IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

EDWIN ASEBEDO, *Plaintiff,* vs. KANSAS STATE UNIVERSITY, *Defendant.*	Case No. 12-1373-EFM

MEMORANDUM AND ORDER

Defendant Kansas State University ("KSU") brings this motion to dismiss Plaintiff Edwin Asebedo's lawsuit alleging violations of Title VII of the Civil Rights Act.[1] Asebedo argues that KSU discriminated against him based on race and then retaliated against him after he filed an Equal Employment Opportunity Commission ("EEOC") Charge of Discrimination. KSU moves to dismiss the amended complaint on the grounds that Asebedo failed to state a claim upon which relief can be granted. The Court finds that Asebedo failed to argue sufficient facts to maintain any of his claims against KSU and, therefore, the Court grants the motion to dismiss.

[1] 42 U.S.C. § 2000e *et seq.*

I. Factual and Procedural Background

Plaintiff Edwin Asebedo is a fifty-four-year-old Hispanic man who has been employed by KSU since January 2007, most recently working in Central Mail Services. Asebedo's discrimination claims began as early as October 2010 when he filed a complaint with KSU against his supervisor, Tom Filippino. Asebedo alleged that Filippino and his coworkers made racial slurs and derogatory remarks against Asebedo and other racial or ethnic groups. KSU supported Asebedo's October 2010 complaint, and warned its employees against retaliation against Asebedo for filing the complaint.

Asebedo claims, however, that the discrimination continued and included the following specific instances of retaliation. First, Asebedo claims that on or about July 20, 2011, a campus police officer swerved his patrol car at Asebedo, who was walking on campus. Because of this incident, Asebedo feared for his safety and left campus in the middle of the work day on or about July 22, 2011, leading to a second incident in which Asebedo received a written reminder regarding his employment duties. Another supervisor, Lolita Sump, told Asebedo the reminder was a "written reprimand" and that the reprimand was filed in Asebedo's personnel file.[2] Asebedo also claims another university employee told Asebedo to be careful, and that if Asebedo got in his "crosshairs," the employee would "run him over."[3] This third incident occurred on or about July 25, 2011.

Asebedo reported these three incidents and retaliatory behavior to KSU officials. Following an investigation, KSU found that Asebedo had not been subject to retaliation but did find that Filippino had continued to engage in racially offensive behavior, violating a university

[2] Am. Compl., Doc. 17, at ¶ 14.

[3] *Id.* at ¶ 11.

policy against discrimination. Asebedo filed an EEOC charge on February 21, 2012, claiming that the aforementioned incidents constituted retaliation for Asebedo's complaint against Filippino. The EEOC was unable to conclude "that the information obtained establish[ed] violations of the statutes," and Asebedo received a right to sue letter on July 9, 2012.[4] He filed his original complaint in federal court on October 3, 2012, arguing that his treatment violated Title VII of the Civil Rights Act.[5].

In May 2012, while his February 2012 charge was pending before the EEOC, Asebedo applied for an open position at Kansas State Central Mail Services as an Administrative Officer. KSU determined Asebedo did not meet the minimum qualifications, and he was not allowed to compete for the position. Asebedo alleges that this denial was retaliation for filing the February EEOC charge. Asebedo filed a second EEOC charge on August 13, 2012, based on this new allegation of retaliation and discrimination. Although Asebedo cannot produce proof, he contends that he received a right to sue letter from the EEOC in November 2012.[6] As a result, Asebedo amended his original complaint on December 28, 2012, to add the discrimination and retaliation charges presented to the EEOC in August 2012.

Asebedo asserts two causes of action against KSU: discrimination and retaliation. First, Asebedo contends that he was discriminated against on the basis of his race. Second, Asebedo argues that KSU retaliated against him in the ways described in the preceding paragraphs. Asebedo requests from the Court (1) an injunction prohibiting further discrimination and/or

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[4] Answer to Am. Compl. (Ex. 5), Doc. 18-5.

[5] 42 U.S.C § 2000e *et seq.*

[6] *See Kenny v. Valmont Indus., Inc.*, 2007 WL 2229284, at *1 (N.D. Okla. July 31, 2007) (stating that claimant needs to allege or offer proof of EEOC's issuance of a right to sue letter).

retaliation, and (2) monetary relief for lost wages, humiliation, embarrassment, emotional distress, attorneys' fees and costs, and other damages.

KSU has filed two motions to dismiss Asebedo's action against it. KSU filed the first motion to dismiss prior to Asebedo's amended complaint. In response to Asebedo's amended complaint, KSU filed a second motion to dismiss. The second motion to dismiss is substantially similar to the first motion but moves to dismiss all of Asebedo's claims. Therefore, the first motion to dismiss is rendered moot. Through its second motion, KSU moves to dismiss Asebedo's amended complaint on two grounds. First, KSU contends that the discrimination charge is barred because Asebedo failed to exhaust administrative remedies creating a judicial issue as per the Federal Rules of Civil Procedure 12(b)(1).[7] Second, KSU argues that both the discrimination charge and the retaliation charge fail to plausibly state a claim upon which relief may be granted as per Federal Rules of Civil Procedure 12(b)(6) and 12(c).

