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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

MAGGIES PARATRANSIT CORP.,

Defendant.

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MEMORANDUM AND ORDER
03-CV-6087 (NGG)(KAM)

GARAUFIS, United States District Judge.

This action was brought by the Equal Employment Opportunity Commission ("EEOC") alleging that defendant Maggies Paratransit Corp. ("Maggies") engaged in discrimination on the basis of sex and retaliation in violation of Section 706(f)(1), (3) and Section 707(3) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e 5(f)(1), (3) and § 2000e-6(e) ("Title VII"), and Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a. The original complaint was filed on December 3, 2003. The EEOC filed an amended complaint on March 19, 2004.

On June 4, 2004, Maggies brought this motion, pursuant to Fed. R. Civ. Proc. 12(b)(1) and (6), to dismiss all pattern or practice claims and to dismiss the claim for retaliation against Mia Maddox.

For the following reasons, the motion is denied in part and granted in part.

I. LEGAL STANDARD

In reviewing a motion to dismiss for failure to state a claim brought pursuant to Fed R. Civ. P. 12(b)(6), the court must accept all factual allegations in the complaint as true and draw

all reasonable inferences from those allegations in the light most favorable to the plaintiff. See Albright v. Oliver, 510 U.S. 266, 268 (1994); Burnette v. Carothers, 192 F.3d 52, 56 (2d Cir. 1999). In deciding such a motion, the court may take into account documents referenced in the complaint, as well as documents that are in the plaintiff's possession or that the plaintiff knew of and relied on in filing the suit. See Brass v. Am. Film Technologies, Inc., 987 F.2d 142, 150 (2d Cir. 1993). The complaint may be dismissed only if "it appears beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Hoover v. Ronwin, 466 U.S. 558, 587 (1984) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). In deciding such a motion, the "issue is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir. 1996) (internal quotations omitted). This standard is applied with "particular force" when the plaintiff alleges civil rights violations. Chance v. Armstrong, 143 F.3d 698, 701 (2d Cir. 1998).

Similar to a motion for failure to state a claim, when a court reviews a motion for lack of subject matter jurisdiction under Fed. R. Civ. Proc. 12(b)(1), it accepts as true all material factual allegations in the complaint. Atlantic Mut. Ins. Co. v. Balfour Maclaine Intern. Ltd., 968 F.2d 196, 198 (2d Cir. 1992) (internal citations omitted). However, unlike a motion for failure to state a claim, the court must refrain from drawing "argumentative inferences" in favor of the party asserting jurisdiction. See id. (internal citations omitted).

II. BACKGROUND

The EEOC's lawsuit stems from charges filed by two former employees of Maggies, Mia Maddox ("Maddox") on June 1, 2002 and Wendy Mercado ("Mercado") on March 13, 2003,

alleging violations of Title VII by Maggies.[1] (Pl. Am. Compl. at ¶ 6). Maddox alleged that she was subjected to sexual harassment by supervisors and managers Kenny Genao ("Genao"), Ray Perez ("Perez") and Angle (last name unknown; "Angle"). (See Charge of Discrimination dated June 1, 2002, attached as Ex. 1 to May 21, 2004 Affidavit of Lauren Dreilinger ("Dreilinger Aff.")). Similarly, Mercado alleged that her supervisors Louis Plumitallo ("Plumitallo") and Genao sexually harassed her. (See Complaint dated March 3, 2003, attached as Ex. 2 to Dreilinger Aff.).

On September 10, 2003 the EEOC sent Maggies a Determination letter regarding the two charges, which indicated that based on its investigation there was reasonable cause to believe that Mercado and Maddox had been sexually discriminated against. (See Determination dated September 10, 2003, attached as Ex. 5 to Dreilinger Aff.). The Determination also indicated that there was reasonable cause to believe that a class of similarly-situated employees were subjected to a sexually hostile work environment. (Id.). The EEOC, following its Procedural Regulations, then invited Maggies to address the issues through proposed "conciliation terms." (Id.).

