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

TARENCE MOSEY
Plaintiff, **DOCKET NO.: 3:16-00150-KRG**

v.

LOGAN TOWNSHIP UNITED FIRE DEPARTMENT, INC. **JURY TRIAL DEMANDED**
Defendant.

PLAINTIFF'S RESPONSE IN OPPOSITION
TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Plaintiff, TARENCE MOSEY, by and through his attorneys, The Law Firm of Jacobson & Rooks, LLC, files the instant RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS, and avers as follows:

I. INTRODUCTION

In its Motion to Dismiss, Defendant seeks dismissal of Plaintiff's claims of intentional racial discrimination, hostile work environment and retaliation under 42 U.S.C. §1981 for failure to state claims under Fed. R. Civ. Proc. 12(b)(6), as well as Plaintiff's state law claim for Intentional Infliction of Emotional Distress, as time barred. See *generally* Defendant's Memorandum of Law in Support of Motion to Dismiss ("Def. Mem."). As discussed more fully below, Defendant's arguments are without merit and Defendant's Motion should be denied or in the alternative, Plaintiff should be granted leave to amend his Complaint.

Plaintiff is an African American, black male who was a Firefighter and Emergency Medical Technician member of Defendant fire department from November 2007 through February 2014. (Compl. at 6, 8, 9). Throughout his tenure with Defendant, Plaintiff was called "nigger," "porch monkey," "koon" and spook" on a daily basis by Defendant employees and supervisory personnel.

(Compl. at 14-18). Plaintiff specifically names the employees and supervisory personnel responsible for these racial slurs in his Complaint. (Compl. at 15, 18). Some of these same individuals stated they would never fight fire with Plaintiff because he is black, and they would never take orders from a "nigger." (Compl. at 21-22).

Defendant routinely required Plaintiff to do more physically demanding tasks and more menial, chore-based tasks than similarly situated white employees of Defendant. (Compl. at 25). Plaintiff was threatened that if he did not complete these sort of tasks, he would not be allowed upstairs with the rest of Defendant employees. (Compl. at 27). Defendant instructed Plaintiff to clean up after co-employees in the gym and shower area, all while calling him "bitch." (Compl. at 28-30). Defendant denied Plaintiff important training required for national certifications and denied him job advancements in favor of less qualified white co-employees. (Compl. at 31-32, 34-35). Defendant acquired new protective equipment for firefighters in 2008 and 2013, but in both instances refused to provide Plaintiff with the new equipment. (Compl. at 37-39). Plaintiff was given no choice but to utilize outdated and unsafe equipment while his white co-employees were given the updated equipment. (Compl. at 40).

Plaintiff also endured physical attacks at the hands of Defendant co-employees. (Compl. at 43-48). Plaintiff was chastised, threatened and ultimately terminated by Defendant supervisors, pretextually, for attending public social events by invitation at a neighboring fire department. (Compl. at 50-61). Despite Plaintiff's numerous, consistent complaints about the treatment he received at the hands of Defendant based upon his race, Defendant never addressed the basis for his complaints, and instead allowed the racially hostile work environment to exist and retaliated against him, including terminating his employment, for his complaints. (Compl. at 49, 62-65).

II. STANDARD OF REVIEW

When presenting a Rule 12(b)(6) motion, the defendant bears the burden of demonstrating that the plaintiff has failed to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Fed.R.Civ.P. 8(a)(2) requires only a plausible short and plain statement of the plaintiff's claim in a complaint, not an exposition of his legal argument. Skinner v. Switzer, 131 S.Ct. 1289, 1296 (2011). The complaint must simply "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 512 (2002); accord, Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 569 (2007); Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993). This is an "extremely lenient" standard. Weston v. Pa., 251 F.3d 420, 430 (3rd Cir. 2001). Notice pleading "relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." Swierkiewicz, 534 U.S. at 512.

A complaint is not meant to prove a claim; rather, it simply "raise[s] a reasonable expectation that discovery will reveal evidence" satisfying the elements of the legal claim. Twombly, 550 U.S. at 556; Matrixx Initiatives, Inc. v. Siracusano, 131 S.Ct. 1309, 1323 (2011). If there are sufficient facts in the complaint to put the defendant on notice of a claim, the court may infer facts as to which the complaint is otherwise silent that would support plaintiff's claim:

> [T]he Supreme Court's recent decisions, while raising the bar for what must be included in the complaint in the first instance, did not eliminate the plaintiff's opportunity to suggest facts outside the pleading, including on appeal, showing that a complaint should not be dismissed. … Therefore, although the plaintiff is required to plead more than bare legal conclusions to survive a motion to dismiss, once the plaintiff pleads sufficient factual material to state a plausible claim-that is, sufficient to put the defendant on notice of a plausible claim against it-nothing in *Iqbal* or *Twombly* precludes the plaintiff from later suggesting to the court a set of facts, consistent with the well-pleaded complaint, that shows that the complaint should not be dismissed.

Reynolds v, CB Sports Bar, Inc., 623 F.3d 1143, 1147 (7th Cir. 2010).

