

Rlml

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

CURTIS NICHOLS,)	
)	
Plaintiff,)	
)	
vs.)	
)	Case No. 10-2086-JAR
KANSAS DEPARTMENT OF CORRECTIONS,)	
)	
)	
Defendant.)	
_____)	

MEMORANDUM AND ORDER

Plaintiff Curtis Nichols, proceeding *pro se* and *in forma pauperis*, brings this action against the Kansas Department of Corrections (“KDOC”), alleging employment discrimination under Title VII, 42 U.S.C. §§ 2000e, *et seq.*, specifically racial harassment from his co-workers and supervisors at the Lansing Correctional Facility that created a hostile work environment. This matter is before the Court on defendant’s Motion to Dismiss (Doc. 9) and plaintiff’s Motion for Leave to Amend Complaint (Doc. 11). For the reasons explained below, the Court grants defendant’s motion to dismiss¹ and denies plaintiff’s motion to amend, without prejudice to refile a motion in compliance with D. Kan. Rule 15.1.

I. Plaintiff’s Complaint

Plaintiff’s Complaint names KDOC as the only defendant. Plaintiff sets forth the essential factors of his claim as being subjected to racial harassment from co-workers and a

¹Defendant’s motion also requests stay of discovery and additional time to answer, which was granted by Magistrate Judge Rushfelt in a separate order (Doc. 10).

superior, which has created a hostile work environment. Plaintiff, who identifies his race as black, states that he believes this constitutes discrimination against him because of his race in violation of Title VII. Plaintiff attaches to his Complaint a copy of his Charge of Discrimination filed with the Equal Employment Opportunity Commission (EEOC), as well as his Dismissal and Notice of Rights issued by the EEOC. Plaintiff's EEOC charge is brought against his employer, Lansing Correctional Facility, where he is employed as a Correctional Officer.

II. Discussion

A. Motion to Dismiss

Plaintiff did not file a response to defendant's Motion to Dismiss and the time to do so has expired.² Under D. Kan. R. 7.4,

Absent a showing of excusable neglect, a party or attorney who fails to file a responsive brief or memorandum within the time specified in D. Kan. Rule 6.1(d) waives the right to later file such brief or memorandum. If a responsive brief or memorandum is not filed within the Rule 6.1(d) time requirements, the court will consider and decide the motion as an uncontested motion. Ordinarily, the court will grant the motion without further notice.

As a result of plaintiff's failure to respond, the Court grants KDOC's motion.

Furthermore, the Court grants defendants' motion to dismiss because plaintiff fails to establish jurisdiction over defendant. KDOC argues that the Court should dismiss plaintiff's claim because it lacks capacity to be sued under Kansas law. Although defendant seeks dismissal under Rule 12(b)(6) for failure to state a claim, whether defendant possesses the

²See D. Kan. R. 6.1(d)(2) (requiring a response to a dispositive motion to be filed within twenty-three days). This Rule was amended effective March 17, 2010, changing the response time to twenty-one days. Because defendant's motion was filed March 11, 2010, the former Rule governs plaintiff's deadlines.

capacity to be sued presents a jurisdictional question.³ Under Kansas law, absent express statutory authority, legislatively-created government agencies lack the capacity to sue or be sued.⁴ The Court therefore considers defendant's motion under Rule 12(b)(2), which governs dismissals for lack of personal jurisdiction.⁵ Here, KDOC is a creature of statute, but Kansas law does not authorize it to sue or be sued.⁶ Because KDOC is not an entity subject to suit, the Court grants defendant's motion to dismiss.

B. Motion to Amend Complaint

On April 6, 2010, plaintiff filed a Motion to Amend his Complaint (Doc. 11), seeking leave to amend to add additional individual defendants who were employees of Lansing Correctional Facility.⁷ Effective December 1, 2009, Rule 15(a) of the Federal Rules of Civil Procedure was amended to permit a plaintiff to amend a pleading as a matter of course within twenty-one days of service of a responsive pleading or motion under Rule 12(b).⁸ After twenty-one days, the plaintiff must obtain leave to amend.⁹ Plaintiff's motion was filed outside the twenty-one day period. Rule 15(a) specifies that the court "freely give leave when justice so

³See *Corder v. Kan. Bd. of Healing Arts*, 889 P.2d 1127, 1144-45 (Kan. 1994) (court has no jurisdiction where government entity not granted power by statute to sue and be sued); *Whayne v. Kansas*, 980 F. Supp. 387, 392 (D. Kan. 1997) (capacity to sue and be sued necessary to establish jurisdiction).

