File No.: 67201-WAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JULIA L. JAMES,	)	
	)	
Plaintiff,	)	
v.	)	04 C 2744
	)	
MANOR CARE HEALTH SERVICES	)	Judge Gettleman
MANOR CARE INC.,	)	
MANOR CARE OF AMERICA, INC.,	)	
HCR MANOR CARE,	)	
HEARTLAND HEALTH SERVICES,	)	
OMNICARE, INC.,	)	
HEARTLAND EMPLOYMENT SERVICES, INC.,	)	
HEARTLAND EMPLOYMENT SERVICES, LLC	)	
HEARTLAND HEALTH SERVICES,	)	
OMNICARE, INC.,	)	
	)	
Defendants.	)	

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO STRIKE AND DISMISS PORTIONS OF PLAINTIFF'S THIRD AMENDED COMPLAINT

Now comes the Defendant, HEARLAND EMPLOYMENT SERVICES, INC. ("Defendant"), and hereby submits its Memorandum of Law in support of its motion to strike and dismiss portions of Plaintiff's Third Amended Complaint.[1] In support thereof, Defendant states as follows:

I. INTRODUCTION

Defendant brings this motion to (1) strike references to statutes for which no relief could be afforded to Plaintiff, and (2) dismiss Count III—which this Court has already dismissed.

[1] The remaining Defendants in this cause have never been served, and it appears that no summons has ever been issued for them. Moreover, while the Court's docket reflects an appearance by counsel for Heartland Health Services, that docket entry is in error as counsel identified Heartland Employment Services in their appearance.

II. BACKGROUND

The facts of this case are well known to this Court. Plaintiff, a 54 year-old woman was terminated from HCR Manor Care on February 27, 2003. She alleges that her age was the reason for the termination, in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq* ("ADEA"). She also claims retaliatory discharge based on her age, as well as age harassment.

This Court has twice before dismissed various claims asserted by Plaintiff. As is relevant here, this Court specifically dismissed Plaintiff's breach of contract claim, and has repeatedly noted that this is an age case under the ADEA.

On April 12, 2006, Plaintiff filed her Third Amended Complaint. Count I alleges age discrimination in violation of the ADEA, the Americans with Disability Act, 42 U.S.C. § 12101, *et seq.*, ("ADA"), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 ("Title VII" or "CRA").[2] Count II alleges retaliatory discharge under the ADEA, though the prayer for relief for Count II also includes the ADA and Title VII. Count III alleges a pendant state law claim for breach of contract based on provisions of the employee handbook. Finally, Count IV alleges age harassment under the ADEA, the ADA, and Title VII.

Defendant is in the process of Answering the claims for ADEA discrimination, retaliation and harassment. However, Plaintiff's counsel's continued assertion of claims that have no basis in law or fact—and claims that have already been dismissed by this Court—have forced Defendant to file yet another motion to dismiss.

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[2] Plaintiff refers to Title VII of the Civil Rights Act as the "CRA." Defendants use the terms "Title VII" and "CRA" interchangeably.

III. ARGUMENT

1. All References to Title VII (the CRA) and the ADA Must be Stricken

Plaintiff peppers her Third Amended Complaint with allegations that she brings this age case under Title VII and the ADA. All references to Title VII and the ADA must be stricken from the Complaint pursuant to Rule 12(f) because they immaterial and have no basis in law or fact.

a. Specific References to the Title VII (CRA) and the ADA in the Complaint

In her complaint, Plaintiff makes repeated references to Title VII and the ADA. As early as Paragraph 1, Plaintiff describes the nature of the case as "age discrimination . . . in violation of the Age Discrimination Employment Act [sic], . . . ; the Civil Rights Act of 1964 . . .; and the American [sic] with Disability [sic] Act . . . ; and for the Defendants [sic] harassment of Plaintiff and breach of contract." (3d Am. Compl. ¶ 1).

Additionally, Count I purportedly asserts a claim for "[v]iolation of the ADEA, the ADA, and the CRA." Plaintiff alleges that, like the ADEA, "the ADA prohibits age discrimination as well," and that "[t]he CRA also prohibits age discrimination." (3d Am. Compl. ¶ 133-134). Paragraph 143 claims that Defendants' alleged age discrimination and harassment violated not only the ADEA, but also the ADA and Title VII. Finally, Plaintiff's prayer for relief in Count I seeks damages for "age discrimination against James in violation of the ADEA, the ADA, and the CRA." (3d Am. Comp. ¶ 143)

Count II is a retaliatory discharge claim specifically referencing Section 623(d) of the ADEA relative to the prohibition against ADEA retaliation. (3d Am. Compl. ¶ 145). Nevertheless, her prayer for relief for Count II again includes the ADEA, the ADA and Title VII.