II. Legal Standard

A. Standard for Dismissal under Fed. R. Civ. P. 12(b)(6)

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a defendant may move for dismissal of any claim for which the plaintiff has failed to state a claim upon which relief can be granted.[8] Upon such motion, the court must decide "whether the complaint contains 'enough facts to state a claim to relief that is plausible on its face.' "[9] A claim is facially plausible if the plaintiff pleads facts sufficient for the court to reasonably infer that the defendant is liable for the

[7] Because the Court dismisses the motion for failure to state a claim, the 12(b)(1) subject matter jurisdiction issue is not discussed.

[8] Fed. R. Civ. P. 12(b)(6).

[9] *Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

alleged misconduct.[10] The plausibility standard reflects the requirement in Rule 8 that pleadings provide defendants with fair notice of the nature of claims as well the grounds on which each claim rests.[11] Under 12(b)(6), the court must accept as true all factual allegations in the complaint, but need not afford such a presumption to legal conclusions.[12] Viewing the complaint in this manner, the court must decide whether the plaintiff's allegations give rise to more than speculative possibilities.[13] If the allegations in the complaint are "so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.' "[14]

B. Title VII of the Civil Rights Act

Title VII of the Civil Rights Act states that "[i]t shall be unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."[15] An employment discrimination charge "need not allege every threat or incident giving rise to . . . employment discrimination claims, but [it] must do more than make conclusory allegations that defendant's employees

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[10] *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 566 U.S. at 556).

[11] *See Robbins v. Oklahoma*, 519 F.3d 1242, 1248 (10th Cir. 2008) (citations omitted); *see also* Fed. R. Civ. P. 8(a)(2).

[12] *Iqbal*, 556 U.S. at 678-79.

[13] *See id.* ("The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." (Citation omitted)).

[14] *Robbins*, 519 F.3d at 1247 (quoting *Twombly*, 566 U.S. at 570).

[15] 42 U.S.C. § 2000e-3(a).

engaged in unspecified threatening behavior."[16] Furthermore, if an employer took corrective action in response to a charge of discrimination, the complainant must then plead sufficient facts to show that the employer's response to the discrimination claims was unreasonable. If the Court determines an employer already took appropriate action, the employer cannot be held liable.[17]

III. Analysis

A. Asebedo failed to allege facts sufficient to show violations of Title VII.

The Court agrees with KSU that Asebedo has failed to allege the existence of sufficient facts to show that he is entitled to relief from the university. The Court will address each charge from the amended complaint in turn.

1. Charge I: Discrimination

Asebedo first claims that KSU racially discriminated against him in violation of Title VII and failed to properly sanction Filippino. Because Asebedo failed to allege sufficient facts showing KSU's response was not reasonable, Asebedo's claim cannot survive KSU's motion to dismiss for failure to state a claim.

KSU investigated Asebedo's first complaint against Filippino and found in Asebedo's favor. KSU warned Filippino against retaliation. But Asebedo contends that KSU's response was unreasonable because the "harassing behavior from Mr. Filippino continued, and notwithstanding the admonition against retaliation, Mr. Filippino and other Kansas State employees, including Lolita Sump, pursued a course of retaliation against [Asebedo]."[18] Asebedo's contention that the continuance of Filippino's harassment inherently renders KSU's

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[16] *Hernoe v. Lone Star Indus., Inc.*, 2012 WL 1991241, at *3 (N.D. Okla. May 31, 2012).

[17] *See Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 676 (10th Cir. 1998).

[18] Am. Compl., Doc. 17, at ¶ 9.

response unreasonable is nothing more than a conclusory allegation built upon an inference. Conclusory allegations are not assumed to be true.[19] If Asebedo had been able to assert facts that the harassment would have ceased if KSU responded in a different manner, he may have a plausible claim. But because Asebedo failed to plead sufficient facts, he failed to state a discrimination claim against KSU.

Furthermore, Asebedo also fails to allege sufficient facts to assert that KSU's response to Asebedo's second complaint was unreasonable. Asebedo argues that harassing behavior and retaliatory incidents continued after KSU resolved his first complaint. In its investigation, KSU found that Asebedo "had not been subjected to retaliation; however, the finding was made that Mr. Filippino had once again created a hostile work environment; specifically, that Mr. Filippino continues to engage i[n] racially offensive behavior."[20] In response, KSU sanctioned and counseled Filippino and suspended him for one day with pay. Additionally, KSU issued Filippino a written warning that informed him that "he would be terminated if he engaged in similar behavior in the future."[21] Asebedo contends this was not enough. Instead, Asebedo asserts that "[g]iven [Mr. Filippino's] repeated and blatant behavior, said sanctions were wholly inadequate and allowed said behavior to continue."[22] But again, Asebedo's criticisms of KSU's actions lack factual support to show that KSU's response was unreasonable. Had Asebedo alleged facts supporting his assertion that KSU must do more than the aforementioned punishments, he may have pled sufficient facts to state a Title VII discrimination claim. But

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[19] *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554–55 (2007).