Maggies accepted a number of the EEOC's proposed conciliation terms, but ultimately the two sides could not reach an agreement. (See September 18, 2003 Letter from Maggies, attached as Ex. 8 to Dreilinger Aff.; September 24, 2003 Email from Maggies, attached as Ex. 9 to Dreilinger Aff.). As a result, the EEOC informed Maggies on October 1, 2003 that no further conciliation efforts would take place. (See EEOC Letter, attached as Ex. 10 to Dreilinger Aff.).

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[1] Mercado's charge was originally made to the New York State Division of Human Rights, but under a Worksharing Agreement with the EEOC it was jointly investigated by the two agencies. The EEOC initially interviewed Mercado on May 13, 2003. (See EEOC Memorandum of Law at 2 n. 2).

Shortly thereafter, the EEOC filed its complaint initiating the present litigation.

In its complaint, the EEOC alleges that Maggies engaged in unlawful employment practices, including intentional discrimination against Maddox and Mercado "and a class of similarly situated women by subjecting them to physical and verbal sexual harassment." (Pl. Am. Compl. at ¶ 7). The EEOC also alleges that Maggies retaliated against Maddox and Mercado for engaging in the protected activity of opposing the harassment to which they were allegedly subjected by terminating Maddox and unfairly disciplining Mercado. (Id. at ¶ 8). Further, the EEOC alleges that Maggies engaged in a "pattern or practice" of failing to correct this sexual harassment. (Id. at ¶ 10). Further, it is contended that the net effect of Maggies' actions has been to "deprive Maddox, Mercado, and a class of similarly situated women of equal employment opportunities and otherwise adversely affect their status as employees because of their sex." (Id. at ¶ 11). Finally, the EEOC alleges that Maggies' conduct was both intentional and was done with "malice or reckless indifference" to the federally protected rights of Maddox, Mercado and a class of similarly situated women. (Id. at ¶¶ 12-13).

III. DISCUSSION

In its motion to dismiss, Maggies raises three contentions: (1) the pattern or practice claims by the EEOC are not reasonably related to the individual charges brought by Maddox and Mercado; (2) the EEOC failed to file a Commissioner's charge, which it argues was a prerequisite to filing the suit given Maggies' first contention, above; and (3) Maddox's EEOC charge did not include an allegation of retaliation so this court lacks jurisdiction over such a claim. These claims are considered in turn.

A. Pattern or Practice Claims Not Reasonably Related

Maggies contends that the court lacks jurisdiction to hear the EEOC's pattern or practice claims because they were not reasonably related to the charges filed by Maddox and Mercado. It argues that the EEOC's claims of a pattern or practice of harassment cannot be reasonably related to Maddox and Mercado's charges because it characterizes them as only involving claims of individual sexual harassment.

Generally, a plaintiff filing a Title VII claim in federal court must have first filed a complaint with the EEOC and exhausted her administrative remedies. The purpose of this administrative exhaustion requirement is to ensure that employers are given notice of the actual substance of the claims they may face in court and an opportunity to settle those issues without the need for litigation. See Mitchell v. Fab Indus. Inc., No. 96 Civ. 0095, 1996 WL 417522, at *2 (S.D.N.Y. July 25, 1996). However, an exception to this requirement exists if the claim asserted is "reasonably related" to the conduct alleged in the EEOC charge, but was not actually made in the charge. Butts v. City of New York Dep't of Hous. Pres. & Dev., 990 F.2d 1397, 1401 (2d Cir. 1993) (citations omitted), superseded by statute on other grounds as recognized in Hawkins v. 1115 Legal Serv. Care, 163 F.3d 684 (2d Cir. 1998). The Court of Appeals for the Second Circuit has defined three types of claims that may be "reasonably related" to the conduct alleged in an EEOC charge. Id. at 1401-03. Included among these is a claim in which "the conduct complained of would fall within the scope of the EEOC investigation which can reasonably be expected to grow out of the charge that was made." Fitzgerald v. Henderson, 251 F.3d 345, 359-60 (2d Cir. 2001), cert. denied, 536 U.S. 922 (2002) (internal quotation marks and citations omitted). "This exception to the exhaustion requirement 'is essentially an allowance of

loose pleading' and is based on the recognition that 'EEOC charges frequently are filled out by employees without the benefit of counsel and that their primary purpose is to alert the EEOC to the discrimination that a plaintiff claims she is suffering.'" Deravin v. Kerik, 335 F.3d 195, 201 (2d Cir. 2003) (quoting Butts, 990 F.2d at 1402).

