

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AUBREY GILL : CIVIL ACTION  
 :  
 v. :  
 :  
 LAWRENCE H. SUMMERS, :  
 SECRETARY OF THE TREASURY : NO. 00-CV-5181

**MEMORANDUM**

**Padova, J.** **March , 2001**

On October 12, 2000, Plaintiff Aubrey Gill filed the instant suit alleging that Defendant unlawfully terminated his employment with the Internal Revenue Service as a tax examiner on the basis of race. Before the Court is Defendant's Motion to Dismiss. For the reasons that follow, the Court grants Defendant's Motion.

**I. LEGAL STANDARD**

Defendant moves to dismiss Plaintiff's Complaint on the ground of lack of personal jurisdiction because Plaintiff failed to exhaust his administrative remedies. Exhaustion of administrative remedies, however, is not a jurisdictional issue. Rather, exhaustion is in the nature of a statute of limitation that does not affect the district court's jurisdiction. Robinson v. Dalton, 107 F.3d 1018, 1021 (3d Cir. 1997). Furthermore, courts are permitted to consider equitable factors to determine whether to require administrative exhaustion. Id. Failure to exhaust administrative remedies, accordingly, is not a jurisdictional prerequisite. Defendant's Motion, therefore, is properly brought under Federal Rule of Civil Procedure 12(b)(6) rather than Rule 12(b)(1).

In resolving motions pursuant to Rule 12(b)(6), courts must liberally construe pro se pleadings and hold them “to less stringent standards than those drafted by attorneys.” Bieros v. Nicola, 839 F. Supp. 332, 334 (E.D. Pa. 1993). Claims by pro se litigants may be dismissed under Federal Rule of Civil Procedure 12(b)(6) only “if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” McDowell v. Delaware State Police, 88 F.3d 188, 189 (3d Cir. 1996) (quotations omitted); see also ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). The reviewing court must ordinarily consider only those facts alleged in the complaint and accept all of the allegations as true. ALA, Inc., 29 F.3d at 859. The court, however, may also consider documents that are “integral to or explicitly relied upon in the complaint” without converting the motion into one for summary judgment. Id. The Court, therefore, will consider the additional materials submitted in connection with the instant Motion as they pertain to the issue of exhaustion of administrative remedies.

## **II. BACKGROUND<sup>1</sup>**

Plaintiff was employed as a tax examining clerk at the Internal Revenue Service Center in Philadelphia, Pennsylvania, beginning in February 25, 1999. (Def. Ex. A, Declaration of Joanne Snyder (“Snyder Declaration”) ¶ 3; Snyder Decl. Ex. 1.) During the course of his employment, Plaintiff told Linda Sott, the employment specialist, that he would be attending graduate classes in African-American studies at Temple University. Sott gave permission to change his work schedule to enable him to attend the classes. (Snyder Decl. Ex. 2.) Later, Joanne Snyder (“Snyder”), the section chief, and Kathy Leslie (“Leslie”), Plaintiff’s manager, denied permission to alter his work schedule because the classes would not benefit the IRS. Plaintiff was terminated from his

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<sup>1</sup>Except where otherwise noted, the following facts are alleged in the Complaint.

employment effective May 6, 2000, purportedly for his failure to observe designated duty hours and follow the proper procedures for requesting leave.<sup>2</sup> (Snyder Decl. Ex. 1 at 1.) Plaintiff claims that his supervisors trumped up charges of being absent without leave, that he was never absent from work without permission, and that white employees who were not fired have been absent without leave more frequently than he. (*Id.*) According to Plaintiff, Defendant fired him because of his race and desire to pursue a graduate program in African-American studies. (*See* Mem. Ans. to Def's Mot. to Dismiss at 1.) Plaintiff seeks reinstatement, back pay, and punitive and compensatory damages.

### **III. DISCUSSION**

Defendant's argument for dismissal involves two-steps. Defendant first argues that Plaintiff raised Defendant's denial of his requests for alterations of his work schedule or assignment and alleged improper AWOL charges in an internal grievance procedure that he failed to exhaust. As a result, Defendant contends that the Court may not resolve any claim related to those issues. Because these unexhausted issues form the base of Plaintiff's present claim regarding his termination and since the Court cannot resolve these issues, Defendant argues that Plaintiff is unable to allege a prima facie case of racial discrimination.

