

BLD-068

January 14, 2021

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 20-2783

MELVIN TRENT WALKER, Appellant

VS.

GOVERNOR OF PENNSYLVANIA, ET AL.

(E.D. Pa. Civ. No. 2-19-cv-04983)

Present: AMBRO, SHWARTZ, and PORTER, Circuit Judges

Submitted by the Clerk for possible dismissal due to jurisdictional defect in the above-captioned case.

Respectfully,

Clerk

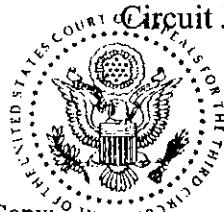
ORDER

The appeal is dismissed for lack of appellate jurisdiction. Melvin Trent Walker appeals from the District Court's order of July 29, 2020, dismissing his claims against Pennsylvania's Governor and Secretary of Transportation. While some claims were dismissed with prejudice, others were dismissed without prejudice, with instructions for Walker as to how he might cure existing defects in an amended complaint. "Generally, an order which dismisses a complaint without prejudice is neither final nor appealable." Borelli v. City of Reading, 532 F.2d 950, 951 (3d Cir. 1976) (per curiam). A dismissal without prejudice can be final if the plaintiff has elected clearly and unequivocally to stand on his complaint. See Weber v. McGrogan, 939 F.3d 232, 240 (3d Cir. 2019). Walker has not done so; instead, he filed an amended complaint. Accordingly, the District Court's order is not appealable at this time.

By the Court,

s/Thomas L. Ambro
Circuit Judge

Dated: January 21, 2021
SLC/cc: Melvin Trent Walker
Claudia M. Tesoro, Esq.



A True Copy:

Patricia S. Dodsweat

Patricia S. Dodsweat, Clerk
Certified Order Issued in Lieu of Mandate

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2783

MELVIN TRENT WALKER,

Appellant

v.

GOVERNOR OF PENNSYLVANIA; SECRETARY
PENNSYLVANIA DEPARTMENT OF TRANSPORTATION

(District Court No.: 2-19-cv-04983)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN,
HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS,
PORTER, MATEY and PHIPPS, Circuit Judges

ORDER

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc is denied.

Walker represents in his petition for rehearing that he wishes to "stand on [his] complaint." However, he did not inform the District Court that he wished to do so, and instead filed an amended complaint. A plaintiff who wishes to invoke the "stand on the complaint" doctrine should "file an appropriate notice with the district court asserting his intent to stand on the complaint, at which time an order to dismiss the action would be appropriate." *Weber v. McGrogan*, 939 F.3d 232, 238 (3d Cir. 2019) (internal citation omitted). Should the District Court dismiss all of Walker's claims with prejudice, he could then file a new appeal within the appropriate timeframe.

BY THE COURT,

s/ THOMAS L. AMBRO
Circuit Judge

Dated: March 10, 2021
SLC/cc: Melvin Trent Walker
Claudia M. Tesoro, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MELVIN TRENT WALKER,

:

CIVIL ACTION

v.

NO. 19-4983

THOMAS WESTERMAN WOLF, et al.,

:

Defendants.

:

ORDER

AND NOW, this 23rd day of July, 2020, upon consideration of Defendants' Motion to Dismiss (ECF No. 6) and Plaintiff's Response in Opposition (ECF No. 10), **IT IS HEREBY ORDERED AND DECREED** that Defendants' Motion is **GRANTED**.

IT IS FURTHER ORDERED as follows:

1. The Title VII and ADEA claims against Defendants are **DISMISSED WITH PREJUDICE**; and
2. The claims arising under Constitutional Question are dismissed **WITHOUT PREJUDICE**.

BY THE COURT:

/s/ **Petrese B. Tucker**

Hon. Petrese B. Tucker, U.S.D.J.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Melvin Trent Walker (“Plaintiff”) is a Black Jewish man born in 1967. Compl. 3, ECF No. 1. Plaintiff brings this civil matter against Pennsylvania Governor Thomas Wolf and former Pennsylvania Department of Transportation (“PennDOT”) Secretary Leslie Richards (“Defendants”), for alleged violations of Title VII of the Civil Rights Act of 1964, 43 U.S.C § 2000e-2, and the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 621. Compl. 1. Plaintiff was a Highway Drafter Paygrade 5 for the Department of Transportation for 10 years. Walker Aff. 2, ECF No. 1. Plaintiff claims Defendants failed to interview him according to the guidelines described by the Pennsylvania Civil Service Rules for competitive promotion to Highway Drafter Paygrade 7 without examination, and failed to train him as needed. Compl. 3. Plaintiff alleges he was discriminated against based on his age, race, and color. Compl. 3.