With these standards and concerns in mind, it is clear that the EEOC's pattern or practice claim is one that involves conduct which falls within the reasonable scope of its investigation of Maggies as precipitated by Maddox and Mercado's charges. See, e.g., Sidor v. Reno, No. 95 Civ. 9588, 1997 WL 582846, at *10 (S.D.N.Y. Sept. 19, 1997) (holding plaintiff's allegation of discrimination against other employees during course of investigation, but not contained in initial charge, sufficient to support a pattern or practice claim).

Although the charges filed with the EEOC by Maddox and Mercado do not allege a pattern or practice of sexual harassment, the EEOC's subsequent administrative investigation raised these issues. In an interview following her charge, Mercado detailed conduct by Maggies' employees that was broader than individual harassment she alone had suffered. For instance, in describing Genao, she indicated that he "does sexual jokes with everyone, he made comments about every girl." (August 19 Notes of Mercado Interview, attached as Ex. 4 to Dreilinger Aff.). Mercado also described the conduct that generally occurred in the dispatch room: "They all talked about women's boobs, butts, had magazines, sex with their wives, sexual positions." (Id.). Further, Mercado explained her reluctance to complain about her treatment based on her view that "[t]hey make up stories and fire people." (Id.). These comments suggest that the sexual harassment alleged in Mercado and Maddox's charges went beyond just being individual treatment that these employees experienced and may have extended to include a pattern or

practice of discrimination. Thus the claim of a pattern or practice of sexual discrimination is reasonably related to the EEOC's investigation.

Furthermore, the fact that Maddox and then Mercado filed charges alleging similar patterns of sexual harassment by an overlapping group of supervisors and managers provided the EEOC with a reasonable basis to investigate whether these individual claims were symptomatic of a more wide-reaching problem. "In the absence of any indication of delinquency on the part of the investigating agency, the scope of the actual investigation conducted is strongly suggestive of what could reasonably be expected to grow out of the administrative charge." Sidor v. Reno, No. 95 Civ. 9588, 1997 WL 582846, at *10 (S.D.N.Y. Sept. 19, 1997).

Maggies was also given notice of the substance of this claim by the EEOC, so its inclusion in the present lawsuit did not catch Maggies by surprise and deny it the opportunity to have addressed the issue through Title VII's administrative procedures. In its Determination, the EEOC informed Maggies that it had "determined that there is reasonable cause to believe that a class of similarly-situated employees was subjected to a sexually hostile work environment." (Dreilinger Aff., Ex. 5).

In contending that the court lacks jurisdiction over this claim, Maggies relies primarily on a case from the Southern District of New York, EEOC v. Golden Lender Financial Group, No. 99 Civ. 8591, 2000 WL 381426 (S.D.N.Y. Apr. 13, 2000). This reliance, however, is misplaced. Contrary to Maggies' assertion, Golden Lender, while persuasive authority, does not require dismissal of this pattern or practice claim. The facts in Golden Lender, in which the court dismissed a race and national origin pattern or practice claim, are materially different from those at issue in this case. Notably, the Golden Lender court made no mention of the scope of

the EEOC investigation resulting from the individual complaints of race and national origin discrimination. Thus the court's determination turned solely on the contents of the charges. However, the Golden Lender court did allow a sexual discrimination pattern or practice claim to proceed. In doing so, the court considered the "scope of the investigation conducted by the EEOC" and found that it "support[ed] the conclusion that the claim is reasonably related to the charges filed in this case." Golden Lender, 2000 WL 381426, at *4. For these reasons, Maggies' position is not supported by this case.

