SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
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June 16, 2016

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RE: ***Trina Gumbs v. Delaware Department of Labor***
C.A. No.: S14C-10-015 RFS

Submitted: May 3, 2016
Decided: June 16, 2016

Upon Defendant's Motion for Judgment on the Pleadings.
Denied.

Dear Counsel:

Pending before the Court is the Motion for Judgment on the Pleadings filed by Defendant, Delaware Department of Labor ("Defendant"). For the following reasons, Defendant's Motion is **DENIED.**

Background

Plaintiff, Trina Gumbs ("Plaintiff"), began her career with Defendant in the Office of Anti-Discrimination ("OAD") in 1996. Plaintiff held multiple positions before advancing to the position of Labor Law Enforcement Supervisor in 2006. In December 2011, upon the departure of the OAD Regulatory Specialist, Plaintiff was temporarily promoted to fill the vacancy. She

received an increase in pay and an expansion of duties commensurate with the OAD Regulatory Specialist's position.

In March 2012, Defendant posted the job opening for the OAD Regulatory Specialist position, for which Plaintiff applied. She was not selected. Instead, Defendant hired Daniel McGannon, a male. Because Defendant filled the Regulatory Specialist position, Plaintiff returned to her previous position of Labor Law Enforcement Supervisor.

On April 1, 2013, Plaintiff filed a Charge of Discrimination ("Charge") with the Equal Employment Opportunity Commission ("EEOC"). As a classified employee, Plaintiff is protected from employment discrimination by federal civil rights legislation.[1] In the Charge, Plaintiff alleged that by hiring a less qualified male instead of her, Defendant committed an unlawful employment practice in violation of the Civil Rights Act of 1964 ("CRA"). Plaintiff also alleged that although she reverted back to her previously held position and salary, she continued to perform the duties of the OAD Regulatory Specialist in violation of the Equal Pay Act of 1963 ("EPA").

Defendant filed a Position Statement on August 8, 2013, refuting the allegations contained in Plaintiff's Charge of Discrimination. On July 21, 2014, after an investigation, the EEOC issued Plaintiff the notice of the Right to File Suit.[2] On October 16, 2014, Plaintiff filed an action in the Superior Court alleging sex discrimination in violation of Title VII of the CRA and the EPA.

On December 3, 2014, Defendant filed a motion to dismiss. The objection was Plaintiff's EPA claims were barred because of sovereign immunity. Consequently, Plaintiff filed her EPA

[1] *See* 42 U.S.C. §§ 2000e-2, 2000e(f).
[2] *See* Am. Compl., Ex. A.

claim in the United States District Court of Delaware. Plaintiff moved to amend her Complaint to reflect this development. The amendment was permitted.[3]

On May 1, 2015, Defendant filed a motion for judgment on the pleadings. Essentially, Defendant contends this action is flawed for Plaintiff's failure to abide by the Merit Rules'[4] grievance procedure.[5] Also, Defendant contends that Plaintiff failed to mitigate her damages, advocating for a reduction of a later judgment.[6] In response, Plaintiff contends this result would eviscerate her Title VII rights. On February 1, 2016, the Court heard oral argument on Defendant's Motion and reserved its decision.[7]

Standard

A party may move for judgment on the pleadings after the pleadings are closed but within such time as not to delay the trial.[8] The standard for granting a motion for judgment on the pleadings is stringent.[9] A motion for judgment on the pleadings will only be granted where no issue of material fact exists and where the movant is entitled to judgment as a matter of law.[10] When legal questions are presented, the factual allegations of a complaint are accepted.[11]

Question

May a State employee suffering sex discrimination prohibited by Title VII lose her right to complete relief afforded by federal law in the Delaware Superior Court? The short answer is no.

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[3] *See Gumbs v. Del. Dept. of Labor*, 2015 WL 1542126, at *1 (Del. Super. May 27, 2015).
[4] The Merit Rules were created pursuant to 29 *Del C.* § 5914 and adopted by the Merit Employee Relations Board. These rules govern in matters of classification, uniform pay, benefits, examination, screening and ranking, rejection of candidates, appointment, paid leave, promotional requirements and standards, and veteran's preference. *See* Merit R. 1.0.
[5] Def.'s Op. Br. in Supp. of Def.'s Mot. for J. on the Pleadings at 8.
[6] *Id.* at 13. The argument references the avoidable consequences doctrine which is a distinction without a difference.
[7] An official transcript was filed on May 3, 2016, which permits the inclusion of portions of the oral argument.
[8] Super. Ct. Civ. R. 12.
[9] *See Artisans' Bank v. Seaford IR, LLC*, 2010 WL 2501471, at *2 (Del. Super. June 21, 2010).
[10] *See West Coast Opportunity Fund, LLC v. Credit Suisse Sec. (USA), LLC*, 12 A.3d 1128, 1131 (Del. 2010).
[11] *See Silver Lake Office Plaza, LLC v. Lanard and Axilbund, Inc.*, 2014 WL 595378, at *6 (Del. Super. Jan. 17, 2014).

