

UNITED STATES DISTRICT COURT
DISTRICT COURT OF MASSACHUSETTS

CIVIL ACTION NO. 12-10098-GAO

MARIE E. LUONGO,
Plaintiff,

v.

COMMONWEALTH OF MASSACHUSETTS,
DEPARTMENT OF DEVELOPMENTAL SERVICES,
and AFSCME COUNCIL 93,
Defendants.

OPINION AND ORDER

March 15, 2013

O'TOOLE, D.J.

This case arises from the termination of the plaintiff's employment by the Massachusetts Department of Developmental Services ("DDS") and her subsequent efforts to challenge that action. The plaintiff has sued the Commonwealth for retaliation in violation of Title VII, and she also sues her former union, AFSCME Council 93, for retaliation and for breach of the duty of fair representation. The union moves for summary judgment on both claims.

I. Background

The following facts are undisputed or indisputably established by the record. The plaintiff, a DDS employee, was suspended for three days in December 2009 and subsequently terminated on May 21, 2010. She filed complaints with two separate state entities regarding AFSCME's conduct in connection with her suspension and termination.

On June 15, 2010, the plaintiff filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD"), claiming that she "was discriminated against by C-Massachusetts EOHHS, AFSCME Council 93, on the basis of retaliation." (Def.'s Mem. in

Supp. of Mot. to Dismiss, Ex. 1 at 1 (dkt. no. 17-1).) On May 29, 2011, the MCAD determined that there was a lack of probable cause as to the plaintiff's allegations of retaliation against both AFSCME and EOHHS, the executive office under which DDS falls. An appeal hearing was held on August 9, 2011, after which the MCAD affirmed its prior determination. The EEOC affirmed this determination on November 8, 2011, and upon the plaintiff's request, reviewed and reaffirmed its findings on December 12, 2011.

On August 2, 2010, the plaintiff filed a Charge of Prohibited Practice against AFSCME with the Commonwealth's Department of Labor Relations ("DLR") for violating Massachusetts General Laws ch. 150E, § 10(b)(1) by breaching the duty of fair representation it owed to her as a member of the relevant bargaining unit. The DLR conducted an in-person investigation and dismissed the charge in October 2011, finding a lack of probable cause as to her allegations against AFSCME. She appealed the dismissal to the Commonwealth Employment Relations Board ("CERB"), which affirmed the dismissal in December 2011. The plaintiff filed a Notice of Appeal with the Massachusetts Appeals Court in December 2011, and the appeal is currently pending.

The present complaint was filed with this Court on October 31, 2012. The plaintiff brings two claims against the union. She alleges that "[o]n Sept. 9, 2010, as a result of the MCAD filing, the union retaliated by taking away all the plaintiff's right to any further arbitration or help." (Id.) She also alleges that "[a]ppropriate action was not taken by the Union to remedy the situation Ms. Luongo faced or to make her 'whole' again as a result of the unfair treatment of the employer." (Compl. at 2 (dkt. no. 1).) AFSCME's position is that it properly grieved the plaintiff's termination, but the plaintiff's concurrent MCAD complaint led to the dismissal of the grievances pursuant to the collective bargaining agreement. It is undisputed that the plaintiff

received notice that she would be unable to continue with the grievance procedure without withdrawing her MCAD complaint and that she ultimately decided not to withdraw the complaint.

II. Discussion

A. Retaliation

The plaintiff's claim against AFSCME for retaliation may plausibly be construed as arising under Title VII. It is unlawful "for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C.A. § 2000e-3(a).

The plaintiff contends that AFSCME violated the statute by "taking away all the plaintiff's right to any further arbitration or help" on September 9, 2010, because she had filed an MCAD complaint. (Compl. at 2.) She presumably refers to a letter sent to her by AFSCME dated September 9, 2010, notifying her of its withdrawal from her disciplinary appeal regarding her suspension.

However, the record clearly shows that under the applicable collective bargaining agreement, the grievance procedure was unavailable to a person who was simultaneously pursuing the same issue in another forum, here the MCAD. By electing not to discontinue the MCAD proceeding, the plaintiff necessarily elected to abandon the union grievance proceeding. The plaintiff argues that the union failed to explain to her until it was too late that she could not sustain both her grievances and her MCAD complaint. However, the plaintiff herself submitted as an exhibit a letter that she received from DDS dated July 12, 2010, explaining the same and

allowing her ten days to withdraw her MCAD complaint. (Pl.'s Opp. to Mot. to Dismiss, Ex. 9 (dkt. no. 18-9).) She also states in her Complaint that she "was informed that if any other type of complaint was filed, she would receive no help from the union whatsoever."

The plaintiff bears the burden of production. Because she has failed to provide any evidence of AFSCME's intent to discriminate or retaliate, her claim for retaliation under Title VII fails. Summary judgment shall enter for the defendant AFSCME on this claim.

B. Unfair Representation

The plaintiff's claim for unfair representation appears to be identical to the claim still pending in the state courts, brought under Massachusetts General Laws ch. 150E, § 10(b)(1), a claim over which this Court has no original jurisdiction.

Although the complaint appears to premise jurisdiction on 28 U.S.C. § 1332, no diversity of citizenship exists here, and any subject matter jurisdiction over state law claims would have to arise under 28 U.S.C. § 1367. As no other claims over which this Court has original jurisdiction remain, I decline to exercise supplemental jurisdiction over the claim for unfair representation. This claim shall be dismissed for lack of subject matter jurisdiction.

III. Conclusion

For the foregoing reasons, the defendant AFSCME's Motion (dkt. no. 33) for Summary Judgment is GRANTED as to the retaliation claim. The plaintiff's claim for unfair representation is DISMISSED.

It is SO ORDERED.

/s/ George A. O'Toole, Jr.
United States District Judge