 34-11-2-1; *Servicemaster Diversified Health Servs. v. Wiley*, 790 N.E.2d 1056, 1059 (Ind. Ct. App. 2003). Indiana's statute of limitations starts to run when "the plaintiff knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained[.]" *Konkle v. Henson*, 672 N.E.2d 450, 458 (Ind. Ct. App. 1996).

Midwest ISO asserts that the state law claims based on events that occurred prior to November 30, 2002 are barred by the statute of limitations.[4] The following actions occurred prior to that date: (1) Mr. Shroyer stated "I just want you to know I am not a racist" which occurred during the first week of the Plaintiff's employment (Am. Compl. ¶ 10); (2) Mr. Shroyer began rumors shortly after Plaintiff began working that Plaintiff was leaving Midwest ISO (*id.* ¶ 15); (3) Mr. Shroyer referred to the Plaintiff as "Buckwheat" in October 2001 (*id.* ¶ 17); and (4) the Plaintiff notified Ms. Nutter and Mr. Phelps about Mr. Shroyer's conduct and met with them in or about November 2001. (*Id.* ¶ 21-23.) While a date is not alleged for other events, any remaining alleged events that occurred before November 30, 2002 do not fall within the statute of limitations. Thus, claims based on such events are time-barred. The Plaintiff may pursue his state law claims based on events occurring only after November 30, 2002.

An amended pleading may relate back to the date of the original pleading. Ind. Trial Rule 15(c). The amended pleading must arise out of the "conduct, transaction, and occurrence set forth or attempted to be set forth in the original pleading." *Id*. The Plaintiff has not asserted any argument regarding the statute of limitations. Assuming the state law claims do not relate back, claims based on conduct occurring before November 30, 2002 are barred. Indiana recognizes a continuing wrong "when an entire course of conduct combines to produce an

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[4] The Plaintiff filed the Amended Complaint on November 30, 2004. The state law claims were not asserted in the original complaint.

injury . . . ." *C & E Corp. v. Ramco Indus.*, 717 N.E.2d 642, 644 (Ind. Ct. App. 1999). A continuing wrong delays the running of the statute of limitations until the end of the continuing wrongful act. *Id*. The doctrine of continuing wrong "will not prevent the statute of limitations from beginning to run when the plaintiff learns of facts which should lead to the discovery of his cause of action even if his relationship with the tortfeasor continues beyond that point. *Id.* at 645. The Plaintiff has not argued for application of this doctrine. Therefore, the court has treated each alleged act as a discrete claim that will be subjected to a statute of limitations bar if it occurred after November 30, 2002.

B. Count II - § 1985(3)

The Defendant contends that the Plaintiff has failed to state a claim under § 1985(3) because he fails to allege that two or more persons agreed to violate his civil rights. "Liability under § 1985 must be predicated on a finding that two or more people agreed to violate the plaintiff's civil rights." *Williams v. Seniff*, 342 F.3d 774, 785 (7th Cir. 2003); *see Green v. Benden,* 281 F.3d 661, 665 (7th Cir. 2002). An agreement to violate a person's civil rights may be inferred from circumstantial evidence. *Green*, 281 F.3d at 666. The Amended Complaint alleges that the Defendant "engaged in the conspiracy to deprive Plaintiff of his civil rights by collaboratively embarking in a scheme that recklessly dismissed Plaintiff's complaints without investigation." (Am. Compl. ¶ 56.) The use of the phrase "collaboratively embarking on a scheme" implies that Midwest ISO

schemed, that is, agreed with at least another person.[5] When read as a whole, the allegations suggest that Midwest ISO conspired with Mr. Shroyer to violate the Plaintiff's civil rights. (*See id.*) The allegations also may suggest that Midwest ISO made this agreement with Ms. Nutter and Mr. Phelps as well. (*See e.g.* Am. Compl. ¶¶ 15, 18, 19, 23-24.) The Complaint is sufficient to give the Defendant notice regarding the alleged conspiracy so that it can answer.

The Defendant also contends that the intracorporate conspiracy doctrine bars the § 1985(3) claim. Under this doctrine, "a corporation's employees, acting as agents of the corporation, are deemed incapable of conspiring among themselves or with the corporation." *Dickerson v. Alachua County Comm'n*, 200 F.3d 761, 767 (11th Cir. 2000); *see Wright v. Ill. Dep't of Children & Family Servs.*, 40 F.3d 1492, 1508 (7th Cir. 1994) ("managers of a corporation jointly pursuing its lawful business do not become 'conspirators' when acts within the scope of their employment are said to be discriminatory or retaliatory" (quotation omitted). However, in *Hartman v. Board of Trustees of Community College District No. 508*, 4 F.3d 465, 470 (7th Cir. 1993), the Seventh Circuit recognized an exception to the intracorporate conspiracy doctrine where the corporate employee's are motivated solely by personal bias and the corporate interests played no part in the employees' action. *Id.* at 470. In such a case it cannot be said that the employees' action was taken within the scope of employment. *Id.* The Plaintiff