Discussion

Preliminarily, Defendant challenged the subject matter jurisdiction of the Superior Court.[12] However, under overwhelming authority, "state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States."[13] Federal courts only have exclusive jurisdiction over federal claims when Congress affirmatively divests the state courts of their presumptive concurrent jurisdiction.[14] Applying this principle, "Title VII contains no language that expressly confines jurisdiction to federal courts or ousts state courts of their presumptive jurisdiction."[15] Contrary to Defendant's Answer, this Court has subject matter jurisdiction.

In enacting the Merit System of Personnel Administration ("MSPA"), the General Assembly established a professional civil service free from the evils of the spoils system.[16] Under the MSPA, "[t]he ***exclusive remedy*** available to a classified employee for the redress of an alleged wrong, arising under any misapplication of any provision of this chapter, the merit rules, or the Director's regulations adopted thereunder, is to file a grievance in accordance with the procedure stated in the merit rules."[17] The Merit Rules are comprehensive, and discriminatory employment practices are prohibited.[18] Thus, if a merit employee can

[12] *See* Answ. at 3 ¶1.
[13] *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990).
[14] *See id.*
[15] *Id.*
[16] *See* 29 *Del. C.* § 5902 ("The general purpose of this chapter is to establish for this State a system of personnel administration based on merit principles and scientific methods governing the employees of the State in the classified service consistent with the right of public employees to organize under Chapter 13 of Title 19.").
[17] 29 *Del. C.* § 5943(a) (emphasis added). As discussed later, the exclusivity language cannot foreclose her federal claim.
[18] See Merit R. 2.1, which states: "Discrimination in any human resource action covered by these rules or Merit system law because of race, color, national origin, sex, religion, age, disability, sexual orientation, or other non-merit factors is prohibited."

demonstrate that an adverse human resource action was motivated by gender bias, relief may be given by way of reinstatement, an award of back pay, and attorneys' fees.[19]

The grievance procedure for merit employees is outlined in Merit Rule 18 as a phased process. To satisfy step one, the aggrieved employee must file a written grievance within fourteen calendar days of the date of the alleged discriminatory action.[20] The grievance must be addressed to the grievant's immediate supervisor and include the details of the complaint as well as the relief sought.[21] After the initial decision, steps two and three provide that the grievant follow additional steps before the matter reaches the Merit Employee Relations Board[22] ("MERB").[23] If an employee is disappointed with the final decision of the MERB, an appeal to the Superior Court is available.[24] However, this appeal is limited to a judicial review of the record.

As noted, classified employees are protected from employment discrimination under Title VII. In order to avail one's self of the protections afforded by Title VII, the aggrieved party must file, within 180 days of the alleged discriminatory action, a Charge with the EEOC.[25] When the State receives notice of the Charge, it can respond by filing a position statement. The EEOC will consider both parties' positions and attempt to resolve the matter through the administrative process. If the matter cannot be resolved administratively, the aggrieved party will receive a right-to-sue letter, which is a prerequisite to filing the action in a court of competent jurisdiction. Within the time allowed to bring her federal claim, Plaintiff filed suit in this Court. The Superior

[19] *Gumbs v. Del. Dept. of Labor*, C.A. No. S14C-10-015, at 12 (Del. Super. Feb. 1, 2016) (TRANSCRIPT).
[20] *See* Merit R. 18.6.
[21] *Id.*
[22] *See* 29 *Del. C.* § 5906(a) ("The Merit Employee Relations Board shall consist of 5 Board members, including 2 management representatives, 2 labor representatives and a chairperson. The Governor shall appoint, with Senate approval, the members for a term of 3 years, or until their successors are appointed; provided however, that members may be removed at the pleasure of the Governor.").
[23] *See* Merit R. 18.7-18.8.
[24] *See* 29 *Del. C.* § 5949(b).
[25] *See* 42 U.S.C. § 2000e-5(e).