The motion to dismiss the EEOC's pattern or practice claims on the ground that they are not reasonably related to the initial charges is denied.

B. Failure to File a Commissioner's Charge

Maggies also contends that the pattern or practice claims should be dismissed because the EEOC failed to file a Commissioner's charge regarding these claims. Maggies argues that since the charges by Mercado and Maddox did not involve allegations of a pattern or practice of sexual harassment, the EEOC was obligated to file a Commissioner's charge so that Maggies would be provided with sufficient notice of the nature of this claim. The EEOC counters that a Commissioner's charge was unnecessary as it put Maggies on notice of the claim through its investigation, the filing of its Determination and the conciliation process.

Maggies' argument essentially involves the same issue as Maggies' first basis for dismissal. As Maggies itself concedes, the EEOC is not obligated under 42 U.S.C. § 20003-6(e) to always file its own charge before instituting a pattern or practice claim. Since the court found that the EEOC's pattern or practice claim reasonably grew out of the EEOC investigation, the question becomes whether Maggies received adequate notice of the claim without the benefit of

having it laid out in a separate Commissioner's charge. The court finds that Maggies did receive such adequate notice.

In advancing its argument, Maggies relies principally on EEOC v. Shell Oil Company, 466 U.S. 54 (1984), in which the Supreme Court enunciated standards for the contents of an EEOC charge of a pattern or practice of discrimination. In construing the EEOC's regulation regarding the required contents of a charge, see 29 CFR § 1601.12(a)(3), the Court elaborated the following standard:

> Insofar as he is able, the Commissioner should identify the groups of persons that he has reason to believe have been discriminated against, the categories of employment positions from which they have been excluded, the methods by which the discrimination may have been effected, and the periods of time in which he suspects the discrimination to have been practiced.

466 U.S. 54, 73. Significantly, in quoting this text, Maggies omits the sentence's opening phrase that this information should be provided by the Commissioner "[i]nsofar as he is able." By omitting this phrase, Maggies apparently seeks to turn the Court's instruction into an absolute requirement. This transformation is unwarranted and imposes a level of formality that does not reflect the Court's more general guiding concern to ensure that employers receive "fair notice of the existence of and nature of the charges against them." Shell, 466 U.S. at 77.

During the course of the EEOC's administrative procedures, Maggies was provided with fair notice of the pattern or practice claim it now faces in this lawsuit. In its Determination, the EEOC specifically indicated that "[b]oth [Mercado and Maddox] allege that the sexually hostile work environment permeated (and continues to permeate) the Maggie's office, thus affecting other employees' work conditions as well." (Dreilinger Aff., Ex. 5). The EEOC went on to inform Maggies that it "has also determined that there is reasonable cause to believe that a class

of similarly-situated employees was subjected to a sexually hostile work environment." (Id.). Thus even though the charges filed against Maggies did not provide it with notice of the pattern or practice claims, the subsequent EEOC administrative process did. By making these additional allegations in the context of Mercado and Maddox's charges, the EEOC sufficiently notified Maggies that it believed that other women employees had suffered harassment similar to that suffered by Maddox and Mercado. Although greater specificity from the EEOC regarding the temporal aspects of the pattern or practice of discrimination might have been desirable, the EEOC did indicate the likelihood that the conduct "continues to permeate" the office.

The terms of the conciliation offered by the EEOC to Maddox also served to give Maggies notice that the EEOC conceived of the harassment at issue as being broader in scope than just isolated incidents affecting two employees. For instance, in addition to specifying that Maddox and Mercado would each receive monetary awards of $100,000, the EEOC provided that Maggies "will pay each individual, other than Charging Parties, affected by sexual harassment a monetary award . . . up to $100,000 in compensatory damages." (Dreilinger Aff., Ex. 6). Inclusion of this term was a clear signal to Maggies that the EEOC believed that other employees had suffered treatment consistent with that described by Maddox and Mercado.

