

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

JOHN E. CALTER	:	CIVIL ACTION
	:	
v.	:	
	:	
WILLIAM J. HENDERSON,	:	
POSTMASTER GENERAL, UNITED	:	
STATES POST OFFICE	:	NO. 99-5736

MEMORANDUM AND ORDER

HUTTON, J.

November 20, 2001

Presently before the Court are the Government's Motion for Summary Judgment (Docket No. 12), Plaintiff John E. Calter's Response to the Government's Motion for Summary Judgment (Docket No. 14), and Reply Brief in Support of Government's Motion for Summary Judgment (Docket No. 15). After full consideration of the arguments, the Government's Motion is **GRANTED** because Plaintiff failed to exhaust administrative remedies within the required forty-five day period.

I. BACKGROUND

Plaintiff John E. Calter ("Plaintiff") brought this pro se action against William J. Henderson, Postmaster General of the United States, alleging that he was discriminated against in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 791, et seq. Plaintiff was employed by the United States Postal Service ("USPS") from 1994 until his termination in 1997. On April 24, 1996, the USPS issued Plaintiff a first Notice of Removal, citing

chronic absenteeism. Following his receipt of this Notice of Removal, Plaintiff filed a grievance which resulted in Plaintiff entering into a "Last Chance Settlement Agreement" on December 23, 1996. According to the Government, Plaintiff's absentee problem reoccurred, and on October 9, 1997, the USPS issued Plaintiff a second Notice of Removal documenting the additional unscheduled sick and annual leave. In a Letter of Decision issued on November 19, 1997, the USPS informed Plaintiff that his removal was to become final within two days of his receipt of the letter. Plaintiff's last day on payroll was December 5, 1997. According to Plaintiff, he would have become eligible for benefits under the Family and Medical Leave Act ("FMLA") the day following the issuance of the October 9 Notice of Removal because he suffered from gout.

Following his removal from the USPS, Plaintiff filed a grievance with the union, which the union took to arbitration. On March 8, 1999, the arbitrator denied Plaintiff's grievance, finding that Plaintiff violated the Last Chance Agreement, and thus the USPS had "good cause" for his termination under the collective bargaining agreement. Plaintiff received a PS Form 50, a reporting form sent to employees by the USPS, on March 31, 1999 detailing his termination. Plaintiff subsequently initiated his first contact with an EEO counselor on May 13, 1999 concerning his removal. Holding that Plaintiff failed to timely initiate his EEO complaint,

the EEOC dismissed Plaintiff's complaint on September 10, 1999. Plaintiff initiated the instant action on November 17, 1999.

On May 16, 2001, the Government filed a Motion for Summary Judgment to which Plaintiff failed to respond. Recognizing that courts traditionally show pro se litigants a leniency not extended to those with legal representation, the Court denied the motion and appraised Plaintiff of his obligations under Federal Rule of Civil Procedure 56. Plaintiff responded to the Motion by letter dated October 31, 2001. With both parties having fully responded to the arguments, the Court now considers the merits of the Government's Motion.

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at

324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is "material" only if it might affect the outcome of the suit under applicable rule of law. Id.

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912, 113 S.Ct. 1262, 122 L.Ed.2d 659 (1993). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. Id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

III. DISCUSSION

The Government seeks summary judgment on two counts. First, the Government contends that Plaintiff's allegations of discrimination must fail on the merits because Plaintiff presents no evidence to support his contention that Plaintiff's pending eligibility for FMLA benefits in any way drove the timing of his termination. See Gov.'s Mot. for Summ. J. at 8. Second, the Government contends that Plaintiff failed to initiate contact with

an Equal Employment Opportunity ("EEO") counselor within the required forty-five days of the alleged illegal activity. The Government argues that, due to his alleged failure to act in a timely manner, Plaintiff failed to comply with administrative remedies. See id. at 12. The Court will first consider the Government's timeliness argument since compliance with EEO regulations is prerequisite for proceeding with the instant action.

A. Timeliness of Plaintiff's EEO Complaint

Title VII provides the exclusive remedy for USPS employees, like Plaintiff in the instant case, who allege workplace discrimination. See 42 U.S.C. § 2000e-16; see also Dougherty v. Henderson, 155 F.Supp.2d 269, 274 (E.D. Pa. 2001). EEOC regulations outline the administrative remedies for federal employees who seek to become Title VII plaintiffs. See 42 U.S.C. § 2000e-16 (b). It is well settled that a such a plaintiff must exhaust all required administrative remedies before bringing a claim for judicial relief. See Robinson v. Dalton, 107 F.3d 1018, 1020 (3d Cir. 1997) (citing McKart v. U.S., 395 U.S. 185, 193, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969)); see also Spence v. Straw, 54 F.3d 196, 201 (3d Cir. 1996) (holding plaintiff must exhaust Title VII remedies before bringing suit under Rehabilitation Act). Under the applicable EEO regulations, an aggrieved federal employee is required to initiate contact with an EEO counselor for pre-compliant counseling within forty-five days of the alleged

discriminatory action. See 29 C.F.R. § 1614.105(a).