Court is open for all Delawareans to obtain relief,[26] including jury trials for federally based causes of action.[27]

The essence of Defendant's position is that by filing her claim in the Superior Court, Plaintiff must comply with the grievance procedure.[28] However, at oral argument, Defendant conceded that a federal cause of action could be brought by a merit employee, like Plaintiff. Further, Defendant agreed the federal court would not be bound by the grievance procedure in the MSPA. The following is an excerpt from oral argument:

> The Court: [I]s the [S]tate suggesting that the federal court independently would have entertained the whole claim through judgment if the matter had been pursued by the plaintiff?
>
> Mr. Cleary: Yes, Your Honor. The federal court could have done so.
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> * * *
>
> Mr. Cleary: Well, by filing this action in State court, the plaintiff -- the merit employee in question -- chose to avail herself of the state court system in which the merit statute is the exclusive administrative remedy.
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> The Court: I understand that position, but I'm just trying to clarify. And does the State agree that the plaintiff could have filed in the federal court and the federal court would have entertained the case through final judgment --
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> Mr. Cleary: Yes, Your Honor.
>
> The Court: -- and would not be bound by the grievance procedures set forth in the state statute?
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> Mr. Cleary: It is unlikely that the federal court would have found itself bound by that, Your Honor.[29]

Defendant's concession was further reiterated:

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[26] *See* Del. Const. art. I, § 9 (opening the courts to every person for injuries suffered).
[27] *See* Del. Const. art. I, § 4 (preserving a trial by jury).
[28] See 29 *Del. C.* § 5943(a), which establishes the grievance procedure as "[t]he exclusive remedy available to a classified employee for the redress of an alleged wrong . . . ."
[29] *Gumbs v. Del. Dept. of Labor*, C.A. No. S14C-10-015, at 3-5 (Del. Super. Feb. 1, 2016) (TRANSCRIPT).

The Court: Well, I think -- and the State can say, [n]o, or I'm not getting it accurately -- and both sides can say that. I mean, I want to be sure we're on the same page.

Ms. Stevens: Yes, Your Honor.

The Court: We had a little bit of a discussion with the State. And what I'm getting out of the discussion with the State at the end of the day is that it appears the State has a position that the plaintiff could have filed in the federal court and gone all the way through judgment in the federal court for this claim and would not have been precluded by the state statutes with respect to the exclusive remedy to the MERB; is that an accurate statement?

Mr. Cleary: Yes, Your Honor.

* * *

Ms. Stevens: Well, I mean, the State can take whatever position they want, but the statute that they're pushing forward says -- which is § 5943 -- that the exclusive remedy available is to go through the MERB process. So to say, [w]ell, you could go through the MERB process and federal court but not the MERB process and the state court --

The Court: Well, I thought the State was saying you didn't have to do the MERB. You could have just sued in the federal court and the case could have proceeded to judgment without any MERB.

Ms. Stevens: No, that wasn't my understanding, Your Honor. I thought they said --

The Court: Did I get that wrong, or no?

Ms. Stevens: I thought he said there would be a stay.

The Court: Let me just ask --

Ms. Stevens: Yes, Your Honor.

Mr. Cleary: No, Your Honor. That's correct. The State's position is that the plaintiff would not need to avail herself of the MERB process if she were to file the claim originally in district court.[30]

[30] *Id.* at 22, 24-25.

These concessions had to be made; merit employees are protected. Plaintiff exhausted the administrative process by adhering to the EEOC's procedures and obtaining a right-to-sue letter. Without a right-to-sue letter, the federal case would have been dismissed.[31]

If Plaintiff is not fettered in the federal system, neither should Plaintiff be foreclosed from asserting the same federally based cause of action in the Superior Court. Yet Defendant states 29 *Del. C.* § 5943(a) is merely a procedural device accompanying any lawsuit.

But this is not a technical affair. Title VII of the CRA provides for federally protected rights for legal and equitable remedies, including a jury trial, compensatory and punitive damages, costs of experts, attorneys' fees, together with reinstatement or pay awards for terminated employees who cannot be reinstated.[32] These remedies are broader than what the MERB can award.[33] To say Plaintiff should file a grievance is a dead-end road. Once filed, Plaintiff would be bound in a process without a jury trial, diminished relief, and limited Superior Court review. Plaintiff is not a second class citizen.

Likewise, in 29 *Del. C.* § 5943(a), the adjective 'exclusive' modifies the noun 'remedy.' 'Exclusive' means, "not shared: available to only one person or group."[34] By its terms, Plaintiff could not bring a Title VII suit. This conclusion would be inconsistent with federal law and frustrate its broad remedial purpose and would be preempted.[35] The State's police powers

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[31] *See Saylor v. Del. Dept. of Health and Soc. Servs., Div. of Child Support Enforcement*, 569 F.Supp.2d 420, 423 (D.Del. 2008) ("The receipt of a federal right-to-sue letter indicates that a complainant has exhausted administrative remedies, an 'essential element for bring a claim in [federal] court under Title VII.' ").