For purposes of the instant Motion, the court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine, whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." Phillips v. County of Allegheny, 515 F.3d 224, 233 (3rd Cir. 2008). "This does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of "the necessary element." Id. at 234.

Plausibility does not depend on any showing of probable or likely success. On the contrary, a claim may proceed even if actual proof is "improbable" and ultimate recovery "unlikely". Fowler v. UPMC Shadyside, 578 F.3d 203, 213 (3rd Cir. 2009).

III. LEGAL ARGUMENT

A. Plaintiff's Complaint Alleges Facts Sufficient to State a Claim of Racial Discrimination, Retaliation and Hostile Work Environment Under 42 U.S.C. §1981.

In order to make out a claim under 42 U.S.C. §1981 ("§1981"), Plaintiff must establish (1) that he is a member of a racial minority; (2) that Defendant had an intent to discriminate against Plaintiff on the basis of his race; and (3) that the discrimination concerned one or more of the activities set forth in §1981, including the right to make and enforce contracts. Lei Ke v. Drexel Univ., 2015 U.S. Dist. LEXIS 118211 *35-36, 2015 WL 5316492 (E.D. Pa. 2015); *citing* Brown v. Philip Morris Inc., 250 F.3d 789, 797 (3d Cir. 2001). Plaintiff's Complaint alleges sufficient facts to put Defendant on notice of his claims. Reynolds, 623 F.3d at 1147.

Defendant goes to great lengths in its Motion to Dismiss to illustrate that a volunteer fire company such as Defendant is a state actor in Pennsylvania and that no private action can lie against a state actor such as Defendant. (*See* Def's Mem., pp 8-13). In doing so, Defendant has assumed that §1981 through 42 U.S.C. §1983 ("§1983") is the only way Plaintiff intends to or

could go about pursuing his claims against Defendant or named individuals in his Complaint. Defendant relies in part upon authority found in Mark v. Borough of Hatboro for these propositions; however, that case also provides that, "[t]he fact that [volunteer fire company] is a state actor does not end our inquiry." Mark v. Borough of Hatboro, 51 F.3d 1137, *1149 (3d Cir. 1995).

In Mark, an arson victim brought an appeal against a city and a volunteer fire company under §1983 to recover damages caused by an arson fire started by a fireman employed by the defendant volunteer fire company. The question for the court was whether the appellee city and volunteer fire company were liable under §1983. Despite finding that the volunteer fire company was a state actor, the Third Circuit also found that the arsonist employed by the volunteer fire company acted in a "purely private capacity" when he committed the arson and his employment status with the volunteer fire company did not make his private tort an act committed under the color of law. Mark, 51 F.3d 1137 at *1150. "Generally, a private person or a corporation cannot be held liable under 42 U.S.C. §1983 unless the wrongful action was done under color of state law or state authority." Kronmuller v. West End Fire Company No. 3, 123 F.R.D. 170; 1988 U.S. Dist. LEXIS 12987, **8 (E.D. Pa. 1988); *citing* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 42 L. Ed. 2d 477, 95 S. Ct. 449 (1974).

The Mark court also explained that, "[i]n order for the tortfeasor to be acting under color of state law, his act must entail 'misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" Mark, 51 F.3d at Id. The Mark court concluded that appellees city and volunteer fire company could not be held liable under §1983. Id. at *1155.

The Mark decision leaves open the possibility, to be fleshed out through discovery, that the *named individuals* accused of intentional discrimination in Plaintiff's Complaint could be likened to the arsonist in Mark, found to be acting in a "purely private capacity" when they discriminated against, retaliated against and created a hostile work environment for Plaintiff based upon his race. At this early stage of the litigation, Plaintiff has not had the luxury of discovering information that could lead to the conclusion that his case, like Mark, may be *unable* to proceed *with* a §1983 claim. In such case, Plaintiff may discover that he must proceed with a private cause of action under §1981. Nor has Plaintiff had the opportunity yet to discover information that might necessitate a motion for leave to amend his Complaint to add or remove defendants or to add, for example, a §1983 claim, or to do both. Discovering the information necessary to that determination will guide the remedies available to Plaintiff, whether under §1983 or otherwise.

Plaintiff has, however satisfied the notion at this stage in the proceedings of providing, "[e]nough facts to raise a reasonable expectation that discovery will reveal evidence of the 'necessary element.'" Phillips v. County of Allegheny, 515 F.3d at 233. Plaintiff therefore asks this Court to deny Defendant's motion and allow Plaintiff to continue on in pursuit of discovery in this case.

B. Plaintiff's Complaint Would Not Be Time Barred, Even if Plaintiff Seeks and is Permitted to Amend His Complaint to Include a Claim Under §1983.

Defendant contends in its Motion to Dismiss, that Plaintiff is barred by the two-year statute of limitations from seeking leave to amend his Complaint to assert a §1983 claim. Defendant's position is counter to jurisprudence in neighboring jurisdictions in and around the Third Circuit, that a four-year statute of limitations applies to §1983 claims when they serve as the vehicle for §1981 claims. The cases cited by Defendant in support of its position are off- point and distinguishable from the instant matter.

Should Plaintiff seek leave to amend his Complaint to include a claim under §1983, the claim should be deemed timely. From 1989's Supreme Court decision in Patterson through enactment of the Civil Rights Act of 1991, the phrase "make and enforce contracts" in §1981, "applied only to the formation of contracts and subsequent legal enforcement." Walker v. City of Coatesville, 2014 U.S. Dist. LEXIS 165434, *3-4, 125 Fair Empl. Prac. Cas. (BNA), 2014 WL 6698304 (E.D. Pa 2014); *citing* Patterson v. McLean Credit Union, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed. 2d 132 (1989). In employment cases during this time span, employees could not use §1981 as a basis for a discrimination suit alleging post-hiring/post-contract discrimination, e.g. discrimination during employment. Walker, 2014 U.S. Dist. LEXIS at *4. As a result of Congress passing the Civil Rights Act of 1991, discrimination after the formation of a contract was once again prohibited under §1981. Id. However, "[p]laintiffs seeking to enforce the protection from discrimination that the statute guaranteed must still press their claims through the vehicle of 42 U.S.C. §1983." Id.; *citing* McGovern v. City of Philadelphia, 554 F.3d 114, 120-21 (3d Cir. 2009). Because §1983 does not include a statute of limitations, it typically adopts an applicable state law statute of limitations "if it is not inconsistent with federal law or policy to do so." Id. at *5; *internal citations omitted.* The Walker court further informs that:

> In 1990, Congress created a statute of limitations specifically for civil actions arising out of newly passed legislation. 28 U.S.C. §1658. The legislation became effective as of December 1, 1990, and provided a window of four years within which to bring 'a civil action arising under an Act of Congress enacted after the enactment of this section…'

Id. at *5-6.

The Supreme Court in Jones reasoned that post-hire discrimination claims under §1981 were made possible by Congress' Civil Rights Act of 1991, which passed after 28 U.S.C. §1658, and therefore the Jones court applied the four-year statute of limitations from 28 U.S.C. §1658 to

private claims under §1981. Id. at *6; *citing* Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 382, 124 S.Ct. 1836, 158 L. Ed. 2d 645 (2004). While the Jones court did not touch upon whether §1658's four-year statute of limitations applied to §1981 claims brought through §1983, the Walker court, in case of first impression, did. Id.

Relevant to the instant matter, the Walker court held that:

> [t]he four-year statute of limitations established by 28 U.S.C. §1656 [*sic*] governs the Section 1981 claim that the plaintiff in this case has brought through Section 1983. …There is no reason to hold that the traditional two year statute of limitations for Section 1983 claims should override the plain meaning of Section 1658 and Jones. Courts import statutes of limitation for Section 1983 suits from state tort law only in the absence of a federal statute. Section 1658 provides such a federal statute for Section 1981 post-contract formation claims brought through Section 1983. To impose a two-year statute of limitations to plaintiff's claim because he was required to use Section 1983 as a vehicle would be to ignore the plain language of the applicable statutes, as analyzed by the Supreme Court. This is not a case where the court needs to "borrow" a state statute of limitations, as Congress has spoken.

Id. at *10; *internal citations omitted.* In arriving at this conclusion, the court cited to decisions by district courts in the Third Circuit and elsewhere (E.D. Pa, D.N.J., E.D.N.Y and E.D.Va) which arrived at similar holdings given the interplay between §1981 and §1983.

The cases Defendant cites, to support his proposition that Plaintiff is time-barred from amending his Complaint to include a §1983 claim, are not applicable. Defendant acknowledges that in McGovern, the plaintiff merely "concedes" a two-year statute of limitations under §1983, which is vastly different from an analysis and holding in the case. McGovern v. City of Philadelphia, 554 F.3d 114, 116 (3d Cir. 2009). Further, Defendant relies upon Tearpock-Martini v. Borough of Shickshinny, 756 F.3d 232, 240 (3d Cir. 2014) and Bougher v. Univ. of Pittsburgh, 882 F.2d 74, 78-79 (3d Cir. 1989) neither of which are cases dealing with the concept of §1983 as a vehicle for §1981 claims – a significant distinction.

Like the plaintiff in Walker, Plaintiff's claims under §1981 are for post-contract discrimination and it is well-settled Supreme Court precedent that a four-year statute of limitations applies to such claims. If discovery bears out that Plaintiff must file for leave to amend his Complaint to include §1983, his allegations would be timely under §1658's four-year statute of limitations and therefore timely under §1983 as it is a vehicle for §1981. Therefore, Defendant's assertion that Plaintiff is time-barred from seeking leave to amend his Complaint to include §1983 must fail.

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendant's Motion to Dismiss, or in the alternative, grant Plaintiff leave to amend his Complaint.

Respectfully submitted,

By:/s/Jared A Jacobson Dated: October 4, 2016

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CERTIFICATE OF SERVICE

I hereby certify that the attached *Plaintiff's Response in Opposition to Defendant's Motion to Dismiss Plaintiff's Complaint* was filed of record and delivered via the Court's CM/ECF system on October 4, 2016 upon the following:

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Respectfully submitted,

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