#### **A. Failure to Exhaust Administrative Remedies**

Although the Complaint does not so state, Plaintiff's claim that he was terminated on the basis of his race is governed by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. *See* 42 U.S.C. § 2000e-16 (1994). Title VII permits federal employees to file civil actions based on

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<sup>2</sup>The termination letter issued by Defendant cites five instances when Plaintiff was allegedly absent without leave ("AWOL"): April 20, 1999 (three hour absence); May 3, 1999 (fifteen minute absence); May 6, 1999 (one hour and fifteen minutes); May 10, 1999 (three hour absence); and February 2, 2000 (fifteen minute absence). (Snyder Decl. Ex. 1 at 1.)

allegations of racial discrimination within ninety days of a final action on a complaint filed with the Equal Employment Opportunity Commission (“EEOC”). See 42 U.S.C. 2000e-16(c) (1994). As a precondition to filing suit under Title VII, however, Plaintiff must have exhausted available administrative remedies. Robinson v. Dalton, 107 F.3d 1018, 1020 (3d Cir. 1997). In Title VII actions, failure to exhaust administrative remedies is an affirmative defense in the nature of statute of limitations. Id. at 1021. The defendant bears the burden of pleading and proving that the plaintiff has failed to exhaust administrative remedies. Williams v. Runyon, 130 F.3d 568, 573 (3d Cir. 1997).

The Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111 (“CSRA”), establishes a comprehensive structure for federal employees to resolve grievances and complaints relating to their employment. See Bush v. Lucas, 462 U.S. 367, 385 (1983). The CSRA requires collective-bargaining agreements between federal agencies and unions to provide for a grievance procedure and binding arbitration for the resolution of disputes arising under the agreement. 5 U.S.C. § 7121(a), (b) (1994). Ordinarily, the negotiated grievance procedure is the exclusive administrative remedy for the resolution of grievances. 5 U.S.C. § 7121(a) (1994). Grievances that involve claims of discrimination, however, are an exception to this rule. Aggrieved employees who are covered by the collective bargaining agreement that provides for a grievance procedure and who raise claims of racial discrimination “may raise the matter under a statutory procedure or the negotiated procedure, but not both.” 5 U.S.C. § 7121(d) (1994); see also 5 U.S.C. 2302(b)(1) (1994); 29 C.F.R. § 1614.103(a) (2001) 29 C.F.R. § 1614.301(a) (2001) (EEOC regulations); (Def. Ex. B, Declaration of Nancy Kelley (“Kelley Declaration”), Ex. 1 (National Agreement Between Internal Revenue Service and National Treasury Employees Union Art. 41 § 2(D)). An employee raising

discrimination claims therefore must choose in which fora, either the negotiated grievance procedure or the statutory forum, he wishes to pursue his administrative remedy. Van Houten, 1998 WL 966021, at \*3.

The statutory exhaustion procedure requires the employee to initiate contact with an EEO counselor within forty-five days of the alleged discriminatory event. 29 C.F.R. § 1614.105(a)(1) (2001). The EEO counselor ordinarily has thirty days to resolve the dispute informally or notify the employee of the right to file a formal written administrative complaint within fifteen days of receipt of the notification. 29 C.F.R. § 1614.105(d) (2001). After the filing of a formal complaint, the EEO counselor investigates the alleged events and issues a final agency decision within 180 days. 29 C.F.R. § 1614.108(e) (2001). If the EEO counselor fails to issue a final decision within 180 days, the employee may file a civil action in United States District Court. 29 C.F.R. § 1614.407(a) (2001). If the employee objects to the EEO counselor's final decision, he or she may appeal to the EEOC within thirty days or seek de novo review in a federal district court. See 42 U.S.C. §2000e-16(c) (1994); 29 C.F.R. § 1614.401(a) (2001); 29 C.F.R. § 1614.402(a) (2001); 29 C.F.R. § 1614.407(a) (2001).

The Collective Bargaining Agreement outlines a four-step grievance procedure for employees alleging discriminatory action on the basis of race.<sup>3</sup> Employees alleging discriminatory personnel actions must file a written grievance within forty-five days of the discriminatory event. (Kelley Decl. Ex. 1 Art. 41 § 5(B).) The first step involves either an informal or formal meeting between the employee and the employer resulting in a written response from the employer within five days of the

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<sup>3</sup>Complainants alleging discrimination on the basis of marital status or political affiliation either alone or in conjunction with some other type of discrimination must appeal the adverse employment action to the United States Merit Systems Protection Board.

meeting. (Id. § 6(A), (B).) The employee may file an appeal with the appropriate division chief within ten days of receipt of the employer’s response. (Id. § 6(C).) If he or she is still dissatisfied with the first appeal, the employee may file a second appeal with the head of the appointing office. (Id. § 6(F).) Adverse decisions rendered as a result of the second appeal may be appealed to binding arbitration. (Id. § 8(A).) Finally, statutory law permits the employee to appeal the arbitrator’s decision first to the Federal Labor Relations Authority and then to the EEOC, 5 U.S.C. §7122(a) (1994), or directly to the EEOC. 29 C.F.R. § 1614.401(d) (2001).