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[5] "Collaborate" means "To work together. . . ." *Webster's II New College Dictionary* 219 (Houghton Mifflin Company ed. 1999).

may prove, consistent with his allegations, that the Defendant's employees were motivated solely by personal bias. In that case, his § 1985(3) claim would not be barred by the intracorporate conspiracy doctrine. The question whether this doctrine ultimately bars the claim, however, is a matter of proof and may be resolved at summary judgment if there is no genuine issue of material fact. Accordingly, it would be inappropriate to dismiss Count II for failure to state a claim.

C. Count III - § 1986

The Defendant argues that the Plaintiff's § 1986 claim should be dismissed since it is derivative of the § 1985(3) claim which should be dismissed. The latter claim has not been dismissed, and the Defendant offers no other ground for dismissing the § 1986 claim. Therefore, the motion to dismiss is denied as to the § 1986 claim.

D. Count V - Intentional Infliction of Emotional Distress

To sustain a claim of intentional infliction of emotional distress, the Plaintiff must establish that the "extreme and outrageous conduct intentionally or recklessly cause[d] severe emotional distress . . . ." *Powdertech v. Joganic*, 776 N.E.2d 1251, 1264 (Ind. Ct. App. 2002). The Defendant contends that the Plaintiff has not alleged acts or conduct that could possibly "support a conclusion that the Midwest ISO behaved in an extreme and outrageous manner." (Def's. Br. Supp. Mot. Dismiss at 6.) Indiana law sets a high bar for conduct which is considered extreme and outrageous:

> Conduct is extreme and outrageous only where it "has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'"

Conwell v. Beatty, 667 N.E.2d 768, 777 (Ind. Ct. App. 1996) (quoting *Restatement (Second) of Torts* § 46 cmt. d (1965)).

The Amended Complaint alleges that the Defendant's conduct was "intentional, oppressive, malicious and/or in wanton disregard of the rights and feelings of Plaintiff and constitutes despicable conduct[.]" (Am. Compl. ¶ 62.) The Defendant's actions are alleged to have caused suffering, "extreme severe mental anguish and emotional distress." (*Id.* ¶ 71.) Given the liberal notice pleading standard, the Plaintiff is not required to allege all facts that support his claim. It is possible for the Plaintiff to prove a set of facts consistent with his complaint which would satisfy this high bar set for intentional infliction of emotional distress claims. Thus, dismissal is inappropriate. However, it is dubious that the Plaintiff will be able to meet the high bar set by Indiana law.

E. Count VI - Negligent Infliction of Emotional Distress

To state a claim for negligent infliction of emotional distress, the Plaintiff has to meet the modified impact rule. *Shuamber v. Henderson*, 579 N.E.3d 452, 456 (Ind. 1991). The modified impact rule is satisfied when "a plaintiff sustains a direct impact by the negligence of another and, by virtue of that direct involvement sustains an emotional trauma which is serious in nature and of a kind and extent

normally expected to occur in a reasonable person. . . ." *Id*. The emotional trauma is not required to have resulted from or accompany a physical injury. *Id.* However, the direct impact to the plaintiff must still be "physical" in nature. *Ross v. Cheema*, 716 N.E.2d 435, 437 (Ind. 1999) (finding that merely hearing a loud pounding at the door is not considered a direct physical impact). Indiana courts have created an exception to the need for direct impact for bystanders. *Groves v. Taylor*, 729 N.E.2d 569 (Ind. 2000).

In his Amended Complaint, the Plaintiff has not alleged any physical impact and the allegations do not satisfy the exception from *Groves*. A claimant is not required to list all of the facts of a claim under the federal system of notice pleading, however a plaintiff's claim must be concise and direct. Fed. R. Civ. P. 8(e). While the Plaintiff may have suffered emotional trauma, without allegation of a direct physical impact, the claim cannot be sustained. Therefore, a Rule 12(b)(6) dismissal is appropriate for this claim. The dismissal is without prejudice, however, and the Plaintiff has thirty days from the date of this entry to file an amended complaint and replead his claim for negligent infliction of emotional distress if he can do so within the confines of Rule 11. If he does not replead this claim within thirty days, then the claim will be dismissed with prejudice.

F. Count IX - Negligent Hiring

Indiana recognizes a cause of action for the negligent hiring of an employee. *Konkle v. Henson*, 672 N.E.2d 450, 455 (Ind. Ct. App. 1996). Adopting the Restatement (Second) of Torts, the court concluded in *Konkle* that

an employer has a duty to exercise reasonable care in hiring an employee. *Id.* at 455.