⁴*Hopkins v. Kansas*, 702 P.2d 311, 316 (Kan. 1985).

⁵See *Grayson v. Kansas*, No. 06-2375-KHV, 2007 WL 1259990, at *2 n.7 (D. Kan. Apr. 30, 2007) (dismissing claim under Rule 12(b)(2) where KDOC lacked capacity to be sued).

⁶K.S.A. § 75-5203.

⁷Plaintiff names the following individuals in their official and individual capacities: James Arnold, Correctional Officer I; William Gregory, Correctional Officer I; Michael Schmidling, Lieutenant; and Ben Reynolds, Unite Team Manager.

⁸Fed. R. Civ. P. 15(a)(1)(B).

⁹Fed. R. Civ. P. 15(a)(2).

requires.”¹⁰ Nonetheless, a court may refuse to grant leave to amend based on, among other things, futility of amendment.¹¹ A district court is justified in denying a motion to amend as futile if the proposed amendment could not withstand a motion to dismiss or otherwise fails to state a claim.¹² Leave to allow amendment is within the court’s sound discretion.¹³

Defendant KDOC summarily objects to plaintiff’s request on three grounds: 1) that plaintiff failed to submit a proposed amended complaint with his motion; 2) that plaintiff failed to exhaust his claims against the individuals; and 3) individuals cannot be sued either in their personal or official capacity under Title VII.

KDOC first asks the Court to deny plaintiff’s motion on the basis that he has failed to comply with D. Kan. Rule 15.1, which sets forth the various procedural requirements for motions to amend. Among other things, Rule 15.1 requires the moving party to attach to the motion the proposed amended pleading. This is more than a mere technical requirement, as movant’s compliance “is critical for the court to assess the different factors relevant in deciding a motion to amend.”¹⁴ Likewise, this requirement is necessary so that the opposing party may fully review and evaluate the proposed amendments and, where appropriate, oppose them.

Plaintiff has not complied with this requirement. Other than naming the individual defendants and their position at Lansing Correctional Facility, both the Court and defendant are

¹⁰*Id.*

¹¹*Foman v. Davis*, 371 U.S. 178, 182 (1962); *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993).

¹²*Ketchum v. Cruz*, 961 F.2d 916, 920 (10th Cir. 1992).

¹³*LeaseAmerica Corp. v. Eckel*, 710 F.2d 1470, 1473 (10th Cir. 1983).

¹⁴*Hammond v. City of Junction City, Kan.*, No. 00-2146-CM, 2002 WL 31545354, at *1 (D. Kan. Nov. 18, 2002) (citing *Gorsline v. Kansas*, No. 95-4085-SAC, 1995 WL 783217, at *1 (D. Kan. Nov. 21, 1995)).

left to speculate about the contents of the proposed amended Complaint. Although KDOC attempts to object, it may not have identified all grounds that it may have to oppose the amendments. The Court is similarly unable to adequately assess whether leave to amend should be granted. For these reasons, the Court will deny plaintiff's motion for leave to amend, without prejudice to refile a motion that complies with D. Kan. Rule 15.1 within fourteen (14) days of the date of this Order. In the event plaintiff fails to file such a motion, this action will be dismissed with prejudice. Because the Court grants defendant's objection on this basis, it does not reach the alternative objections based on futility.

IT IS THEREFORE ORDERED BY THE COURT THAT defendant KDOC's Motion to Dismiss (Doc. 8) is GRANTED.

IT IS FURTHER ORDERED that plaintiff's Motion to Amend Complaint (Doc. 11) is DENIED without prejudice to refile a motion that is in compliance with D. Kan. Rule 15.1 within fourteen (14) days of the date of this Order.

IT IS SO ORDERED.

Dated: August 18, 2010

S/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE

