UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CARL FOLEY,	:	
Plaintiff,	:	CIVIL ACTION NO.
v.	:	3-00-CV-712 (JCH)
	:	
CITY OF DANBURY, DANBURY	:	
POLICE DEPARTMENT,	:	
Defendants.	:	MARCH 9, 2001

RULING ON DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT [DKT. NO. 8]

This is a cause of action for equitable relief and damages alleging that the defendants, the City of Danbury ("Danbury") and the Danbury Police Department ("Department"), discriminated against the plaintiff, Carl Foley ("Foley"), in violation of the Age Discrimination in Employment Act ("ADEA"), retaliated against Foley in violation of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2000e-17 ("Title VII"), and subjected Foley to emotional distress in violation of common law doctrines. The City and the Department have filed a motion to dismiss or, in the alternative, a motion for summary judgment. The issues raised by their motion are: 1) whether Foley has exhausted administrative remedies as required; 2) whether Foley's ADEA claim is time barred; 3)whether the plaintiff satisfies his prima facie burden of disparate treatment and disparate impact based on

age; and 4)whether the plaintiff alleges facts sufficient to support a claim for intentional infliction of emotional distress. For the reasons stated hereinafter, the defendants 'motion is granted.

II. FACTUAL BACKGROUND[1]

Danbury is a municipality organized and existing under the laws of the state of Connecticut. As such, Danbury is charged with the responsibility of administering the police department. On or about September 18, 1967, Danbury hired Foley as a police officer. On or about November 13, 1978, Foley was promoted to Sergeant. On December 13, 1982, Foley was promoted to Lieutenant. Since 1982, Foley has maintained his status as Lieutenant.

In March 1997, Danbury's Police Chief, Nelson Macedo ("Macedo"), retired. At the time of his retirement, Macedo had been the Danbury Chief of Police for 20 years. In the summer of 1997, the mayor of Danbury appointed Robert Paquette ("Paquette") as Chief of Police. In August 1997, detective captain Valentine Coelho ("Coelho") retired and in September 1997, deputy chief F. Leo Gantert ("Gantert") retired. In August 1997, an announcement was made that examinations would be given for the position of deputy chief and captain. In December 1997, an

[1] The complaint, affidavits, and statements filed pursuant to Local Rule 9(c) disclose the following facts, which are undisputed unless otherwise stated.

examination for the position of captain was administered. No examination was given for the Deputy Chief position.

A written and oral examination are administered in the process of selecting a police captain. Candidates must score a 70 or above on the written examination in order to progress to the oral examination. A board of examiners administers the oral examination and scores candidates on a scale from 1 to 100. Candidates who complete the oral examination are then ranked on an eligibility list.

In December 1997, Foley passed the written examination with a score of 70 or better. Foley was 52 years old at that time. In February 1998, an eligibility list for captain was generated. Foley was ranked number three on the eligibility list. Lieutenant James S. McNamara ("McNamara") was ranked first on the eligibility list. McNamara was 51 years old at that time. On May 12, 1998, McNamara was appointed to the position of captain. As of May 13, 1998, all six police captains in Danbury were over the age of 40 and two were over the age of 50.

Although the Danbury Civil Service Rules provide that eligibility lists expire after one year, the Civil Service Commission can extend the list for another year. The life of the list cannot exceed two years in total. In 1999, the February 1998 captain eligibility list was extended for another year to expire in February 2000. According to Foley, Danbury was forced by action of the city council to extend the

eligibility list despite a past practice of always extending such lists. The plaintiff also contends that, during the extension, all promotions were delayed and, immediately after the list expired, two younger persons, age 39 and 36, were promoted to captain.

On June 14, 1999, Foley filed a complaint with the Commission on Human Rights and Opportunities ("CHRO") against the Danbury Police Department. In his CHRO complaint, Foley claimed that the Department violated the ADEA and the Connecticut Fair Employment Practices Act ("CFEPA") by failing to promote him. Foley also claimed that the Department sought to avoid promoting him by not filling the deputy chief position with one of the captains prior to the expiration of the captain eligibility list in February 2000. Had the Department filled the deputy chief position with a captain, Foley claimed, a captain's position for which he would have been considered would have opened up.

On August 5, 1999, the defendants filed a response to Foley's CHRO complaint, denying the allegations of age discrimination. On November 3, 1999, the CHRO dismissed Foley's complaint, finding no reasonable possibility that further investigation would result in a reasonable cause finding of age discrimination.