[20] Am. Compl., Doc. 17, at ¶ 16 (internal quotations omitted).

[21] *Id.* at ¶ 17.

[22] *Id.*

merely asserting that the behavior continued which consequently means KSU must have responded inadequately is conclusory and therefore insufficient to survive KSU's motion to dismiss.

2. Charge II: Retaliation

Asebedo's second claim against KSU argues that KSU retaliated against Asebedo when (1) the KSU Police Officer swerved his police automobile at Asebedo, (2) a former KSU employee warned Asebedo about getting in the KSU employee's crosshairs, (3) Asebedo received a written reminder after leaving campus, and (4) KSU denied Asebedo the opportunity to compete for the Administrative Officer position. Asebedo bears the burden of establishing a prima facie case of retaliation.[23] To do so, Asebedo must show that (1) he engaged in protected action in opposition to discrimination, (2) KSU acted adversely in response to that protected activity, and (3) a causal connection existed between Asebedo's protected opposition and KSU's materially adverse action.[24]

With respect to Asebedo's claim that a KSU Police Officer swerved at him, the Court is not convinced that there was a causal connection between the complaint Asebedo filed and the officer's action. Although temporal proximity may be sufficient to infer a retaliatory motive, the Tenth Circuit has stated that the adverse action must be "*very closely* connected in time to the protected activity."[25] For example, an intervening period of three months, standing alone, was found to be insufficient to establish a prima facie case of causation.[26] Asebedo filed his

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[23] *See Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1178 (10th Cir. 1999).

[24] *See Hennagir v. Utah Dep't of Corrections*, 587 F.3d 1255, 1265 (10th Cir. 2009).

[25] *Anderson*, 181 F.3d at 1179.

[26] *Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997).

complaint in October 2010, and the incident occurred in July 2011. The nine months between filing the complaint and this incident is not close enough in time to be considered retaliation, and Asebedo does not provide any other facts in support of a causal connection. There are no facts to show that the officer even knew about Asebedo's complaint; no apparent connection exists between Mr. Filippino and the police officer. Consequently, Asebedo failed to establish a causal connection between the officer's action and Asebedo's complaint against Mr. Filippino.

Furthermore, Asebedo fails to establish a causal connection between the university employee who threatened to "run him over" if Asebedo got in his crosshairs and the complaint Asebedo filed. Asebedo only asserts that the man was a university employee and told him to "be careful, because if [Asebedo] got in Mr. Sperman's crosshairs, Mr. Sperman would 'run him over.' "[27] Asebedo fails to allege any additional facts connecting Sperman's statement to the complaint Asebedo filed against Mr. Filippino nine months earlier. Sperman seemingly lacks any defined motive to harass Asebedo and threaten Asebedo to say out of Sperman's way.

Turning to Asebedo's claim that KSU issued a written reminder against him, Asebedo again fails to establish a prima facie claim of retaliation. There are no facts to suggest that Ms. Sump was even aware of Asebedo's October complaint.[28] Had Asebedo instead argued facts showing Filippino signed and issued the reminder, Asebedo might have established a stronger causal connection because Filippino was the subject of Asebedo's complaint. But as it is, there exists no causal connection linking the issuance of the written reminder to the complaint Asebedo filed nine months earlier. Additionally, the fact that Ms. Sump mentioned a

[27] Am. Compl., Doc. 17, at ¶ 11.

[28] *See Williams v. Rice*, 983 F.2d 177, 181 (10th Cir. 1993) (holding that in order to establish a prima facie case of retaliation, the "plaintiff must show that the individual who took adverse action against him knew of the employee's protected activity")

"reprimand" and its placement in Asebedo's file fails to establish a causal connection between the reminder and the October 2010 complaint. Ms. Sump's statements only illustrate that a reminder was issued. Thus, aside from a retaliatory motive, there are other logical reasons to support the issuance of a written reminder.[29]

Asebedo's final claim also does not establish a prima facie case for retaliation. Asebedo has not pled any facts to establish a causal connection between his filing of an EEOC charge and KSU preventing him from competing for the open position. Asebedo filed his EEOC charge in February 2012 and applied for the Administrative Officer position in May 2012. This intervening period of three months, standing alone, is insufficient to support Asebedo's claim of retaliation.[30] Asebedo also fails to provide any facts to show that the human resources manager in charge of the screening for the position even knew of his EEOC charge. These facts may have at least established a basic connection between KSU's action and Asebedo's EEOC charge. There are no additional facts to support a causal connection. Therefore, Asebedo's retaliation claim must be dismissed under Rule 12(b)(6) for failure to state a claim.

[29] For example, Asebedo left his work vehicle unattended with the keys in the ignition. KSU might have issued the reminder because of this incident alone.

[30] *See Richmond*, 120 F.3d at 209.

IT IS ACCORDINGLY ORDERED this 16th day of July, 2013, that Defendant's Second Motion to Dismiss (Doc. 19) is hereby **GRANTED**.

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss (Doc. 5) is hereby rendered **MOOT**.

IT IS SO ORDERED.

ERIC F. MELGREN
UNITED STATES DISTRICT JUDGE