Finally Count IV alleges that Plaintiff was harassed based on her age. She alleges:

167. Age harassment is a form of age discrimination under Title VII because the ADEA anti-discrimination provisions were modeled after Title VII.

168. Thereby harassment on the basis of age is a violation of the anti-discrimination laws on the basis of age found in the ADEA, the ADA, and the CRA – Title VII, as previously mentioned herein.

(3d Am. Compl. ¶¶ 167-168). Additionally, the prayer for relief for Count IV also seeks damages for age harassment under the ADEA, the ADA, and Title VII

2. Allegations Regarding Title VII and the ADA Must be Stricken

Under Rule 12(f), this court may strike from a pleading any "redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f); *Porter v. International Business Machines*, 21 F. Supp. 2d 829, 831 (N.D. Ill. 1998).

This case is an age case. As such, the claims arise under the ADEA. All allegations regarding Title VII and the ADA are unrelated to Plaintiff's age claims and will prejudice Defendant. *Porter*, 21 F. Supp. 2d at 831. Accordingly, they must be stricken

At this stage—two years after the initial filing—this point should be conclusively settled. After all, fifteen months ago this Court noted that the case arose under the ADEA rather than Title VII. (Docket No. 21 at 3 n.3; *available at James v. Heartland Health Servs.*, 2005 U.S. Dist. LEXIS 5044, *5 n.3 (N.D. Ill. January 28, 2005)) ("Although plaintiff titles Count I 'violation of 42 U.S.C. Section 2000e, et seq.' the parties agree that Count I is an ADEA – not a Title VII claim. The Court considers it such.").

In November 2005, the Court noted that the Plaintiff incorrectly alleged that this case is based on the ADA. (Docket No. 42 at 1 n.3) ("Paragraph 1 of plaintiff's second amended complaint incorrectly states that the action is also brought pursuant to the American with Disability Act[.]")

Despite the Court's multiple polite rebuffs, Plaintiff still purports to bring her age claims—and seeks damages under—two facially inapplicable statutes, Title VII and the ADA.

It is regrettable that Defendant must bring this motion on such an elementary point, as it would rather answer the ADEA discrimination, harassment and retaliation claims that the Court has already found to state a claim and proceed with discovery.[3] Nevertheless, Defendant will attempt to educate Plaintiff and her attorney why age is not protected under Title VII and the ADA.

Title VII does not prohibit discrimination, harassment or retaliation based on age. By its terms, Title VII only prohibits discriminatory conduct based on an "individual's race, color, religion, sex, or national origin" 42 U.S.C. § 2000e-2(a). "During the deliberations that preceded the enactment of the Civil Rights Act of 1964, Congress considered and rejected proposed amendments that would have included older workers among the classes protected from employment discrimination [under Title VII]." *Smith v. City of Jackson*, 544 U.S. 228, 232 (2005). However, subsequently, Congress created the ADEA to protect employees based on their age. *Id.* at 233. Thus, Title VII applies to race, color, religion, sex, and national origin discrimination while the ADEA applies to age discrimination. *Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 584 n.12 (1978)

Similarly, the ADA does not prohibit discrimination, harassment or retaliation based on age. The ADA only prohibits discriminatory conduct against a "qualified individual with a disability." 42 U.S.C. § 12112(a). A "qualified individual with a disability" is a statutorily defined term, and nowhere in that definition is "age." 42 U.S.C. § 12111(8) ("The term "qualified individual with a disability" means an individual with a disability who, with or

[3] Of course, Defendant denies the allegations in those claims.

without reasonable accommodation, can perform the essential functions of the employment position"). *See EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 792 (7th Cir. 2005).

Given that age is not protected by either the ADA or Title VII, Plaintiff's allegations regarding these statutes is immaterial and unrelated to her age claims. Moreover, allowing them to stand will prejudice the Defendant, who will be forced to defend against, and face potential liability for, inappropriate claims.

Accordingly, because plaintiff's age claims cannot be brought under Title VII or the ADA, the Court must strike all references to those statutes in the Third Amended Complaint.