On November 23, 1999, Foley obtained a release of jurisdiction from the

CHRO to bring his CFEPA in the Superior Court of Connecticut. Foley did not bring any action on his state law discrimination claims within the required 90 days of receipt of the release of jurisdiction. On January 21, 2000, the Equal Employment Opportunity Commission ("EEOC") notified Foley that it adopted the findings of the CHRO. The EEOC notification also provided notice of Foley's right to sue and gave him 90 days within which to file a law suit in federal or state court.

In March 2000, another examination for the position of captain was administered, and, in April 2000, a new eligibility list was created. Foley did not participate in the March 2000 examination process and thus was not on the April 2000 eligibility list.

In August 2000, McNamara and another captain, Andrew J. Woods ("Woods"), retired. In August 2000, the mayor of Danbury promoted the top two candidates on the April 2000 captain eligibility list. The new captains were age 39 and age 36.

III. DISCUSSION

A. Standard

Under Rule 12(b) of the Federal Rules of Civil Procedure, "[i]f, on a motion . . . to dismiss for failure of the pleading to state a claim upon which relief can be

granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment . . .." Fed. R. Civ. P. 12(b). The defendants in this case filed their motion as a motion to dismiss for failure to state a claim or, in the alternative, as a motion for summary judgment. In so doing, they filed affidavits and a statement of facts. Foley responded to the motion by submitting affidavits and a statement of facts. The submission of these materials and their consideration by the court require that the motion be deemed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Dacourt Group, Inc., 747 F. Supp. 157, 159-60 (D.Conn. 1990).

Summary judgment is only appropriate when there is no genuine issue as to a material fact, and the moving party is entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(c); Galabya v. New York City Bd. of Educ., 202 F.3d 636, 639 (2d Cir. 2000) (citing Fagan v. New York State Elec. & Gas Corp., 186 F.3d 127, 132 (2d Cir. 1999)). The burden of showing that no genuine factual dispute exists rests upon the moving party. See Carlton v. Mystic Transp., Inc., 202 F.3d 129, 133 (2d Cir. 2000) (citing Gallo v. Prudential Residential Servs., Ltd. Partnership, 22 F.3d 1219, 1223 (2d Cir. 1994)). Once the moving party establishes that there is an absence of evidence to support the non-moving party's case, the burden shifts to the non-moving party to "set forth specific facts showing that there is genuine

issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986).

In assessing the record to determine if such issues do exist, the evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in the light most favorable to the non-movant. See Anderson, 477 U.S. at 255; Heilweil v. Mount Sinai Hosp., 32 F.3d 718, 721 (2d Cir.1994). "This remedy that precludes a trial is properly granted only when no rational finder of fact could find in favor of the non-moving party." Carlton, 202 F.3d at 134. When reasonable persons, applying the proper legal standards, could differ in their responses to the questions raised on the basis of the evidence presented, the question is best left to the jury. See Sologub v. City of New York, 202 F.3d 175, 178 (2d Cir. 2000).

B. Jurisdiction Over Danbury Police Department

The defendants contend that the court lacks jurisdiction over the Danbury Police Department because it is not a separate entity from the City of Danbury. Under Connecticut law, municipalities are authorized to sue and be sued. Conn. Gen. Stat. §§ 7-148, 52-73, 7-465. Unless departments within municipal government constitute distinct "bodies politic" under state law, the proper defendant is the municipality itself, not the department. Levine v. Fairfield Fire Dept., 1999 WL 241734, at *3 (Conn. Supp. April 19, 1999)(citing Gordon v. Bridgeport Housing Authority, 208 Conn. 161, 173-177 (1988)). While some administrative

entities have been constituted as separate entities with the power to sue and be sued, police departments have not. See Gordon, 208 Conn. at 173; Levine, 1999 WL 241734, at *3. Therefore, the defendants 'motion to dismiss the complaint against the police department is granted.

C. Title VII Claim

The defendants make two arguments with respect to the Title VII claims. First, they argue that the claims should be dismissed for failure to exhaust administrative remedies. Second, they argue that the claims fail to state a claim upon which relief may be granted.

Title VII prohibits employers from discriminating on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2. A district court only has jurisdiction over Title VII claims if they have been included in a prior Equal Employment Opportunity Commission ("EEOC") charge or if they are "reasonably related to the EEOC charge." Butts v. City of New York Dept. of Housing Preservation and Development, 990 F.2d 1397, 1401 (2d Cir. 1993)(superseded by statute on other grounds as stated in Hawkins v. 1115 Legal Service Care, 163 F.3d 684, 693 (2d Cir. 1998)).

In his CHRO/EEOC charge, Foley asserted a violation of the ADEA and the CFEPA alleging he was discriminated against on the basis of his age. Foley did not

assert a violation of Title VII in his CHRO/EEOC charge or a violation of any other statute due to discrimination based on race, color, religion, sex, or national origin. Because age is not protected under Title VII, any claim Foley has under Title VII was not "reasonably related" to the CHRO/EEOC charge Foley filed. Therefore, the administrative remedies for any Title VII claim have not been exhausted.

Further, Foley's complaint in this case makes allegations only that he was discriminated against because of his age. Because Foley fails to allege any type of discrimination that is protected under Title VII in his complaint, there are no genuine issues of material fact with regard to whether Danbury discriminated against Foley on the basis of his race, color, religion, sex, or national origin. Summary judgment is therefore granted as to any Title VII claim.

D. ADEA Claims

1. Res Judicata

The defendants argue that Foley's ADEA claims are barred by the doctrine of res judicata because CHRO determined that there was no reasonable possibility of finding reasonable cause that discrimination occurred. This argument is without merit.

"[T]he doctrine of res judicata provides that when a final judgment has been entered on the merits of a case, [i]t is a finality as to the claim or demand in

controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. '" Nevada v. United States, 463 U.S. 110, 129-30 (1983)(quoting Cromwell v. County of Sac, 94 U.S. 351, 352 (1876)). Res judicata can apply to rulings by administrative agencies as well as courts. Greenberg v. Board of Governors of the Fed. Reserve Sys., 968 F.2d 164, 168 (2d Cir.1992). However, res judicata will only be applied to the judgments of an administrative agency if "both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings." Utah Construction & Mining Co., 384 U.S. 394, 422 (1965).

In this case, Foley filed a claim with the CHRO and the CHRO made a determination on that claim. Following that determination, the EEOC sent Foley a "right-to-sue" letter indicating that, as required by the ADEA, Foley had exhausted his administrative remedies and could file a claim in state or federal court. 29 U.S.C. § 626(d). Foley then filed this lawsuit as permitted under the ADEA. He did not file a claim in any other court and no other court has made a determination in this case. Foley is therefore only now seeking court review of the findings of the CHRO, as he is entitled to do under the ADEA. Res judicata cannot apply to the

CHRO decision until Foley has been given a full opportunity to receive court review of that decision. Therefore, res judicata does not apply to the CHRO decision.

2. Time of Filing

The defendants first argue that Foley's ADEA claims are time barred because he did not file his complaint within 300 days of the alleged discriminatory act as required by the ADEA. Under the ADEA, when a case, such as this one, involves an alleged unlawful practice occurring in a state which has a law prohibiting discrimination in employment because of age, that case must be brought within 300 days of the alleged unlawful practice. 29 U.S.C. §§ 626(d)(2), 633(b).

The defendants assert that Foley's ADEA claim is based on a failure to promote him on May 12, 1998. Foley filed his CHRO/EEOC complaint on June 14, 1999. Therefore, if the May 12, 1998 date is the date of the alleged discriminatory act, then his CHRO/EEOC complaint was not timely filed. However, in his complaint to the CHRO/EEOC, Foley states that he was discriminated against on February 3, 1999. Defendants 'Motion to Dismiss [Dkt. No. 11], Ex. F. Further, Foley's claims under the ADEA are not limited to May 12, 1998, the date on which McNamara was appointed to the position of captain. Construing the evidence and making all reasonable inferences in the light most favorable to Foley, Foley does not assert that he should have been appointed instead

of McNamara, but that the department violated the ADEA by only promoting McNamara and failing to appoint Foley at any time before the February 1998 eligibility list expired. The list did not expire until February of 2000. At the time Foley filed his CHRO/EEOC complaint, he was still on the eligibility list and the defendants had failed to promote him. That alleged discriminatory action occurred up to and even past the June 14, 1998 filing date. Therefore, the claim was filed within 300 days of the alleged discriminatory action and the ADEA claims are not time barred.

3. Disparate Treatment

The defendants argue that, even if Foley's ADEA claims are not time barred, Foley cannot establish a prima facie case of discrimination in his disparate treatment claims and, therefore, cannot survive summary judgment. The court agrees.

The ADEA prohibits discrimination based on a person's age. 29 U.S.C. § 623(a)(1). Under the ADEA, the protected group of persons is limited to individuals who are at least 40 years of age. 29 U.S.C. § 631(a). The same standards govern disparate treatment claims arising under either Title VII or the ADEA. Brennan v. Metropolitan Opera Assn., Inc., 192 F.3d 310, 316-17 (2d Cir. 1999) (citing Austin v. Ford Models, Inc., 149 F.3d 148, 152 (2d Cir.1998)). First, the plaintiff must prove a prima facie case of discrimination. "To establish a

prima facie case of age discrimination, a plaintiff must show four things: (1) he is a member of the protected class; (2) he is qualified for his position; (3) he has suffered an adverse employment action; and (4) the circumstances surrounding that action give rise to an inference of age discrimination." Abdu-Brisson v. Delta Airlines, 239 F.3d 456 (2d Cir. Feb. 12, 2001)(pinpoint page numbers unavailable)(citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)); see also Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097, 2106 (2000). Once the plaintiff has met this burden, the burden of production shifts to the employer to proffer a legitimate, nondiscriminatory reason for the action. Reeves, 120 S.Ct. at 2106. If the employer meets its burden of production, the inference of discrimination raised by the prima facie case then drops out and the plaintiff must prove by a preponderance of the evidence that the employer's proffered reason is merely a pretext for discrimination. Id.

Foley cannot prove a prima facie case of age discrimination. First, in relation to McNamara, there is no genuine issue of material fact regarding whether Foley suffered an adverse employment action under circumstances giving rise to an inference of discrimination. There is no dispute that McNamara was 51 years old in 1998 when he was promoted to captain. Foley was only one year older. The fourth element of the prima facie case, an inference of discrimination, cannot be drawn

from "the replacement of one worker with another worker insignificantly younger." O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312-13 (1996). Foley cannot demonstrate that there was a significant difference between his age and McNamara's age. Therefore, as a matter of law, there are no circumstances giving rise to an inference of age discrimination in relation to McNamara's promotion.

Second, Foley cannot otherwise demonstrate that he suffered an adverse employment action under circumstances giving rise to an inference of discrimination. In his complaint, Foley alleges that the defendants "permitted younger candidates, to replace Plaintiff as eligible candidates for Police Captain by purposefully delaying hiring decisions until the eligibility list upon which Plaintiff was a high ranking candidate [expired]." Complaint [Dkt. No. 1] ¶ 6. At the time Foley filed his CHRO/EEOC complaint, he was still ranked on the eligibility list and no other names had replaced him on that list. Any delay applied to all candidates on the list, regardless of age. Foley does not provide any evidence that the delay affected him differently than any other candidate and therefore no genuine issues of material fact exist regarding whether there was any adverse employment action under circumstances giving rise to an inference of discrimination.

Third, to the extent that Foley's ADEA claims are based on the fact that younger candidates were appointed to captain in 2000, these claims fail for two

reasons. First, those appointments were not made at the time Foley filed his CHRO/EEOC complaint and were, therefore, not included in the consideration of that claim. In fact, the EEOC's right to sue letter was dated January 21, 2000 and Myles and Shanahan were not appointed as captains until August 2000. Neither the CHRO nor the EEOC could have considered any claim in relation to those candidates because they had not yet been promoted. Therefore, Foley has not exhausted his administrative remedies in relation to any claim involving the candidates appointed in 2000.

Any claim in relation to the appointments made in August 2000 fails for the second reason that, even if Foley had exhausted his administrative remedies, he cannot establish a prima facie case of discrimination. To establish the second element of a prima facie claim of discrimination, Foley must show that he "applied and was qualified" for the position of captain in 2000. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); see also Brown v. Coach Stores, 163 F.3d 706, 709-10 (2d Cir. 1998). He must thus demonstrate that "he applied for a specific position or positions and was rejected therefrom . . .." Brown, 163 F.3d at 710. Foley cannot establish that he applied for the position of captain in 2000 because he did not take the March 2000 examination. Foley was, therefore, not on the eligibility list of qualified candidates when the captain's position became available in

August 2000. Candidates have to be on the eligibility list to be considered for position of captain. Therefore, Foley cannot establish that he applied and was qualified for the position and cannot establish the second element of his prima facie case in relation to the appointments to captain made in August 2000.

