

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

<b>DENNIS JOHN CAMPBELL</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	<b>NO. 01-CV-4517</b>
	:	
<b>JOHN E. POTTER, POSTMASTER GENERAL and THE UNITED STATES POSTAL SERVICE</b>	:	

**MEMORANDUM AND ORDER**

**Kauffman, J.**

**December 9, 2004**

Plaintiff Dennis John Campbell (“Plaintiff”) brings this action for violations of the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq., against Defendants John E. Potter, Postmaster General, and the United States Postal Service (“Defendants”). Now before the Court is Defendants’ Motion to Dismiss. For the reasons that follow, Defendants’ Motion will be granted.

**I. BACKGROUND**

Accepting the factual allegations of Plaintiff’s Amended Complaint (“Complaint”) as true and drawing all inferences in Plaintiff’s favor, the facts are as follows. Plaintiff began work for Defendant United States Postal Service on September 21, 1971 as a distribution clerk in Fort Lauderdale, Florida. He continued in that position until he resigned in January of 1986. Complaint at ¶ 11. Two months later, Plaintiff rejoined the United States Postal Service in Landsdale, Pennsylvania. Id. at ¶ 13. Soon after assuming his duties in Landsdale, Plaintiff was accused of stealing a postal registry pouch. Id. at ¶¶ 14 - 15. Although the accusation was never corroborated, Plaintiff claims that he suffered harassment at the hands of his co-workers, who tried to link him to the theft. Id. at ¶¶ 16 - 18. Plaintiff was subsequently diagnosed with Post-

Traumatic Stress Disorder and Acute Paranoid Disorder, and was granted sick leave. Id. at ¶¶ 19-21. While on sick leave, Plaintiff was terminated for unsatisfactory performance and poor attendance, but was rehired a year later after “extended litigation.” Id. at ¶¶ 22 - 23.

In October of 1988, Plaintiff secured a transfer to the neighboring post office in Hatfield, Pennsylvania, where he was assigned to the position of City Carrier. Id. at ¶ 27. In 1991, Plaintiff’s disability resurfaced. His repeated requests for accommodation were denied. Id. at ¶ 31. In one incident, the post-master ordered Plaintiff to perform certain duties involving driving despite his protests that he was taking medications that might impair his driving ability. Id. at ¶ 33. Soon thereafter, Plaintiff suffered an acute panic attack. Id. at ¶ 34. On March 4, 1992, Plaintiff was discharged from the Hatfield Post Office. Id. at ¶ 37. In the years since Plaintiff’s discharge, prospective employers have contacted Defendants to inquire as to his job performance. In response, Defendants have made derogatory comments, effectively preventing him from finding new work. Id. at 38. Plaintiff brought this action for violations of the Rehabilitation Act on September 6, 2001.

## **II. LEGAL STANDARD**

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O’Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). The Court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted only when it is certain that no relief could be granted under any set of facts that could be proved by the plaintiff. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d

Cir. 1988).

### III. ANALYSIS

#### A. *Exhaustion of Administrative Remedies*

The Rehabilitation Act of 1973 gives a private cause of action to handicapped individuals who have suffered from discrimination at the hands of the federal government and its agencies. See Spence v. Straw, 54 F.3d 196, 199 (3d Cir. 1995). However, before bringing such an action, a prospective plaintiff must first timely exhaust all available administrative remedies. Id. at 201. A failure to do so would render the plaintiff's claim defective, and thus susceptible to a motion to dismiss. See Weber v. Henderson, 2001 WL 285605 at \* 3 (E.D. Pa. 2001) (citing Robinson v. Dalton, 107 F.3d 1018, 1022 (3d Cir. 1997)).

In this case, the relevant administrative remedies available to a plaintiff with a Rehabilitation Act claim derive from 42 U.S.C. § 2000e-16 ("Title VII"). See Spence, 54 F.3d at 201. The applicable regulations require aggrieved persons to (1) initiate contact with an Equal Employment Opportunity ("EEO") counselor within 45 days of the alleged discriminatory conduct; and (2) file a formal EEO complaint within 15 days after being informed by the EEO Counselor that his grievance has not been resolved. 29 CFR § 1614.105 (2004).

