

**MIGUEL A. BONILLA, Plaintiff, - against - SMITHFIELD ASSOCIATES LLC  
and PASCAL LESEAC'H, Defendants.**

**09 Civ. 1549 (DC)**

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF  
NEW YORK**

*2009 U.S. Dist. LEXIS 116233*

**December 4, 2009, Decided  
December 4, 2009, Filed**

**COUNSEL:** [\*1] AKIN & SMITH, LLC, Attorneys for Plaintiff, By: Derek T. Smith, Esq., New York, New York.

JACKSON LEWIS LLP, Attorneys for Defendants, By: Felice B. Ekelman, Esq., Liane Chinwalla, Esq., New York, New York.

**JUDGES:** DENNY CHIN, United States District Judge.

**OPINION BY:** DENNY CHIN

**OPINION**

**MEMORANDUM DECISION**

**CHIN, District Judge**

In this employment discrimination case, plaintiff Miguel A. Bonilla alleges that his former employer Smithfield Associates LLC ("Smithfield") and supervisor Pascal Leseac'h discriminated against him on the basis of age and national origin. Bonilla brings these claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e ("Title VII"); the New York State Human Rights Law, the *N.Y. Exec. Law § 15 et seq.* (the "NYSHRL"); and the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq.* (Am. Compl. 1).<sup>1</sup> Plaintiff also brings common-law claims for assault and battery. (Id. PP 29-30, 38, 40).

<sup>1</sup> In his amended complaint, plaintiff cites 42 U.S.C. § 1981. Generally, employment claims brought under this statute are analyzed under the same framework as claims brought under Title VII. See *Adorno v. Port Auth.*, 258 F.R.D. 217, 230 (S.D.N.Y. 2009). Neither party, [\*2] however, addresses 42 U.S.C. § 1981 in the motion papers, and thus it is unclear whether plaintiff has abandoned this claim.

Defendants move to dismiss certain of the claims in the amended complaint. Specifically, defendants argue that plaintiff's Title VII and ADEA claims against Leseac'h should be dismissed because there is no individual liability under either statute, and that plaintiff's Title VII national origin discrimination claim should be dismissed for lack of subject matter jurisdiction because plaintiff failed to exhaust his administrative remedies. Defendants also argue that plaintiff's allegations of assault and battery prior to June 4, 2008, should be dismissed because they are time-barred. Lastly, defendants argue that the assault and battery claim against Smithfield should be dismissed because Smithfield cannot be held directly or vicariously liable for Leseac'h's individual actions. For the reasons that follow, defendants' motion is granted.

**BACKGROUND**

**A. Facts**

For purposes of this motion, the facts alleged in the amended complaint are assumed to be true.

**1. The Parties**

**a. Plaintiff**

Bonilla is approximately fifty-five years old, male, and of Ecuadorian origin. (Am. Compl. [\*3] PP23-24). He was hired by Smithfield to work at Pastis Restaurant ("Pastis") as a line cook in or around November 1999. (Id. P 21). Bonilla alleges that while employed at Pastis he was discriminated against on the basis of his age and national origin, and was a victim of assault, battery, and retaliation. (Id. PP29-30, 32-38, 40).

**b. Smithfield**

Smithfield is a limited liability company with its principal place of business in New York City. (Id. P 10). Smithfield owns Pastis. (Id. P 11).

**c. Pascal Leseac'h**

In 2004, Leseac'h began working as an executive chef at Pastis and became Bonilla's supervisor. (Id. P 13). This supervisory relationship existed until Bonilla's discharge on August 8, 2008. (Id.).

## 2. Employment Overview

Bonilla alleges that he suffered continual harassment and discrimination while employed at Pastis. Leseac'h and plaintiff's co-worker, Joel Solano, continually made derogatory and humiliating comments to Bonilla, referring specifically to his age and national origin. (Id. P 25). They called him "stupid" and "old man," and encouraged him to retire, return to Ecuador, and care for his grandchildren. (Am. Compl. PP 26-27). Solano pinched plaintiff and threw hot potatoes at [\*4] his face. (Id. P29). On several occasions, Leseac'h sent Bonilla home without justification or explanation. (Id. P 33). On a daily basis, Leseac'h smacked Bonilla's hat off of his head and "back kicked" him while he worked. (Id. PP 30-32). On or around July 20, 2008, Leseac'h burned plaintiff's right hand by throwing a pair of kitchen tongs that had been soaking in hot oil at him. (Id. P 38). The younger line cooks were treated more favorably than Bonilla. (Id. P36). Bonilla alleges that as a result of the adverse treatment, he became mentally and physically ill. (Id. P 37).

