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

SEDRICK STEELE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 17-cv-2679-JPM-tmp**
	)	
EZULDIN AHMED MURSHED,	)	
	)	
Defendant.	)	
	)	

REPORT AND RECOMMENDATIONS

On September 14, 2017, *pro se* plaintiff Sedrick Steele filed a complaint against defendant Ezuldin Ahmed Murshed, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634. (ECF No. 1.) Steele also filed a motion to proceed *in forma pauperis*. (ECF Nos. 2) The undersigned granted the motion to proceed *in forma pauperis*, and ordered Steele to provide an address for Murshed in order to effect service of process. (ECF No. 7.) Steele responded, and a summons was issued. (ECF Nos. 8; 9.) On October 11, 2017, Murshed moved to dismiss for failure to state a claim. (ECF No. 11.) Steele responded on October 25, 2017. (ECF No. 13.) Pursuant to Administrative Order 2013-05 (Apr. 29, 2013), 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, it is recommended that the Motion to Dismiss for Failure to State a Claim be granted.

I. PROPOSED FINDINGS OF FACT

Murshed owns an EZ Food Mart in Memphis, Tennessee. (ECF No. 11-1 at 2.) Steele alleges that he was an employee at the EZ Mart, and that, while employed there, Murshed subjected him to: unlawful termination of employment, failure to hire, and unequal terms and conditions of employment on the basis of his race, color, gender/sex, and religion. (ECF No. 1 at 3-4.) In support of his complaint, Steele asserts: "About pay everyone he hires pay more. To many Job tasks no pay no raises or vacation work more hours no pay. Ask many time got no other race hire pay more [sic]." (ECF No. 1 at 4.) Steele requests that Murshed be directed to re-employ him and pay an unspecified amount of back pay. (ECF No. 1 at 6.) Steele also attached a letter from the U.S. Department of Labor, indicating that Steele "might not have been paid as required by the law" between June 8, 2015, and May 29, 2017. (ECF No. 1-1.) The Department of Labor letter advised that its Wage and Hour Division informed Murshed of the Fair Labor Standards Act wage requirements, and requested that Murshed pay Steele back wages owed, if any. (Id.) The letter further stated that the Department of Labor would neither litigate on Steele's behalf, nor take any further action to secure any payments owed. (Id.)

II. PROPOSED CONCLUSIONS OF LAW

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.'" Ctr. 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 so* 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).

Murshed first argues that Steele's Title VII and ADEA claims must be dismissed for failure to exhaust administrative remedies.

(ECF No. 11-1 at 4.) Before filing a Title VII claim in federal court, a claimant is required to file a charge of discrimination or retaliation through the Equal Employment Opportunity Commission ("EEOC"), and is precluded from seeking judicial review until the EEOC has made a final disposition of the claim and issues a right-to-sue letter. See 42 U.S.C. § 2000e-5; E.E.O.C. v. Frank's Nursery & Crafts, Inc., 177 F.3d 448, 456 (6th Cir. 1999). But see Parry v. Mohawk Motors of Michigan, Inc., 236 F.3d 299, 310 (6th Cir. 2000) (explaining that failure to obtain a right-to-sue letter is a condition precedent, not a jurisdictional defect, and thus may be waived by the parties or the court). The same rule applies to lawsuits filed under the ADEA. See 29 U.S.C. § 626(d); Davis v. Sudexho, Cumberland Coll. Cafeteria, 157 F.3d 460, 463 (6th Cir. 1998).