Maggies' motion for dismissal on the basis that the EEOC did not file a Commissioner's charge is denied.

C. Maddox's EEOC Charge Did Not Include an Allegation of Retaliation

Maggies asserts that the claim that it retaliated against Maddox must be dismissed because her charge fails to allege a sufficient factual basis to support it. Specifically, Maggies points out that the retaliation claim is duplicative because it relies on the exact same facts as are

used to support her sexual harassment claim and so fails to point to any retaliatory action that was suffered by Maddox that is not already covered by the sexual harassment claim. The EEOC counters that Maddox's termination was retaliatory because it followed her rejection of sexual advances and her opposition to the harassment.

Maggies has the better of this argument because Maddox did not engage in conduct that would have provided a basis on which Maggies could have retaliated. Absent such a showing, there is no possibility that the EEOC can sustain a case of retaliation. In order to establish a prima facie case for retaliation under Title VII, a plaintiff must show that "(1) the employee was engaged in protected activity; (2) the employer was aware of that activity; (3) the employee suffered an adverse employment action; and (4) there was a causal connection between the protected activity and the adverse employment action." Reed v. A.W. Lawrence & Co., Inc., 95 F.3d 1170, 1178 (2d Cir. 1996) (citations omitted). There has been no showing that Maddox met the first requirement.

Maddox's charge contains no indication that she engaged in any sort of protected activity in response to the harassment to which she alleges she was subjected. Her charge contains no indication that she complained to anyone at Maggies, only that she resisted and avoided the employees who harassed her. Thus the only potential basis on which Maggies could be said to have retaliated against her would be based on her rejection of other employees' sexual advances. While some courts in this circuit have recognized rejection of a sexual advance as a basis for retaliation, see, e.g., Burrell v. City Univ. of New York, 894 F.Supp. 750, 761 (S.D.N.Y. 1995) (refusing to accede to sexual advance constitutes activity protected under Title VII), the more common and preferred view is that retaliation cannot occur without some affirmative opposition

from the employee, however slight. See, e.g., Soliman v. Deutsche Bank AG, No. 03 Civ. 104, 2004 WL 1124689, at *12 (S.D.N.Y. May 20, 2004) ("at the very least, there must be some form of professional indicia of a complaint made against an unlawful activity") (internal quotations and citations omitted); Rashid v. Beth Israel Med. Ctr., No. 96 Civ. 1833, 1998 WL 689931, at *2 (S.D.N.Y. Oct. 2, 1998) ("Plaintiff's claim--that she suffered an adverse employment action as a result of refusing sexual favors--presents a textbook example of quid pro quo sex discrimination. A retaliation claim, under these circumstances, is duplicative and unnecessary, and runs the risk of confusing a jury."); Del Castillo v. Pathmark Stores, Inc., 941 F.Supp. 437, 438-39 (S.D.N.Y. 1996) ("Protected activity" cannot consist simply of declining sexual advances, or "every harassment claim would automatically state a retaliation claim as well."). For instance, in addition to filing a formal complaint, an employee can engage in "informal protests of discriminatory employment practices, including making complaints to management, writing critical letters to customers, protesting against discrimination by industry or by society in general, and expressing support of co-workers who have filed formal charges." Sumner v. U.S. Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990); see also Galarza v. Am. Home Assur. Co., 99 F.Supp.2d 251, 257 (E.D.N.Y. 2000) (finding even a "vague and unspecific" complaint to management to be "protected activity").

Because there has been no showing that Maddox engaged in any protected activity under Title VII, the EEOC cannot state a claim for retaliation. Accordingly, the Maddox retaliation claim is dismissed.

III. CONCLUSION

For the reasons stated above, the defendant's motion to dismiss the pattern or practice claims is DENIED, while the motion to dismiss the Maddox retaliation claim is GRANTED.

SO ORDERED.

Dated: November 29, 2004
Brooklyn, N.Y.

/s/
Nicholas G. Garaufis
United States District Judge