"The forty-five day time limit for presenting a claim is not just jurisdictional, but rather akin to a statute of limitations and thus subject to the equitable modifications such as tolling." Weber v. Henderson, Civ. A. No. 99-2763, 2001 WL 285605, at *2 (March 21, 2001); see also Williams v. Runyon, 130 F.3d 568, 573 (3d Cir. 1997); Schafer v. Bd. of Public Educ., 903 F.2d 243, 251 (3d Cir. 1990). Thus, in order to determine whether Plaintiff complied with the exhaustion requirements in bringing his discrimination claim against the USPS, the Court must first decide if Plaintiff contacted an EEO counselor within forty-five days of the alleged discriminatory incident. Weber, 2001 WL 285605, at *2. If Plaintiff failed to act within the required forty-five days, the Court must next determine whether the period was tolled under equitable principles. Id.

Here, while the relevant dates are not in dispute, the parties disagree as to the legal significance of the dates in relation to the timeliness of Plaintiff's claim. On October 9, 1997, USPS issued Plaintiff a Notice of Removal that informed Plaintiff he would be removed "from the Postal Service no sooner than thirty (30) days from the date of your receipt of this letter." Gov.'s Mot. for Summ. J. at Ex. 4. In a Letter of Decision issued on November 19, 1997, the USPS informed Plaintiff that his removal from the USPS was to become final within two days from the receipt

of the letter. Id. at Ex. 5. The letter further instructed Plaintiff that, if he appealed this decision, he would "remain on the rolls, but in a non-pay, non-duty status until either a disposition of his case had been reached, or his administrative remedies had been exhausted." Id. After the arbitrator issued his decision on March 8, 1999 denying Plaintiff's grievance against the removal action, Plaintiff received a PS Form 50 on March 31, 1999 detailing his termination of employment with the USPS. Id. at Ex. 7. Plaintiff then sought pre-complaint counseling on May 13, 1999.

The Government contends that the forty-five day time frame should be calculated from the date Plaintiff received his Notice of Removal on October 21, 1997. See Gov.'s Mot. for Summ. J. at 13. At the latest, the Government asserts that Plaintiff possessed all relevant information to bring the appropriate action regarding his termination by November 19, 1997, when his removal from the USPS became final, or by December 5, 1997 when he was dropped from the payroll. Id. "Under no circumstances should Plaintiff have tarried until May 13, 1999" to initiate contact with the agency counselor. Id. Plaintiff, however, alleges that the forty-five days should be counted from on March 31, 1999 when he received the PS Form 50 detailing the reasons for his termination. The Government counters that, under Plaintiff's theory of the case, the critical event was the Notice of Proposed Removal which was issued on October 9, 1997. See id. at 7.

In order to comply with EEO regulations, it is clear that Plaintiff must have initiated contact with a counselor within forty-five days "of the date of the matter alleged to be discriminatory." 29 C.R.F. § 1614.105(a)(1) (1998) (emphasis added). Moreover, a statute of limitations begins to run when plaintiff's cause of action accrues; that is, not when plaintiff understands that his injury constitutes a legal wrong, but when "he is aware, or should be aware, of the existence of and source of an injury." Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1386 (3d Cir. 1994). Here, according to Plaintiff, the matter alleged to be discriminatory is the issuance of the Notice of Proposed Removal of October 9, 1997. Plaintiff received this notice on October 21, 1997.

According to Plaintiff's complaint, the USPS issued the Notice on October 9, 1997 in order to prevent Plaintiff from becoming eligible for benefits under FMLA. "In section 4 on the Notice of Proposed Removal the date is October 9, 1997. The date on my certification by 'Employee's Health Care Provider for Employee's Serious Illness-FMLA' is October 10, 1997." Pl.'s Resp. to Gov.'s Mot. for Summ. J. at 1. Construing the facts in the light most favorable to the Plaintiff, Plaintiff was discriminated against by the USPS when he received the Notice of Removal on October 21, 1997, not when he received his PS Form 50 on May 13, 1999. See e.g., Fullman v. Henderson, 146 F.Supp.2d 668, 695-96 (E.D. Pa.