3. Alternatively, Any Claim Under Title VII or the ADA is Barred

Alternatively, to the extent that Plaintiff actually intends to assert some unspecified claim under Title VII or the ADA, her failure to list those bases in her EEOC charge bars her litigating them before this Court, and such claims must be dismissed pursuant to Rule 12(b)(6). A copy of Plaintiff's Charge is attached as **Exhibit A**.

Judicial relief cannot be sought for claims not listed in the original EEOC charge unless they are reasonably related to, or grow out of, the allegations in the charge. *Sauzek v. Exxon Coal USA, Inc.*, 202 F.3d 913, 920 (7th Cir. 2000). This rule serves two purposes: affording an opportunity for the EEOC to settle the dispute between the employee and employer and putting the employer on notice of the charges against it. *Harper v. Godfrey Co.*, 45 F.3d 143, 147-48 (7th Cir. 1995); citing *Rush v. McDonald's Corp.*, 966 F.2d 1104, 1110 (7th Cir. 1992).

In this case, the basis for Plaintiff's purported Title VII and ADA claims is unclear (other than her incorrect belief that they cover age claims). (3d Am. Compl. ¶¶ 1; 133; 134; 167; 168). However, to the extent she is actually alleging claims based on her race, sex, religion, national origin, or disability, such claims are barred by her failure to include them in her EEOC charge.

In her administrative charge, Plaintiff only marked the box for age discrimination, and states that "I believe that I was discriminated against on the basis of my age, 52 (date of birth: May 16, 1951) in violation of the Age Discrimination in Employment Act of 1967, as amended." (Exhibit A). Nowhere in the charge does Plaintiff indicate her race, gender, national origin or disability is a claimed basis of her discharge.

Because none of the facts asserted in Plaintiff's administrative charge are like or reasonably related to claims of race, sex, religion, national origin or disability discrimination, the purported Title VII and ADA claims must be dismissed with prejudice. *See Brucker v. Chi. Transit Auth.*, 2001 U.S. Dist. LEXIS 9200, *3-6 (N.D. Ill. July 2, 2001) (dismissing ADA claims not asserted in EEOC charge for gender and national origin discrimination); *Lamas v. Freeman Decorating Co.*, 37 F. Supp. 2d 1105, 1106 (N.D. Ill. 1999) (dismissing race and national origin claims when EEOC charge only for retaliation).

For the reasons stated above, the Court to the extent Plaintiff asserts Title VII or ADA claims, they must be dismissed with prejudice from her Third Amended Complaint.

B. Count III (Breach of Contract) Fails to State a Claim

Count III of the Third Amended Complaint asserts a breach of contract claim based on the Defendant's alleged failure to comply with the employee handbook. Count III must be dismissed with prejudice pursuant to Fed. R. Civ. P. 12(b)(6).

It is truly outrageous that Plaintiff has once again asserted this breach of contract claim after this Court previously dismissed the same claim from her First Amended Complaint. (*See* Docket No. 21 at 11-15; *James*, 2005 U.S. Dist. LEXIS 5044, at *18-25). To make matters worse, Plaintiff has attached to her Complaint an incomplete copy of her Employee Handbook. Nevertheless, in discussions with Plaintiff's attorney, it became apparent that the incompleteness

was due to a failure to copy double-sided pages. Attached hereto as **Exhibit B** is what Plaintiff and Defendant agree is a complete copy of the employee handbook. Plaintiff received this handbook, and acknowledged as much on May 5, 2000. A copy of the signed Acknowledgement of Receipt dated May 5, 2000, is attached hereto as **Exhibit C**.

1. Count III Must Be Dismissed Under the Law of the Case Doctrine

Count III must be dismissed as barred by the law of the case doctrine because this Court has already considered—and rejected—the claim that the employment handbook created an employment contract. *See Evans v. City of Chicago*, 873 F.2d 1007, 1013-14 (7th Cir. 1989) ("The law of the case doctrine 'is a rule of practice, based on sound policy that, when an issue is once litigated and decided, that should be the end of the matter.'").[4] The Court, in its January 28, 2005 Memorandum of Opinion and Order, specifically addressed "plaintiff['s] argu[ment] that the terms of the Handbook created an enforceable contract." (*See* Docket No. 21 at 13; *James*, 2005 U.S. Dist. LEXIS 5044, at *22). Simply stated, Plaintiff already asserted this contention—and lost—but now she has raised it once again in her Third Amended Complaint.