Because Foley cannot establish a prima facie case of disparate treatment under the ADEA, the defendants' motion for summary judgment as to those claims is granted.[2]

4. Disparate Impact

The defendants argue that Foley's claim that the defendants' conduct has had a "disparate impact on persons over the age of 50 years" is insufficient to sustain a disparate impact claim. Complaint [Dkt. No. 1], Second Count ¶ 5.

To establish a prima facie case of disparate impact, a plaintiff must identify a specific employment practice that causes the "exclusion of applicants for jobs or

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[2] In the first count of his complaint, Foley alleges "discrimination based on age." Complaint, Dkt. 1 at 6. To the extent that Foley is making a claim under a theory other than disparate treatment, the court finds such a claim to be without merit. In Abdu-Brisson, the Second Circuit held that "a showing of disparate treatment, while a common and especially effective method of establishing the inference of discriminatory intent necessary to complete the prima facie case, is only one way to discharge that burden." 239 F.3d 456 (pinpoint page citation unavailable). However, because the court finds that Foley cannot establish that he was qualified for the position of captain in 2000, Foley cannot establish a prima facie case regardless of the method of establishing the inference of discriminatory intent.

promotions because of their membership in a protected group." Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988). The defendants argue that Foley is unable to identify any component of the decision-making process that adversely impacts individuals who are forty years of age or older and, further, that Foley cannot demonstrate that older persons are disproportionately under-represented as police captains.

The court agrees. First, Foley challenges the defendants 'alleged attempt to deviate from the policy and practice of renewing the police captain eligibility list for an additional year. He admits, however, that the list was typically renewed and that, in the end, it was renewed in 1999. Therefore, the only practice at issue was the department's practice of renewing the eligibility list. Foley does not challenge that practice.

Second, to the extent that Foley challenges the practice of delaying any appointment to captain during the time in which he was ranked high on the eligibility list, there is no evidence that any employment practice had the effect of excluding applicants who were over the age of forty. At the time McNamara was promoted, all captains were over the age of forty. Currently, a majority of the captains are over the age of forty. Further, there is no evidence to suggest that Foley was prevented from re-examining for the eligibility list in 2000 because of his age.

Therefore, no genuine issue of material fact exists regarding whether any employment practice has had an effect of excluding applicants who were over the age of forty. The defendants 'motion for summary judgment as to the disparate impact claim is therefore granted.

E. Intentional Infliction of Emotional Distress

In order to prevail on a claim of intentional infliction of emotional distress, a plaintiff must demonstrate: (1) that the defendants intended to inflict emotional distress or knew or should have known that emotional distress was a likely result of their conduct; (2) that the conduct was extreme and outrageous; (3) that the defendants 'conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe. Petyan v. Ellis, 200 Conn. 243, 253 (1986). "Liability for intentional infliction of emotional distress requires 'conduct exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind.'" DeLaurentis v. City of New Haven, 220 Conn. 225, 266 (1991)(quoting Petyan, 200 Conn. at 254 n. 5).

Even construing the evidence and making all reasonable inferences in the light most favorable to the plaintiff, a reasonable jury could not find that Foley has satisfied the elements of intentional infliction of emotional distress. The conduct

that Foley complains of in his intentional infliction of emotional distress claim is "[t]hat the defendants did not afford Plaintiff an equal opportunity for . . . employment . . . ." Complaint, Dkt. No. 1, at 12. The defendants' failure to promote Foley is insufficient to constitute extreme and outrageous conduct. See, e.g., Whelan v. Whelan, 41 Conn. Supp. 519, 522 (1991)(defining extreme and outrageous conduct as "conduct considerably more egregious than that experienced in the rough and tumble of everyday life"). Because Foley cannot prove that the defendants conduct was extreme and outrageous, the defendants' motion for summary judgment with regard to the intentional infliction of emotional distress claim is granted.

III. CONCLUSION

For the foregoing reasons, the defendants' motion to dismiss or, in the alternative for summary judgment [Dkt. No. 8] is GRANTED.

SO ORDERED.

Dated at Bridgeport, Connecticut this 9th day of March, 2001.

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Janet C. Hall
United States District Judge