[32] *See* 42 U.S.C. § 1981a.

[33] *See* 46 Am. Jur. Proof of Facts 3d (1999) ("When Congress enacted the Civil Rights Act of 1991, it greatly expanded the remedies available to litigants under Title VII and other civil rights statutes. In addition to attorney's fees and equitable relief, persons with viable gender claims can now recover compensatory and punitive damages, are entitled to a trial by jury, and are entitled to recover expanded court costs, including expert witness fees.").

[34] MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/exclusive (last visited June 10, 2016).

[35] See 42 U.S.C. § 2000h-4, which provides:

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision

cannot be exercised in a manner where compliance with both the federal and state law is impossible or if the state law stands as an obstacle to Congress' objectives.[36] It would be impossible for Plaintiff to comply with federal law and the grievance procedure, which also is impermissible.[37]

Additionally, the Merit Rules frustrate Congress's objectives in enacting Title VII because under the grievance procedure, employees must file their grievance within fourteen days of the alleged discriminatory action. By contrast, "Delaware allows claimants who file either with the [EEOC] or the Delaware Department of Labor to rely on the 300 day statute of limitations."[38] Discriminatory motives in employment actions may not be immediately evident. If the grievance procedure, as Defendant contends, is a merit employee's exclusive remedy, then a merit employee who discovers that an adverse employment action was made with a discriminatory motive fifteen days after the action would have no options for redress.

The Court is not persuaded that, pursuant to 29 *Del. C.* § 5943(a), the grievance procedure outlined in Merit Rule 18 is the only remedy for merit employees alleging employment discrimination. That is, it is unlikely that Delaware's General Assembly intended for the grievance procedures promulgated under the MSPA to supplant Title VII. As mentioned, Title VII was specifically enacted to combat workplace discrimination. The MSPA, on the other hand, was enacted to ensure state employees were qualified and to protect them from the "potential arbitrary whims of elected officials or their minions."[39] Although the MSPA provides merit employees an avenue to resolve claims of employment discrimination, it was not designed

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of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

[36] *See* 2 Employment Law § 9:19.
[37] *See id.*
[38] *Arasteh v. MBNA America Bank, N.A.*, 146 F.Supp.2d 476, 490 (D.Del. 2001).
[39] *Foster v. State of Del. Dept. of Public Safety*, 1997 WL 127002, at *5 (Del. Super. Jan. 27, 1997).

with the sole objective of eradicating discrimination in the workplace. The only logical conclusion is that the grievance procedure is an option, not the exclusive remedy.

Nonetheless, Defendant urges that 29 *Del. C.* § 5943(a) must be a mitigation of damages qualifier by happenstance. This case does not present mitigation of damages concerns. Unlike a personal injury or construction defect or breach of contract action, where the amount of damages could be less with reasonable efforts to minimize them, Plaintiff remains employed and, if successful, Defendant's lost pay financial liability would be a fixed amount, payable over time representing the differential in pay between the positions. The damages exposure would not be materially different from a tort claim, which, like this case, would be liquidated at trial, with interest running from the time of the verdict.[40]

Defendant claims *Shaw v. Delta Air Lines, Inc.*[41] supports the notion that a state administrative remedy, like the grievance procedure, must be followed in lockstep fashion. However, upon review, the decision largely stands for two points. First, a state cannot prohibit practices that are lawful under federal law.[42] To that extent, a New York Human Rights Law was preempted concerning ERISA[43] benefit plans.[44] Second, a New York disabilities law was not preempted by ERISA. However, New York could not enforce its own provisions through regulation of ERISA covered benefit plans.[45] The *Shaw* Court did state:

> Moreover, Title VII requires recourse to available state administrative remedies. When an employment practice prohibited by Title VII is alleged to have occurred in a State or locality which prohibits the practice and has established an agency to enforce that prohibition, the [EEOC] refers the charges to the state agency. The EEOC may not actively process the charges before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such

[40] *See Smith v. Nor-Com, Inc.*, 2013 WL 211041, at *3 (E.D. Ky. Jan. 17, 2013) (explaining that employment discrimination claims sound in tort).
[41] 463 U.S. 85 (1983).
[42] *Id.* at 101.
[43] ERISA stands for The Employment Retirement Income Security Act.
[44] *Shaw*, 463 U.S. at 102 (internal citations and quotation marks omitted).
[45] *Id.*