Plaintiff concedes that he did not contact an EEO Counselor within 45 days of the alleged discriminatory conduct on which his suit is based. Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss ("Plaintiff's Reply Memo") at 6. Accordingly, he has failed to satisfy a statutory prerequisite to his action.<sup>1</sup>

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<sup>1</sup> Plaintiff's Amended Complaint contains three counts, each of which is based on conduct that occurred during or prior to 1992. In his reply memorandum, Plaintiff alleges additional discriminatory conduct – that Defendants made derogatory comments about him after

### *B. Equitable Tolling*

Plaintiff next argues that the period within which he must exhaust his administrative remedies should be extended under the doctrine of equitable tolling. In this Circuit, 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.” Oshiver v. Levin, Fishbein, Sedran, & Berman, 38 F.3d 1380, 1391-92 (3d. Cir. 1994). Plaintiff argues that the third of those circumstances applies in this case, citing his “ongoing and continuous acts...to pursue his claims through countless measures, such as the Merit Systems Protections Board, his collective bargaining unit, the National Labor Relations Board, the Office of Personnel Management...writing to various Congressmen, Senators, the President of the United States, as well as countless Postmaster Generals.” Plaintiff’s Reply Memo at 10.

Plaintiff bears the burden of demonstrating that equitable tolling is appropriate. Parker v. Royal Oak Entm’t, 2004 WL 23101851, at \*2 (3d Cir. 2003). The doctrine of equitable tolling must be applied sparingly and only in cases where the plaintiff has exercised due diligence in

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he had been terminated and that those comments ultimately prevented him from securing new employment. Plaintiff further alleges that he did contact an EEO Counselor within 45 days of discovering the alleged derogatory comments. Plaintiff’s Reply Memo at 6 - 7. On that basis, Plaintiff argues that, at least with respect to the derogatory comments, he did timely exhaust his administrative remedies. However, Plaintiff never asserted Defendants’ alleged derogatory comments as a basis for relief in his Amended Complaint. Plaintiff’s argument that he exhausted his administrative remedies with respect to the derogatory comments, therefore, has no bearing on the disposition of this action. See, e.g., Longport Ocean Plaza Condominium, Inc. v. Robert Cato & Assoc., Inc., 2002 WL 436742 at \* 4 (E.D. Pa. 2002) (holding that a complaint must indicate the legal theory upon which the action is based in order to satisfy the notice-pleading requirements.).

defending his legal rights. Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1999).

Even after drawing all inferences in Plaintiff's favor, it is clear that he has failed to show that he is entitled to equitable tolling. First, although Plaintiff has undertaken various measures to protect his rights (including writing letters to political officials and bringing an action before his collective bargaining unit), Plaintiff has failed to cite a single case in which the measures he resorted to have been found to justify equitable tolling. This absence of precedential support is particularly significant in the case of a doctrine that must be applied "sparingly." But even if the various measures Plaintiff undertook could serve as a basis for equitable tolling, the allegations he has pled do not satisfy the Oshiver test in two additional respects. First, Plaintiff has failed to allege that his attempts to protect his rights were timely, in the sense that they took place within 45 days of his termination;<sup>2</sup> second, Plaintiff has not alleged that the measures he undertook involved the same rights he seeks to vindicate through this action. Clearly, Plaintiff has not met his burden. It follows that equitable tolling does not apply.

#### **IV. CONCLUSION**

For the foregoing reasons, the Court finds that Plaintiff has failed to exhaust his administrative remedies in a timely fashion and that he cannot avail himself of the doctrine of equitable tolling to rectify that omission. Accordingly, the Court will grant Defendants' Motion. An appropriate order follows.

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<sup>2</sup> Plaintiff has failed to provide information as to when he undertook the measures he describes. The one exception is his obviously untimely appeal from being denied retirement/pension benefits in 1994.

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<b>GENERAL and THE UNITED STATES</b>	:	
<b>POSTAL SERVICE</b>	:	

**ORDER**

**AND NOW**, this \_\_\_\_\_ day of December, 2004, upon consideration of Defendants' Motion to Dismiss (docket no. 29) and for the reasons stated in the accompanying Memorandum, it is **ORDERED** that the Motion is **GRANTED**. Accordingly, all claims against Defendants are **DISMISSED WITHOUT PREJUDICE**. It is **FURTHER ORDERED** that Plaintiff may amend his complaint within 30 days of receipt of this Order.

**BY THE COURT:**

**S/Bruce W. Kauffman  
BRUCE W. KAUFFMAN, J.**