Under the CSRA, an employee is deemed to have elected the statutory procedure when he timely initiates an action under the applicable statutory procedure. 5 U.S.C. 7121(d) (1994). In discrimination cases, filing a formal complaint with the EEOC constitutes an election of the statutory procedure. 29 C.F.R. § 1614.301(a) (2001); see also 5 U.S.C. § 7121(d) (1994). Alternatively, timely filing a grievance in writing in accordance with the provisions of the collective bargaining agreement constitutes an election of the negotiated procedure. See 5 U.S.C. § 7121(d) (1994). Once an employee has filed a written grievance under the negotiated procedure, he cannot thereafter file a complaint with the EEOC on the same matter. 29 C.F.R. § 1614.301(a) (2001). “Matter” under § 7121(d) has a very broad scope referring to the underlying employment actions at issue in the dispute. Bonner v. Merit Sys. Protection Bd., 781 F.2d 202, 204-05 (Fed. Cir.1986); Facha v. Cisneros, 914 F. Supp. 1142, 1148 (E.D. Pa.1996). If the employee attempts to file a complaint with the EEOC raising a matter that was alleged in a negotiated grievance procedure, the EEOC must dismiss the complaint. 29 C.F.R. § 1614.301(a) (2001).

Once the employee has made an election as to which administrative procedure to pursue, he must fully exhaust the administrative remedy prior to bringing suit in a judicial forum. Johnson v.

Peterson, 996 F.2d 397, 399, 401 (D.C. Cir. 1993); Van Houten, 1998 WL 966021, at \*4. Full exhaustion of the negotiated administrative procedure requires the grievant to appeal an adverse arbitration decision to either the Federal Labor Relations Authority or directly to the EEOC. Johnson, 996 F.2d at 399-400 (stating that 42 U.S.C. § 2000e-16(c) authorizes civil actions before the district court only after appeal to the EEOC or a final action taken by a department or agency, and not upon an arbitral decision); Van Houten, 1998 WL 966021, at \*4; see also 5 U.S.C. § 7122(a) (1994); 29 C.F.R. § 1614.401(d) (2001).

Plaintiff was an employee governed by the National Agreement Between Internal Revenue Service and National Treasury Employees Union (“Collective Bargaining Agreement”) and a member of the National Treasury Employees Union (“Union”). The Collective Bargaining Agreement covers all professional and nonprofessional service center employees of the Internal Revenue Service including tax auditors.<sup>4</sup> (Collective Bargaining Agreement Art. 1 § 1(A).) Gill submitted grievances with the Union raising disputes with his employer to be resolved under the terms of the Collective Bargaining Agreement. (Snyder Decl. Ex. 2; Snyder Decl. Ex. 3; Snyder Decl. Ex. 4; Pl. Ans. to Def. Mot. to Dismiss at 1.) The Collective Bargaining Agreement was in effect and applicable to bargaining unit employees including Plaintiff during the period of Plaintiff’s employment. (Kelley Decl. ¶ 3.)

Plaintiff submitted grievances in accordance with the Collective Bargaining Agreement’s negotiated grievance procedure relating to his requests for reassignment and alteration of his work

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<sup>4</sup>The scope of the Collective Bargaining Agreement excludes certain positions that are not applicable here. (See Collective Bargaining Agreement Art. 1 § 1(A).)