## 3. Bonilla's Administrative Complaints

Plaintiff filed two separate complaints with the New York State Division of Human Rights (the "NYSDHR"). Each time, he authorized the NYSDHR to accept the complaint on behalf of the Equal Employment Opportunity Commission (the "EEOC"). In his first complaint, dated August 5, 2008, plaintiff refers specifically to age discrimination four times. (8/5/2008 NYSDHR Compl.). With the exception of one passing comment, he never specifically refers to national origin or national origin discrimination. <sup>2</sup> In his second complaint dated August 13, 2008, Bonilla avers that Smithfield discharged [\*5] him in retaliation for filing the first complaint. (8/13/2008 NYSDHR Compl.).

<sup>2</sup> The full quotation includes the following: "Approximately four years ago, Pascal 'Doe' was hired as Chef. Pascal 'Doe' constantly asks me when am I leaving my job, says I am too old, and always calls me 'old man.' Mr. Pascal 'Doe' even told me he would give me the ticket to go back to Ecuador." (8/5/2008 NYSDHR Compl. P 3).

## 4. Bonilla's Dismissal

On August 8, 2008, three days after filing his first administrative complaint, plaintiff arrived at work and was asked by Leseac'h to pass him a salad platter. (Id. P 40). Unhappy with Bonilla's slow delivery, Leseac'h pulled plaintiff out of his work station and subsequently

ordered him to go home. (Id.). At that point, plaintiff asked Leseac'h if he was being fired, and Leseac'h answered affirmatively. (Id.). Plaintiff never returned to Pastis as an employee. (Id.).

## B. Prior Proceedings

### 1. Termination of Administrative Proceedings

On or about October 24, 2008, the NYSDHR dismissed plaintiff's complaints on the grounds of administrative convenience. On January 30, 2009, the EEOC issued Bonilla a right to sue letter. (Id. P 4).

### 2. This Suit

Bonilla filed the instant action [\*6] on February 24, 2009, charging discrimination and retaliation. On June 4, 2009, plaintiff filed an amended complaint in which he added assault and battery claims.

In their partial motion to dismiss, defendants seek dismissal of plaintiff's Title VII and ADEA claims, all assault and battery claims arising after June 4, 2008, and the assault and battery claims against Smithfield. For the reasons that follow, the motion is granted.

## DISCUSSION

Defendants move to dismiss the foregoing claims pursuant to *Federal Rules of Civil Procedure 12(b)(1)* and *12(b)(6)*. First, I discuss the issue of whether plaintiff exhausted his administrative remedies with respect to the Title VII national origin claims. Second, I discuss plaintiff's claims under Title VII and the ADEA against Leseac'h individually. Third, I discuss the assault and battery claims.

### A. The Title VII National Origin Claim

#### 1. Title VII Administrative Remedies Requirement

Before an individual may bring a Title VII suit in federal court, the claims asserted must first be presented in a complaint to the EEOC or an equivalent state agency. *42 U.S.C. § 2000e-5 (2000)*. If a plaintiff fails to pursue a Title VII claim in administrative proceedings, [\*7] the federal court generally lacks jurisdiction to adjudicate the claim. See, e.g., *Brown v. Coach Stores, Inc.*, *163 F.3d 706, 712 (2d Cir. 1998)*; *Butts v. City of N.Y. Dep't of Hous. Pres. & Dev.*, *990 F.2d 1397, 1401-02 (2d Cir. 1993)*.

While exhaustion is ordinarily "an essential element" of a Title VII claim, *Legnani v. Alitalia Linee Aeree Italiane, S.P.A.*, *274 F.3d 683, 686 (2d Cir. 2001)*, claims not raised in an EEOC complaint may be brought in federal court if they are "reasonably related" to the

claim filed with the agency. *Williams v. N.Y. City Hous. Auth.*, 458 F.3d 67, 70 (citing *Butts*, 990 F.2d at 1401).

The Second Circuit has held that a claim is recognized as "reasonably related" if the acts complained of would prompt the EEOC to investigate the charge of discrimination on that basis. *Fitzgerald v. Henderson*, 251 F.3d 345, 359-60 (2d Cir. 2001) (internal quotation marks omitted). Thus, the essential question is whether the complaint filed with the EEOC gave the agency adequate notice to investigate discrimination on both bases. *Id.* at 1402.

This inquiry is not based on a bright line rule. *Williams*, 458 F.3d at 67, 71. Instead, the relationship between an age discrimination claim [\*8] and a subsequently articulated national origin claim should be closely connected to the factual allegations raised in the EEOC complaint. *Id.* This determination varies on a case-by-case basis and requires a close examination of the factual allegations made in the underlying complaint. *Id.*

## 2. Application

In the third paragraph of his EEOC complaint, Bonilla mentions (seemingly in passing), "Mr. Pascal 'Doe' even told me he would give me the ticket to go back to Ecuador." (8/5/2008 NYSDHR Compl. P 3). The Court cannot reasonably conclude that this single comment would have prompted the EEOC to launch an investigation into national origin discrimination, particularly when plaintiff specifically alleged only age discrimination and failed to explicitly articulate a national origin discrimination claim.<sup>3</sup> The animus involved in age discrimination is different from the animus involved in national origin discrimination, and for the latter the NYSDHR and EEOC would have wanted to investigate different facts, including, for example, the national origin of other employees and whether other employees were of an Ecuadorian or Hispanic background. Plaintiff's age discrimination and national origin [\*9] discrimination claims are therefore not reasonably related. Thus, as plaintiff failed to exhaust his administrative remedies as required, plaintiff's Title VII national origin claim is dismissed.

