

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

ALEXANDER F. CANONICA,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
DEPARTMENT OF DEFENSE, et al.,	:	
Defendants	:	NO. 01-650

NEWCOMER, S.J. July , 2002

**O P I N I O N**

Presently before the Court is Defendants' Motion to Dismiss, Plaintiff's Objection to Defendants' Motion to Dismiss and the parties' sur-replies.

**BACKGROUND**

The Plaintiff, Alexander Canonica, was an Air Force reservist, who, in August of 1991 signed a six year re-enlistment agreement with the Air Force. Shortly thereafter, Plaintiff was notified, pursuant to a mandatory retirement scheme known as High Year Tenure (HYT), he must retire. After unsuccessfully seeking a waiver from the requirements of the HYT program, Plaintiff's retirement became effective on June 30, 1993.

Prior to initiating this action, Plaintiff unsuccessfully filed no less than three lawsuits concerning the HYT program. Among other claims, Plaintiff alleges that the HYT program violated age discrimination laws, the Air Force's

inconsistent allowance of waivers violated equal protection laws, his re-enlistment agreement was breached and his coerced retirement violated several constitutional amendments. The Defendants filed a Motion to Dismiss arguing that Plaintiff's claims were barred by the applicable statutes of limitations and/or by res judicata. The Plaintiff failed to respond and this Court granted said motion as uncontested. The Third Circuit overturned that Order by finding that motions to dismiss could not be granted as unopposed and remanded the case back to this Court for further action. Defendants renewed their Motion to Dismiss to which the Plaintiff has filed objections.

## **DISCUSSION**

Defendants' offer two main arguments in support of their Motion to Dismiss: (1) Plaintiff's action is barred by the applicable statutes of limitations; and (2) Plaintiff is barred by the doctrine of res judicata from pursuing his claims. Defendants are successful in justifying dismissal of the Plaintiff's claims based on their first argument and, therefore, this Court need not consider the Defendants' second argument.

### **A. Plaintiff's Civil Rights Claims**

The applicable statute of limitations for Plaintiff's Third Amendment, Fourth Amendment and Thirteenth Amendment claims

are based on Pennsylvania's relevant statute of limitations. Napier v. Thirty or More Unidentified Federal Agents, 855 F.2d 1080, 1087-89 (3d Cir. 1988) ("correct statute of limitations for §§ 1981 and 1983 actions is the state statute of limitations for personal injury tort actions."). An action for personal injuries in Pennsylvania must commence within two years of the date of accrual of the cause of action. 42 Pa.C.S.A. § 5524. Therefore, assuming, at the latest, that Plaintiff's claim accrued on June 30, 1993 (his retirement date), Plaintiff had until June 30, 1995 to bring his Third, Fourth and Thirteenth Amendment claims. He did not file the instant suit until 2001, some six years after the statute had run. Likewise, Plaintiff's claim under the Civil Rights Act of 1964 and 1965 is also untimely as a two year statute of limitations applies. Bougher v. Univ. of Pittsburgh, 882 F.2d 74, 78-79 (3d Cir. 1989) (Congress did not stipulate a specific statute of limitations for claims under the Civil Rights Act and, therefore, federal courts shall borrow the state statute of limitations for the most analogous cause of action.).

#### **B. Plaintiff's Breach of Contract Claim**

The statute of limitations for Plaintiff's breach of contract claim falls under the catch-all statute of limitations of six years. 28 U.S.C. § 2401(a). Once again, the instant action accrued, at the latest, on June 30, 1993. Therefore,

Plaintiff had until June 30, 1999 to bring the instant breach of contract claim. However, Plaintiff did not file his breach of contract claim until February of 2001. Plaintiff's claim must, therefore, be dismissed as untimely.

### **C. Plaintiff's Age Discrimination Claim**

Plaintiff failed to comply with the prerequisites set forth by the Equal Employment Opportunity Commission (EEOC) in order to file suit under the Age Discrimination in Employment Act (ADEA). EEOC regulations require a plaintiff to give the EEOC 30 days notice of intent to file suit within 180 days of the alleged discriminatory conduct. 29 C.F.R. § 1614.201(a). Plaintiff not only failed to notify the EEOC of his intentions to sue, but also failed to bring suit within the allotted time period.

In addition, military personnel do not enjoy the protection offered under Title VII or the ADEA. Mier v. Owens, 1995 WL 341777 \*1 (9<sup>th</sup> Cir. 1995); Johnson v. Alexander, 814 F. Supp. 130, 131 (D.D.C. 1993); Kawitt v. United States, 842 F.2d 951, 953 (7<sup>th</sup> Cir. 1988); Helm v. California, 722 F.2d 507, 509 (9<sup>th</sup> Cir. 1983). Accordingly, Plaintiff's age discrimination claim must be dismissed.

### **D. Tolling the Statute of Limitations**

Application of the maximum catch-all six year statute of limitations period to each of Plaintiff's claims consistently results in the dismissal of each of the claims as untimely. Therefore, Plaintiff's only hope of sustaining these claims is to somehow show a tolling of the statutes of limitations. To this end, Plaintiff asserts that his previous lawsuits concerning his retirement from the Air Force tolled the applicable statute of limitations in each of his current claims. To the contrary, statutes of limitations are not tolled by the filing of a previous complaint. Cardio-Medical Associates, Ltd. v. Crozer-Chester Medical Center, 721 F.2d 68, 77 (3d Cir. 1983).

Likewise, any argument concerning equitable tolling also fails. Equitable tolling may be appropriately applied in the following three situations: (1) the plaintiff was actively misled by the defendant with regard to plaintiff's cause of action; (2) the plaintiff has, in some extraordinary way, been prevented from asserting his or her rights; and (3) the plaintiff has timely asserted his rights, mistakenly, in the wrong forum. Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1387 (3d Cir. 1994). Plaintiff's attempts to claim an earlier assertion of his rights through his June 7, 1995 letter to Major Steele is unpersuasive. Major Steele's letter of June 25, 1995, indicates that the Plaintiff was directed to another office which has no record of Plaintiff's pursuit of his complaint.

Therefore, Plaintiff is unable to argue that he timely asserted his complaint in the wrong forum. Moreover, Plaintiff fails to present any claims which may justify equitable tolling of any of his claims.

AN APPROPRIATE ORDER WILL FOLLOW

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Clarence C. Newcomer, S.J.

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O R D E R

AND NOW, this        day of July, 2002, upon consideration of the Defendants' Motion to Dismiss (Document 11), Plaintiff's Objection to Defendants' Motion to Dismiss as well as the parties' sur-replies, it is hereby ORDERED that the Defendants' Motion to Dismiss is GRANTED. This matter is hereby DISMISSED, with prejudice, for the reasons as set forth in the accompanying Opinion. The Clerk shall MARK this case as closed for statistical purposes.

AND IT IS SO ORDERED.

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Clarence C. Newcomer, S.J.