What is even more incomprehensible is that Plaintiff apparently recognizes that this Court already dismissed her breach of contract claim since Paragraph 122 alleges that this Court "dismiss[ed] Counts II, III, and V [i.e., the breach of contract claim] of James' amended Complaint." (3d Am. Compl. ¶ 122).[5]

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[4] Count III does not appear barred by *res judicata* (claim preclusion) as the Court's prior dismissal was apparently without prejudice, and thus not a final judgment on the issue. *See Kratville v. Runyon*, 90 F.3d 195, 197 (7th Cir. 1996).

[5] Also peculiar is the fact that Plaintiff seeks damages for common law breach of contract to which she is not entitled: "Plaintiff James request [sic] that this Honorable Court award her injunctive relief, employment reinstatement, back pay, front pay, liquidated damages, compensatory damages, punitive damages, attorney fees, and litigation costs for the Defendants breach of contract against James due to her age." (3d Am. Compl., Prayer for Relief to Count III).

In the January 28, 2005, order the Court considered the explicit and unambiguous disclaimers contained in the handbook, and concluded that "[t]he handbook, therefore, did not create an employment contract with plaintiff." (Docket No. 21 at 15; *James*, 2005 U.S. Dist. LEXIS 5044, at *25).

Moreover, the fact that Plaintiff cites to *Duldulao v. St. Mary of Nazareth Hospital Center*, 136 Ill. App. 3d 763 (1985) for the proposition that an employee handbook can rise to the level of an employment contract is not a new development. (*See* 3d Am. Comp. ¶ 153.) Both the Defendant (in its motion to dismiss) and the Court (in its Memorandum of Decision and Order) cite to the Illinois Supreme Court's disposition of that case. (*See* Docket No. 15 at page 9; Docket No. 21 at 12; *James*, 2005 U.S. Dist. LEXIS 5044, at *20). Indeed, even after considering that case, the Court still found that the employee handbook did not create an employment contract.

Accordingly, because the viability of Count III has already been considered and expressly rejected, the Court should follow the law of the case doctrine and dismiss Count III with prejudice.

2. Alternatively, the Employee Handbook Does Not Create an Enforceable Contract

Alternatively, if the Court feels it necessary once again to examine the issue on the merits, Count III must be dismissed with prejudice as a matter of law.

The Plaintiff signed the Employee Handbook, and therefore acknowledged that she read carefully and understood the policies, rules of conduct, terms of conditions and agreed to abide by them. (*See* Exhibit C). The signature page of the Employee Handbook states that:

> ***This Employee Handbook does not represent an expressed or implied contract for any duration between you and the company. This Handbook is not contractually binding. You retain your right to terminate your employment at anytime and the company retains the same right.***

(See, the attached Exhibit "C") (Emphasis added).

By plain and unmistakable language the Handbook defeats any allegation that it created any contract of employment with any employee, including the Plaintiff. Most significantly, the Handbook states:

> ***Employment-At-Will***
>
> ***This Employee Handbook does not represent an express or implied employment contract for any duration between Manor Care, Inc., Heartland Employment Services, Inc., or any other HCR Manor Care affiliated company and our employees. This Handbook is a brief, general description of practices and policies of HCR Manor Care and is not meant to be a substitute for the*** **Police and Procedures Manual. . . .** ***The employment relationship is one that is at-will. Because this Handbook is not contractually binding, you retain your normal right to terminate your employment relationship at anytime, and HCR Manor Care retains the same right.***

(See, the attached Exhibit "B" at page 42) (Emphasis added).

Such unambiguous disclaimers have been held to prevent the formation of a contract. *Border v. City of Crystal Lake*, 75 F.3d 270, 273 (7th Cir. 1996); *Boulay v. Impell Corp.*, 939 F.2d 480, 482 (7th Cir. 1991); *Miller v. Ford Motor Co.*, 254 F. Supp. 2d 1024, 1026 (N.D. Ill. 2003); *James*, 2005 U.S. Dist. LEXIS 5044, at *24-25.

Given the repeated and unequivocal disclaimers contained in the Employee Handbook, Plaintiff's breach of contract claim (Count III), should be dismissed with prejudice as the employee handbook did not create an employment contract.

CONCLUSION

For the foregoing reasons, all references to the ADA and Title VII must be stricken from Plaintiff's Third Amended Complaint, and to the extent Plaintiff asserts claims under the ADA and Title VII, those claims must be dismissed with prejudice. Finally, Count III of the Third Amended Complaint must be dismissed with prejudice.

Respectfully Submitted,

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