On October 24, 2019, Plaintiff filed his Complaint. Compl. On December 13, 2019, Defendants filed a Motion to Dismiss for Failure to State a Claim. Defs.’ Mot. to Dismiss, ECF No. 6. Between November 8, 2019 and January 6, 2020, Plaintiff filed several notices to add multiple claims to his suit. *See, e.g.*, November 8, 2019 Notice, ECF No. 4. Plaintiff filed two notices of Constitutional question. ECF Nos. 4, 9. Plaintiff also filed a notice of his Equal Employment Opportunity Commission (“EEOC”) right to sue, as well as a notice of employment discrimination on the basis of sex against Defendant Richards. ECF Nos. 7, 8. On January 13, 2020, Plaintiff filed a Response in Opposition to the Motion to Dismiss. Pl.’s Resp. in Opp’n, ECF No. 10.

II. STANDARD OF REVIEW

To prevail on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is plausible when “the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* Rule 8(a)(2) requires only a “short plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Pro se complaints, “however inartfully pleaded,” are held to “less stringent standards than formal pleadings drafted by lawyers.” *Haines v. Kerner*, 404 U.S. 519, 520 (U.S. 1972). However, “[the court] need not accept as true unsupported conclusions and unwarranted inferences.” *Doug Grant, Inc. v. Greate Bay Casino Corp.*, 232 F.3d 173, 183-84 (3d. Cir. 2000) (internal quotation omitted). The “complaint must do more than allege the plaintiff’s entitlement to relief,” it must “show such [] entitlement with its facts.” *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009). As such, “[t]hreadbare recitals of the cause . . . of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678.

III. DISCUSSION

Defendants argue that (1) Defendants, as individuals, cannot be sued under either Title VII or the ADEA as a matter of law; (2) Plaintiff fails to allege facts that would satisfy a *prima facie* case under the ADEA; and (3) Plaintiff’s Notice of Constitutional Question is devoid of any factual allegations. Defs.’ Mot. to Dismiss 3, 6.

It is well-settled in the Third Circuit that individual employees cannot be sued under either Title VII or the ADEA as a matter of law. *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1078 (3d Cir. 1996) (“Congress did not intend to hold individual employees liable under

Title VII."); *Hill v. Borough of Kutztown*, 455 F.3d 225, 246 n.29 (3d Cir. 2006) ("[T]he ADEA does not provide for individual liability.").

Further, to make a *prima facie* case under the ADEA, Plaintiff must show "1) that he belongs to the protected class, 2) that he applied for and was qualified for the job, 3) that despite his qualifications he was rejected, and 4) that the employer either ultimately filled the position with someone sufficiently younger to permit an inference of age discrimination or continued to seek applicants from among those having plaintiff's qualifications." *Barber v. CSX Distrib. Servs.*, 68 F.3d 694, 698 (3rd Cir. 1995).

As the Complaint stands, Plaintiff does not plead enough factual allegations from which the Court may draw reasonable a conclusion that Plaintiff can articulate a *prima facie* case under the ADEA. Plaintiff fails to allege facts showing he satisfied the requirements of prong two: that he applied for and was qualified for the position of Highway Designer Paygrade 7. Plaintiff further fails to allege the requirements of prong four: that the person who filled the position of Highway Designer Paygrade 7 was significantly younger than him and equally unqualified, or that PennDOT continued to solicit applications from younger individuals with the same or less experience as Plaintiff. Defs.' Mot. to Dismiss 6. Additionally, the Notices of Constitutional Question do not contain any factual allegations from which the Court may draw any reasonable conclusions in favor of the Plaintiff.

The Complaint and Notices filed by Plaintiff do not satisfy Rule 8(a)(2). If Plaintiff would like to add the claims discussed in the Notices—the Constitutional questions and an employment discrimination on the basis of sex claim—Plaintiff must amend his Complaint to include those claims. Plaintiff also must include factual allegations to show the Court that the Plaintiff is

entitled to relief. If Plaintiff wishes to pursue new claims under Title VII and the ADEA, he must ensure he does not make these claims against individuals instead of employers.

IV. CONCLUSION

For the reasons set forth above, the Court **GRANTS** Defendants' Motion to Dismiss for Failure to State a Claim **WITH PREJUDICE** as it pertains to the claims arising under Title VII and the ADEA and **WITHOUT PREJUDICE** as it pertains to the claims arising under Constitutional question.