schedule and allegedly unfounded AWOL charges.<sup>5</sup> The Government has submitted written grievances filed in a negotiated grievance procedure involving the issue of the charges of being AWOL and failure to accommodate his request for a different work schedule. (Snyder Decl. Ex. 2; Snyder Decl. Ex. 3; Snyder Decl. Ex. 4.) On July 23, 1999, Plaintiff filed a grievance for a denial of a promotion. (Snyder Decl. Ex. 2.) On February 16, 2000, Plaintiff along with his Union representative, Diane Nagle, met with his division chief pursuant to the procedure outlined in the Collective Bargaining Agreement to discuss the July 23, 1999 grievance. (Snyder Decl. Ex. 2.) At that meeting, Plaintiff indicated that he had requested reassignment from night shift to the day shift to enable him to pursue educational advancement and requested reassignment to a different manager due to problems related to his participation in an African-American studies doctoral program. (Id.) On February 18, 2000, Plaintiff filed a second grievance regarding charges of being AWOL, and a third grievance requesting that administrative leave be substituted for the sick leave taken on February 15, 2000. (Snyder Decl. Ex. 3; Snyder Decl. Ex. 4.) An employee is deemed to have elected the negotiated grievance procedure to raise a matter when he files a written grievance in accordance with the negotiated procedures. 5 U.S.C. § 7121(d) (1994). Thus, any dispute about Defendant's failure to alter his work schedule and absence without leave charges were committed to the negotiated grievance procedure.

The Court further concludes that Plaintiff has failed to fully exhaust his administrative remedies. Full exhaustion of the negotiated administrative procedure requires the grievant to appeal

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<sup>5</sup>Defendant also submits evidence about two other complaints regarding his termination Plaintiff filed with the United States Merit Systems Protection Board and an EEO counselor, neither of which were resolved on the merits or fully exhausted. (See Kelley Decl. ¶ 5; Kelley Decl. Ex. 2; Kelley Decl. Ex. 3 at 1; Kelley Decl. ¶ 8; Kelley Decl. Ex. 5; Kelley Decl. Ex. 6.)

an adverse arbitration decision to either the Federal Labor Relations Authority or directly to the EEOC. Johnson, 996 F.2d at 399-400 (stating that 42 U.S.C. § 2000e-16(c) authorizes civil actions before the district court only after appeal to the EEOC or a final action taken by a department or agency, and not upon an arbitral decision); Van Houten, 1998 WL 966021, at \*4. There is no evidence that Plaintiff even pursued the grievance with respect to the AWOL charges, or appealed the Department of the Treasury's decision as to his work schedule grievance to the head of his appointing office or binding arbitration. Accordingly, Plaintiff failed to exhaust his administrative remedies with respect to the disputes over his work schedule and assignment and AWOL charges. These matters may not be challenged now before the Court unless his failure to exhaust is excused.

District courts may apply principles of equitable tolling of statutes of limitation when determining whether to excuse a plaintiff's failure to exhaust administrative remedies. Robinson, 107 F.3d at 1022. Equitable tolling may be appropriate: (1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum. Id. (citations omitted). The Court sees no basis for excusing Plaintiff's failure to exhaust his administrative remedies. Plaintiff raised his grievance regarding his work schedule and absence without leave charges in the appropriate forum, but failed to follow through with the grievance procedure. There is no evidence that Defendant misled Plaintiff as to his cause of action, or any extraordinary occurrence that prevented him from asserting his rights. Rather, Plaintiff claims that he relied on statements by Union officials that the Union could not help him and that he had exhausted all administrative remedies. (Mem. Ans. to Def. Mot. to Dismiss at 2.) This assertion is insufficient to justify excusing his failure to exhaust his remedies.

**B. Failure to State a Prima Facie Case**

To state a prima facie case for racial discrimination under Title VII, the plaintiff must establish he was: (1) a member of the protected class, (2) qualified for the position she sought, and (3) nonmembers of the protected class were treated more favorably. Goosby v. Johnson & Johnson Medical Inc., 228 F.3d 313, 318-19 (3d Cir. 2000). Defendant argues that the Complaint fails to allege that similarly situated employees were treated more favorably than he. Although the Complaint fails to make specific allegations, Plaintiff asserts that he can prove that nonmembers of the protected class were treated more favorably by showing that white employees were often absent and did not suffer any adverse employment actions. (Mem. Ans. to Def's Mot. to Dismiss at 1.) The propriety of his AWOL charges, therefore, lies at the heart of his proof of a prima facie element under Title VII. Since Plaintiff failed to exhaust his administrative remedies with respect to his previously-filed grievances about the AWOL charges, the Court cannot address that matter and Plaintiff will be unable to establish an essential element of his case. Accordingly, Plaintiff's claim must be dismissed.

**IV. CONCLUSION**

Because proof of an essential element of his claim of racial discrimination involves a matter that was raised in a prior grievance procedure but not fully exhausted, Plaintiff cannot maintain this action. Accordingly, the Court dismisses the action. An appropriate Order follows.