> proceedings have been earlier terminated. In its subsequent proceedings, the EEOC accords substantial weight to the state administrative determination.[46]

This language follows settled law that:

> It has been discussed to satiety in the jurisprudence that a claimant who seeks to recover for an asserted violation of Title VII, first must exhaust administrative remedies by filing a charge with the EEOC, or alternatively, with an appropriate state or local agency, within the prescribed time limits. The plaintiffs admitted they have done neither. This omission bars the courthouse door, as courts have long recognized that Title VII's charge-filing requirements are a prerequisite to the commencement of suit. These statutes mandate compliance with the administrative procedures specified in Title VII. Such compliance must occur before a federal court may entertain a suit that seeks recovery for an alleged violation [of Title VII].[47]

Here, the EEOC processed Plaintiff's Charge, and the EEOC was authorized to proceed after time for State consideration. There is only one administrative remedy to satisfy—the conciliation process—not two, as Defendant's position suggests. Here, the State knew about Plaintiff's Charge, filed a position statement, and ultimately deferred to the EEOC. This was done apparently to alleviate a conflict of interest because Plaintiff is an employee of the OAD, the state equivalent of the EEOC.[48]

Finally, the parties were asked to comment on the decision in *Smith v. Lorch*.[49] In *Lorch*, the plaintiff, a classified civil employee of Louisiana's Department of Health and Hospitals, alleged a continuing pattern of racial discrimination against her by the defendants.[50] As a basis for her recovery, the plaintiff filed a petition in state court and cited, *inter alia*, 42 U.S.C. § 2000e *et seq.*[51] In response, the defendants filed an exception for lack of subject jurisdiction over the matter.[52] The trial court sustained this exception and the plaintiff appealed.[53]

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[46] *Id.* at 101-02.
[47] *Soler v. Puerto Rico Tel. Co.*, 230 F.Supp.2d 232, 235 (D.P.R. 2002).
[48] *Gumbs v. Del. Dept. of Labor*, C.A. No. S14C-10-015, at 40-41 (Del. Super. Feb. 1, 2016) (TRANSCRIPT).
[49] 730 So.2d 530 (La. Ct. App. 1999).
[50] *Id.* at 531.
[51] *Id.* at 532.
[52] *Id.*

On appeal, the defendant contended that the State Civil Service Commission had exclusive jurisdiction over classified civil service employer-employee disputes that are employment related.[54] Reversing the decision, the *Lorch* court explained, "absent congressional intent to vest exclusive jurisdiction of federal claims in federal courts, state courts have concurrent jurisdiction to enforce rights under federal statutes."[55] The court went on to explain that "the exhaustion of either state judicial or administrative remedies is not a prerequisite to the invocation of federal relief . . . since the causes of action established by [42 U.S.C. § 2000e *et seq.*] are fully supplementary to any remedy, adequate or inadequate, that might exist under state law."[56]

The holding in *Lorch* is sound. This Court has the power and authority to decide claims arising under 42 U.S.C. § 2000e *et seq.* Plaintiff exhausted her administrative remedies with the EEOC.[57] Section 5943(a) of Title 29 cannot be mechanically applied to deprive or diminish Plaintiff's Title VII rights.

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[53] *Id.*
[54] *Lorch*, 730 So.2d at 532.
[55] *Id.* at 533.
[56] *Id.*
[57] The Delaware Department of Labor ("DDOL") has jurisdiction over all cases arising under Delaware's Discrimination in Employment Act ("DDEA"), codified at 19 *Del. C.* § 710 *et seq.* Plaintiff is an employee under § 710(6). The DDOL uses an administrative process to eliminate unlawful discrimination in employment akin to EEOC procedure. Section 712(b), which outlines the DDOL's administrative procedure states, "[t]his subchapter shall afford the sole remedy for claims alleging a violation of this chapter to the exclusion of all other remedies." Among other things, the DDEA eliminated common law actions with goals like the EEOC's to initially pursue informal methods of resolution through mediation and conciliation and then permit civil actions in Superior Court. *See Alred v. Eli Lilly and Co.*, 771 F.Supp.2d 356 (D.Del 2011). The goals of the DDEA were likewise satisfied by the EEOC in this case. There is no reference to the grievance procedure in Title 29 and if the General Assembly intended for it to override the DDEA, it would have done so expressly.

Considering the foregoing, Defendant's Motion for Judgment on the Pleadings is **DENIED.**

Very truly yours,

/s/ Richard F. Stokes
Richard F. Stokes

cc: Prothonotary's Office