<sup>3</sup> Plaintiff alleged on his first NYSDHR Complaint the following: "I, Miguel A. Bonilla . . . charge the above named respondent . . . with an unlawful discriminatory practice relating to employment . . . because of age . . . . I believe I have been discriminated against due to my age . . . . Based on the foregoing, I charge respondent with an unlawful discriminatory practice relating to employment because of age . . . ." (8/5/2008 NYSDHR Compl. PP 1, 5).

## B. The ADEA and Title VII Retaliation Claims Against Leseac'h, Individually

The Second Circuit does not recognize individual liability for Title VII transgressions. See *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313-17 (2d Cir. 1995); see also *Negussey v. Syracuse Univ.*, No. 95-CV-1827, 1997 U.S. Dist. LEXIS 3853, at \*11 (N.D.N.Y. Mar. 24, 1997); *Ausfeldt v. Runyon*, 950 F. Supp. 478, 488 (N.D.N.Y. 1997). Similarly, individuals may not be held individually liable for claims under the ADEA. *Cherry v. Toussaint*, 50 Fed. App'x 476, 477 (2d Cir. 2002) (citing [\*10] *Parker v. Metro. Transp. Auth.*, 97 F. Supp. 2d 437, 452 (S.D.N.Y. 2000) (holding that a union president is not individually liable under ADEA)). Thus, plaintiff's Title VII and ADEA claims against Leseac'h are dismissed.

## C. Assault and Battery Claims

### 1. Statute of Limitations

Under New York State law, the statute of limitations for filing a charge of assault and battery is one year. See *N.Y. Civ. Prac. L. & R. § 215(3)*.

Plaintiff asserted assault and battery charges against defendants for the first time in his amended complaint dated June 4, 2009. (Am. Compl. PP 93-97). Under *Federal Rule of Civil Procedure 15(c)*, however, claims asserted in the amended complaint relate back to the original complaint if the claims "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." *Fed. R. Civ. P. 15 (c)*.

Here, the assault and battery claims asserted in the amended complaint arise out of the conduct set forth in the original pleading. Accordingly, the assault and battery claims arising out of events that occurred after February 12, 2008, are not time-barred. The July 20, 2008, and the August 8, 2008, allegations involving the throwing of [\*11] the tongs and the passing of the salad platter are thus timely. As plaintiff has not provided dates for any of the other alleged instances of assault and battery, the Court cannot determine whether those allegations are time-barred.

### 2. Assault & Battery Claims Against Defendant Smithfield

In their motion papers, defendants move to dismiss the assault and battery claims on three grounds (1) plaintiff's allegations against both defendants prior to June 4, 2008, are time-barred, (2) plaintiff cannot establish that Smithfield is directly liable for assault and battery, and (3) plaintiff cannot establish that Smithfield is vicariously liable for assault and battery. Plaintiff, in his opposition papers, opposed the motion as to the statute of limitations defense, and I have ruled above. Plaintiff, however, fails to respond to the remaining two argu-

ments regarding Smithfield's liability. Accordingly, plaintiff has effectively abandoned the assault and battery claims against Smithfield and they are dismissed as a matter of law. *Hanig v. Yorktown Central School District*, 384 F. Supp. 2d 710, 723 (S.D.N.Y. 2005); *Martinez v. Sanders*, No. C 08-5293 CRB, 2004 U.S. Dist. LEXIS 10060, at \*\*8-9 (N.D. Cal. June 2, 1994). [\*12]

#### CONCLUSION

For the foregoing reasons and to the extent set forth above, defendants' partial motion to dismiss is granted. Plaintiff's Title VII national origin discrimination claims against Leseac'h and Smithfield are dismissed. His assault and battery claims against Leseac'h based on events occurring after February 12, 2008 may proceed. Thus, remaining are (1) plaintiff's assault and battery claims against Leseac'h based on post-February 12, 2008,

events, (2) plaintiff's ADEA claim against Smithfield, (3) plaintiff's retaliation claims against Smithfield, and (4) plaintiff's state and city age discrimination, national origin discrimination, and retaliation claims.

The Court will hold a pretrial conference on December 18, 2009, at noon.

SO ORDERED.

Dated: New York, New York

December 4, 2009

/s/ Denny Chin

DENNY CHIN

United States District Judge