

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

KENT A. GREEN,)	
)	
Plaintiff,)	
)	
v.)	No. 18-cv-02269-JTF-tmp
)	
MEMPHIS LIGHT, GAS & WATER,)	
CRAIG V. POWERS, HAROLD COOK,)	
SUSAN JENKINS, and STEVEN)	
BREWER,)	
)	
Defendants.)	

REPORT AND RECOMMENDATION

Before the Court is defendant Memphis Light, Gas and Water's ("MLGW") motion to dismiss, filed on May 23, 2018. (ECF No. 11.) *Pro se* plaintiff Kent A. Green filed a response in opposition on June 19, 2018. (ECF No. 13.) MLGW replied on June 29, 2018. (ECF No. 14.) Pursuant to Administrative Order No. 2013-05, this case has been referred to the United States magistrate judge for management and for all pretrial matters for determination and/or report and recommendation as appropriate. For the following reasons, the undersigned recommends that MLGW's motion be granted in part and denied in part.

I. PROPOSED FINDINGS OF FACT

Green filed a complaint on April 20, 2018, asserting that MLGW and individual defendants Craig V. Powers, Harold Cook, Susan

Jenkins, and Steven Brewer discriminated against him on the basis of race and color in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e-2000e-17, and age in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621-634. (ECF No. 1.) Specifically, Green asserts that he has been employed at MLGW since September 29, 1995 and has over 23 years of experience in the gas department. (Id. at 4.) He alleges that he worked for ten months as a Safety & Training Specialist, and that a Mrs. Helen Towns told him that he "needed to complete the supervisor exam to receive that position." (Id. at 5.) Green alleges that he passed the exam in November 2014, but was subsequently told to return to his original position of Gas Crew Leader. (Id.) Green further asserts that the Safety & Training Specialist position he sought was given to an "under qualified Caucasian welder." (Id.) Green indicated in the complaint that the alleged discriminatory acts of failure to promote and retaliation occurred between June 2014 and January 2016. (Id. at 3.) In addition to his complaint, Green attached an Equal Employment Opportunity Commission ("EEOC") charge of discrimination, filed on February 6, 2017. (ECF No. 1-1 at 2.) That charge states that Green applied for the Safety Training Specialist Gas position around October 2016, but a younger white male was hired in January 2017. (Id.) The charge also states that he applied for an "Inspector Contracted Serv. [sic] position" in

November 2016, but three other men were selected for that position. (Id.) The EEOC closed its file on this charge and informed Green of his right to sue on January 31, 2018. (ECF No. 1-1 at 1.)

MLGW's motion to dismiss asserts that: (1) Green's failure to promote claim is time-barred; (2) Green failed to exhaust his administrative remedies with respect to the color-based discrimination claim; (3) the individually-named defendants should be dismissed because the Sixth Circuit does not recognize individual liability for Title VII or ADEA claims; and (4) Green should be precluded from naming the individual defendants in this action because he did not name them in his EEOC charge. (ECF No. 11 at 1-2.) Green's response states merely that he would "like for you to not dismiss the motion of this case on the grounds that the statement by the defendant are false." (ECF No. 13.)

II. PROPOSED CONCLUSIONS OF LAW

A. Standard of Review

To avoid dismissal for failure to state a claim, "'a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" Hill v. Lappin, 630 F.3d 468, 470-71 (6th Cir. 2010) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)); see also Fed. R. Civ. P. 12(b)(6). "A claim is plausible on its face if the 'plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" Center for

Bio-Ethical Reform, Inc. v. Napolitano, 648 F.3d 365, 369 (6th Cir. 2011) (quoting Iqbal, 556 U.S. at 678). Without factual allegations in support, mere legal conclusions are not entitled to the assumption of truth. Iqbal, 556 U.S. at 679.