In the Amended Complaint, the Plaintiff mentions Mr. Shroyer and Ms. Nutter as managers or supervisors that were involved in or had knowledge of the alleged harassment. (Am. Compl. ¶¶ 18-24, 26, 31, 39.) The Defendant asserts that the Plaintiff's claims based on the hiring of these employees are time-barred because they were already employed when the Plaintiff began his employment with Midwest ISO on August 1, 2001. (Def's. Br. Supp. Mot. Dismiss at 8 n.6.) The Plaintiff has alleged that he met Mr. Shroyer, a Midwest ISO manager in his first week of the Plaintiff's employment with Midwest ISO. The Plaintiff also alleges that his employment began August 1, 2001. (Am. Compl. ¶¶ 9, 10.) As discussed, Indiana's two year statute of limitations applies to the Plaintiff's state law claims in this case. Since it is alleged that Mr. Shroyer was already employed as of August 1, 2001, a negligent hiring claim based on his hire is time-barred and subject to dismissal. The Plaintiff makes allegations which establish that Ms. Nutter was employed at least as of November 2001. (Am. Compl. ¶ 21.) Thus, the negligent hiring claim based on her hire is also time-barred.[6] The negligent

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[6] The Amended Complaint also mentions Mr. Phelps, a manager, and Michael Catlin. (Am. Compl. ¶¶ 19-23, 35.) Based on the allegations, Mr. Phelps was employed with Midwest ISO at the latest by November 2001. (*Id.* ¶ 21.) Hence, a negligent hiring claim premised on his hire would also be time-barred. The negligent hiring claim is based on the hiring of supervisors and administrative personnel and hiring of "persons with negative views of race and practices of discriminatory acts". (*Id.* ¶ 78.) It is not alleged that Mr. Catlin is a supervisor or administrative personnel, or that he held racial beliefs or acted discriminatorily. Thus, the court does not understand the negligent hiring claim to be based on the hire of Mr. Catlin.

supervision claim remains, however, as the Defendant has withdrawn its challenge to that claim.

G. Count VIII - Wrongful Termination Claim

Indiana regards an employee at-will to be presumptively terminable at the will of each party.[7] *McClanahan v. Remington Freight Lines*, 517 N.E.2d 390, 392 (Ind. 1988). The Indiana Supreme Court has recognized a public policy exception to this doctrine in two instances: where an employee-at-will was discharged for filing a worker's compensation claim, *see Frampton v. Central Ind. Gas Co.*, 297 N.E.2d 425, 428 (Ind. 1973), or for refusing to commit an illegal act for which he would be personally liable, *see McClanahan v. Remington Freight Lines, Inc.*, 517 N.E.2d 390, 392-93 (Ind. 1998). *See Groce*, 193 F.3d at 392-93. The Defendant contends that the Plaintiff has not alleged any facts to fall within the public policy exception. (Def's. Br. Supp. Mot. Dismiss at 10.) The Plaintiff alleges that his termination was the result of discriminatory and retaliatory practices. (Am. Compl. ¶¶ 73-75.) Implicitly, he seeks to extend the public policy exception to a discharge based on the exercise of a right under federal employment discrimination law. However, the public policy exception to the employment-at-will doctrine has been narrowly construed and the Indiana Supreme Court has been reluctant to broaden the public policy exception absent direction from the state legislature. *See Groce*

[7] Midwest ISO asserts that the Plaintiff was an at-will employee. The Plaintiff does not dispute this.

v. Eli Lilly, 193 F.3d 496, 503 (7th Cir. 1999). This court declines to extend the public policy exception here. Therefore, a Rule 12(b)(6) dismissal is appropriate.

III. CONCLUSION

Based on the foregoing, the Rule 12(b)(6) motion to dismiss (Dkt. No. 32) is **DENIED** with respect to Count II - § 1985, Count III - § 1986, and Count V - Intentional Infliction of Emotional Distress; **GRANTED** with respect to Count VIII - Wrongful Termination and Count IX - Negligent Hiring; and **GRANTED WITHOUT PREJUDICE** with respect to Count VI - Negligent Infliction of Emotional Distress. The Plaintiff has **thirty (30)** days from the date of this entry to file an amended complaint repleading his negligent hiring claim consistent with this entry. If he does not do so, the dismissal of that count will be with prejudice.

This entry does not address in any way the question of Plaintiff's counsel's compliance with Judge Baker's Order Following Show Cause Hearing on November 22, 2004 (Dkt. No. 23).

ALL OF WHICH IS ENTERED this 27th day of July 2005.

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John Daniel Tinder, Judge
United States District Court

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