Steele has not shown (or even alleged) that he filed a claim with the EEOC as required. He attached a letter from the Department of Labor to his complaint; however, such a letter is not a substitute for an EEOC right-to-sue letter, and is insufficient to show that he has exhausted his administrative remedies as to the Title VII and ADEA claims. There is nothing in Steele's pleadings to suggest that he has ever filed a charge of discrimination with the EEOC. Furthermore, Steele had the opportunity to address the deficiency in his response, and he failed to do so. Thus, it is recommended that Steele's Title VII and ADEA claims be dismissed

without prejudice. See Dickerson v. Assocs. Home Equity, 13 F. App'x 323, 324 (6th Cir. 2001) (concluding that Title VII action was properly dismissed for failure to state a claim where the pleadings did not include a right-to-sue letter); see also Stampone v. Freeman Decorating Co., 196 F. App'x 123, 126 (3d Cir. 2006) ("In the absence of a right-to-sue letter, a Title VII suit can be dismissed for failure to state a claim upon which relief may be granted.") (citing Gooding v. Warner-Lambert Co., 744 F.2d 354, 358 n.5 (3d Cir. 1984)); Monticciolo v. Fox, No. 11-15253, 2012 WL 395743, at *2 (E.D. Mich. Feb. 7, 2012) ("[A] a failure to obtain a right-to-sue letter merits dismissal without prejudice.") (citing Dixon v. Ohio Dep't of Rebah. & Corr., 181 F.3d 100, 1999 WL 282689, at *1 (6th Cir. Apr. 28, 1999) (unpublished table decision)).

Apparently based on the Department of Labor letter attached to the complaint, Murshed construes Steele's complaint as asserting a claim for relief under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq*. Murshed argues that Steele's FLSA claim must be dismissed for failure to seek minimum wage or overtime pay. (ECF No. 11-1 at 5.) It is not clear from the complaint itself that Steele intended to assert an FLSA claim, because the complaint does not mention of the FLSA, and the only reference to minimum wage or overtime pay is contained in the attached letter from the Department of Labor. Even so, construing the complaint liberally

and assuming, *arguendo*, that Steele intended to assert an FLSA claim, the complaint fails to state a plausible claim for relief under the FLSA. The FLSA provides for an employee's right to minimum wage and overtime pay at a premium rate. See 29 U.S.C. §§ 206(a)(1); 207(a). There is some dispute among the federal courts as to the level of specificity that a pleading asserting claims under the FLSA must contain to survive a motion to dismiss. See Landers v. Quality Commc'ns, Inc., 771 F.3d 638, 641 n.1 & 642-46 (9th Cir. 2015) (considering whether a plaintiff is required to approximate the overtime hours worked or amount of wages owed to state a plausible claim for relief under the FLSA). Several district courts within the Sixth Circuit have concluded that a simple statement that the employer failed to pay overtime or a minimum wage is sufficient to state a claim for violation of the FLSA. See Doucette v. DIRECTV, Inc., No. 2:14-cv-02800-STA-tmp, 2015 WL 2373271, at *7 (W.D. Tenn. May 18, 2015) (collecting cases). The Sixth Circuit has not directly addressed this issue. However, Steele's complaint fails to meet even this lenient standard. Steele does not specifically allege that he was paid less than the minimum wage, or that he was denied overtime pay. Rather, he alleges that he was paid less than other workers, denied raises despite asking many times, and not given sufficient vacation time. (ECF No. 1 at 4.) Nor does the Department of Labor letter assert that Steele was denied minimum wage or overtime pay; it only

states he might not have been paid as required by law. Therefore, the factual allegations contained in Steele's complaint, even construed liberally, see Williams, 631 F.3d at 383, are at best naked assertions, or "unadorned, the-defendant-unlawfully-harmed-me accusation[s]." See Iqbal, 556 U.S. at 678; see also Brown, 415 F. App'x at 613; Payne, 73 F. App'x at 837. Thus, the complaint fails to state a plausible claim for relief under the FLSA. Accordingly, it is recommended that, to the extent Steele attempted to assert an FLSA claim, such claim be dismissed.

III. RECOMMENDATION

For the above reasons, the undersigned recommends that Murshed's Motion to Dismiss be granted.

Respectfully submitted,

s/ Tu M. Pham
TU M. PHAM
United States Magistrate Judge

November 29, 2017
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); L.R. 72.1(g)(2). FAILURE TO FILE OBJECTIONS WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND FURTHER APPEAL.