Pro se complaints are held to less stringent standards than formal pleadings drafted by lawyers, and are thus liberally construed. Williams v. Curtin, 631 F.3d 380, 383 (6th Cir. 2011). Even so, *pro se* litigants must adhere to the Federal Rules of Civil Procedure, see Wells v. Brown, 891 F.2d 591, 594 (6th Cir. 1989), and the court cannot create a claim that has not been spelled out in a pleading. See Brown v. Matauszak, 415 F. App'x 608, 613 (6th Cir. 2011); Payne v. Sec'y of Treas., 73 F. App'x 836, 837 (6th Cir. 2003).

B. Limitation Period for Failure-to-Promote Claim

A plaintiff must typically file a timely charge of discrimination with the EEOC prior to filing suit in federal court. See Amnini v. Oberlin College, 259 F.3d 493, 498 (6th Cir. 2001). In Tennessee, a plaintiff pursuing a claim under Title VII must file a charge within three hundred days of the alleged unlawful employment practice. Jones v. City of Franklin, 309 F. App'x 938, 945-46 (6th Cir. 2009) (citing Tartt v. City of Clarksville, 149 Fed. App'x 456, 460 (6th Cir. 2005)). The same three-hundred day limitation applies to claims brought under the ADEA. See Gamble v. JP Morgan Chase & Co., No. 3:15-cv-0496, 2016 WL 4541818, at *11

(M.D. Tenn. Aug. 31, 2016) (citing Weigel v. Baptist Hosp. of E. Tenn., 302 F.3d 367, 375-76 (6th Cir. 2002)). Where the plaintiff alleges a "discrete act[] such as termination, failure to promote, denial of transfer, or refusal to hire[,]" the time for filing starts to run on the date of that act. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113-114 (2002); cf. Jones v. Johnson, 707 F. App'x 321, 328 (6th Cir. 2017). In assessing the facial sufficiency of a complaint, a court "may consider exhibits attached to the complaint, so long as they are referred to in the complaint and are central to the claims." Floyd v. Cty. of Kent, 454 F. App'x 493, 494 n.1 (6th Cir. 2012) (citing Rondingo, L.L.C. v. Twp. of Richmond, 641 F.3d 673, 680-81 (6th Cir. 2011)).

Green's complaint states that the alleged discriminatory acts occurred between June 2014 and January 2016. (ECF No. 1 at 3.) However, his EEOC charge states that, after applying for the Safety Training Specialist Gas position, a younger white male was selected in January 2017. (ECF No. 1-1 at 2.) Based on this date, Green's EEOC charge, filed on February 6, 2017, would be timely. Thus, to the extent that Green's claims under Title VII and the ADEA relate to this discrete instance of failure to promote, they would not be time-barred. Because the EEOC charge is referred to in his complaint, and is central to his claims, it should be considered. See Floyd, 454 F. App'x at 494 n.1; Rondingo, L.L.C., 641 F.3d at 680-81. Furthermore, Green is proceeding *pro se*, so his pleadings

should be liberally construed. See Williams, 631 F.3d at 383. Accordingly, Green's pleadings contain sufficient factual matter, accepted as true, to state a plausible claim to relief for failure to promote. See Hill, 630 F.3d at 470-71; see also Fed. R. Civ. P. 12(b)(6). Thus, MLGW's motion should be denied on this ground.

C. Failure to Exhaust Color-Based Discrimination Claim

Generally, a Title VII plaintiff cannot bring a claim in a lawsuit that was not included in a previous EEOC charge. See 42 U.S.C. § 2000e-5(f)(1); Younis v. Pinnacle Airlines, Inc., 610 F.3d 359, 362 (6th Cir. 2010) (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974)). Even so, *pro se* complaints are construed liberally, and courts may consider claims that are reasonably related to or grow out of the factual allegations in the EEOC charge. Younis, 610 F.3d at 362; see also EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 599 (6th Cir. 2018). Thus, "whe[n] facts related with respect to the charged claim would prompt the EEOC to investigate a different, uncharged claim, the plaintiff is not precluded from bringing suit on that claim." Younis, 610 F.3d at 362 (quoting Davis v. Sodexho, 157 F.3d 460, 463 (6th Cir. 1998)); see also R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d at 599. "[C]olor discrimination is distinct from race discrimination in that the former arises when the particular hue of the plaintiff's skin is the cause of discrimination." Payne v. Lucite Intern., No. 13-2948-STA-tmp, 2014 WL 2826343, at

*3 (W.D. Tenn. June 23, 2014) (quoting Cooper v. Jackson-Madison Cnty. Gen. Hosp. Dist., 742 F. Supp. 2d 941, 951 (W.D. Tenn. 2010)).