2001) (explaining that, for statute of limitations purposes, plaintiff's Title VII claim accrued when he was sent a Notice of Removal from the USPS, not when plaintiff received the Form 50 formally terminating his employment). Therefore, the alleged discrimination occurred on October 21, 1997, when Plaintiff received the Notice of Removal, and this date triggered the start of the forty-five day period. Accordingly, Plaintiff's contact of the EEO counselor almost two years later on May 13, 1999, was untimely.

Courts staunchly enforce a failure to comply with the forty-five day limitations period as a precondition of proceeding with a discrimination claim. See e.g., Dougherty v. Henderson, 155 F.Supp.2d 269 (2001) (granting summary judgment where pro se plaintiff failed to initiate contact with EEO counselor within forty-five days of leaving the postal service on disability); Weber v. Henderson, Civ. A. No. 99-2763, 2001 WL 285605, at *2 (E.D. Pa. March 21, 2001) (granting summary judgment where pro se plaintiff failed to initiate contact with EEO counselor within forty-five days of the USPS's refusal to buy back sick leave). Furthermore, the fact that Plaintiff arbitrated his grievance during the forty-five day period does not toll the limitations period. See e.g., Int'l Union of Elec., Radio & Mach. Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976) (concluding that submission of grievance under a collective bargaining agreement did not toll the period in

which a charge of discrimination must be filed with the EEOC); Johnson v. Railway Express Agency, 421 U.S. 454 (1975) (holding that an EEO filing did not toll the limitations period for suit brought under 42 U.S.C. § 1981). According to the Supreme Court, "contractual rights under a collective-bargaining agreement and the statutory right provided by Congress under Title VII 'have legally independent origins and are equally available to the aggrieved employee.'" Elec. Workers, 429 U.S. at 236 (citation omitted). Accordingly, Plaintiff's contact with the EEO counselor on May 13, 1999 was untimely and failed to comply with EEO regulations.

B. Equitable Tolling

The Supreme Court has held that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982). This interpretation "honors the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer." Id. at 397. Moreover, the Third Circuit has ruled that the forty-five day limitations period may be equitably tolled:

- (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.

Robinson v. Dalton, 107 F.3d 1018, 1022 (3d Cir. 1997); see also
Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1387 (3d
Cir. 1994). In order for Plaintiff to defeat the instant summary
judgment motion, he need only "present enough evidence from which
a jury could reasonably believe that any of the three circumstances
occurred." Dougherty v. Henderson, 155 F.Supp.2d 269, 275 (E.D.
Pa. 2001).

Plaintiff does not allege, nor do the facts demonstrate, that
he was in anyway misled as to his cause of action. There is no
indication that Plaintiff could not discover the relevant
information necessary to pursue his claims prior May 13, 1999
because of deception on the part of the Government. To the
contrary, the facts demonstrate that Plaintiff possessed all of the
relevant information two years prior to that date. Plaintiff
complaint is based solely on his Notice of Removal dated October 9,
1997. As Plaintiff stated, "[i]n section 4 on the Notice of
Proposed Removal the date is October 9, 1997. The date on my
certification by 'Employee's Health Care Provider for Employee's
Serious Illness-FMLA' is October 10, 1997." Pl.'s Resp. to Gov.'s
Mot. for Summ. J. at 1. Construing the facts in the light most
favorable to Plaintiff, the Court finds that no reasonable fact-

finder could conclude that Plaintiff was misled by the Government.

Furthermore, there is no evidence to support a claim that Plaintiff was in any way prevented from asserting his rights. Nor do the facts, taken in light most favorable to Plaintiff, demonstrate that Plaintiff was delayed by having first raised his claim in an improper forum. As previously discussed, Plaintiff filed a grievance with his union which was taken to arbitration, but this in no way constitutes an improper forum, nor did it relieve Plaintiff of his obligation to contact an EEO counselor within the specified time period. Therefore, there is no basis upon which the Court could equitably toll the relevant limitations period. Since Plaintiff failed to initiate contact with an EEO counselor within forty-five days of the alleged discrimination, and because equitable tolling principles do not apply under the facts of this case, the Court grants the Government summary judgment on Plaintiff's claims.

An appropriate Order follows.

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JOHN E. CALTER : CIVIL ACTION
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 v. :
 :
 WILLIAM J. HENDERSON : NO. 99-5736

O R D E R

AND NOW, this 20th day of November, 2001, upon consideration of the Government's Motion for Summary Judgment (Docket No. 12), Plaintiff John E. Calter's Response to the Government's Motion for Summary Judgment (Docket No. 14), and Reply Brief in Support of Government's Motion for Summary Judgment (Docket No. 15), IT IS HEREBY ORDERED that the Government's Motion is **GRANTED**.

BY THE COURT:

HERBERT J. HUTTON, J.