Green checked the box for color-based discrimination in his complaint. (ECF No. 1 at 4.) Green did not check that box in his initial EEOC charge. (ECF No. 1-1 at 2.) Green stated in the EEOC charge that he was “discriminated against because of my race (Black) and age[.]” (Id.) Liberally construed, the factual basis of Green’s Title VII claim is that he was discriminated against because of his race. At no point, either in the EEOC charge or in the complaint, does Green allege that he was discriminated against on the basis of color in a manner which would be cognizable under Title VII. See Payne, 2014 WL 2826343, at *3; Cooper, 742 F. Supp. 2d at 951. Because Green did not include a claim of color-based discrimination in his EEOC charge, and because such claim is neither reasonably related to nor expected to grow out of his EEOC charge, he has failed to exhaust his administrative remedies with respect to that claim. Accordingly, it should be dismissed.

D. Individually-Named Defendants

An individual employee or supervisor who does not otherwise qualify as an “employer” may not be held personally liable under Title VII. Roof v. Bel Brands USA , Inc., 641 F. App’x 492, 496 (6th Cir. 2016) (citing Wathen v. General Elec. Co., 115 F.3d 400, 406 (6th Cir. 1997)). Likewise, they may not be liable under the

ADEA. See Bogard v. Hilton Worldwide, No. 2:17-cv-02705-JTF-tmp, 2017 WL 4799821, at *2 (W.D. Tenn. Oct. 24, 2017); see also Tennial v. United Parcel Serv., Inc., No. 2:13-cv-02277-JTF-tmp, 2015 WL 13022010, at *3 (W.D. Tenn. Nov. 12, 2015) (citing Hiler v. Brown, 177 F.3d 542, 546 (6th Cir. 1999)). Furthermore, "a plaintiff 'may only sue an entity for violating civil rights statutes such as Title VII . . . if it named the same entity in its prior EEOC charge.'" Lockhart v. Holiday Inn Exp. Southwind, 531 F. App'x 544, 546 (6th Cir. 2013) (quoting Szoke v. United Parcel Serv. of Am., Inc., 398 F. App'x 145, 153 (6th Cir. 2010)).

Green names four individual defendants in his complaint. (ECF No. 1 at 2.) Green does not discuss these individuals elsewhere in his complaint, offer any description of their job titles or responsibilities, or indicate, in any way, their involvement in the alleged discriminatory conduct. These individual defendants are also not named in his EEOC charge. Thus, Green's complaint, even liberally construed, does not contain factual content that would allow this court to draw the reasonable inference that the defendants are liable for the misconduct alleged. See Ctr. for Bio-Ethical Reform, Inc., 648 F.3d at 369; Iqbal, 556 U.S. at 678. Accordingly, the individual defendants Craig V. Powers, Harold Cook, Susan Jenkins, and Steven Brewer should be dismissed.

III. RECOMMENDATION

For the above reasons, it is recommended that MLGW's motion to

dismiss be granted as to Green's claim of color discrimination and the individually-named defendants, and denied as to Green's claims under Title VII and the ADEA for failure to promote and retaliation.¹

Respectfully submitted,

s/ Tu M. Pham

TU M. PHAM
United States Magistrate Judge

July 24, 2018

Date

NOTICE

WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THIS REPORT AND RECOMMENDED DISPOSITION, ANY PARTY MAY SERVE AND FILE SPECIFIC WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATIONS. ANY PARTY MAY RESPOND TO ANOTHER PARTY'S OBJECTIONS WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b)(2); LR 72.1(g)(2). FAILURE TO FILE OBJECTIONS WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND FURTHER APPEAL.

¹MLGW's present motion does not specifically address Green's retaliation claim.