

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

A. WILLIAM STARR : CIVIL ACTION
: :
v. : :
: :
MARVIN T. RUNYON, JR., : NO. 96-3209
POSTMASTER GENERAL : :
UNITED STATES POSTAL SERVICE :

MEMORANDUM AND ORDER

BECHTLE, J.

JUNE 30, 1997

Presently before the court is defendant Marvin T. Runyon's ("Runyon") motion for summary judgment, and plaintiff A. William Starr's ("Starr")¹ opposition thereto. For the reasons set forth below, the court will grant Runyon's motion for summary judgment.

I. BACKGROUND

Starr brought this civil action claiming that the United States Postal Service ("Postal Service") violated the Rehabilitation Act of 1973 ("Rehabilitation Act"), 29 U.S.C. §§ 791 and 794, and retaliated against him for filing Equal Employment Opportunity ("EEO") complaints against his supervisors. This court has subject matter jurisdiction over these claims pursuant to 28 U.S.C. §§ 1331.

1. Starr's birth name was Alan Howard Gilbert. (Starr Dep. at 6.)

The pertinent facts in the light most favorable to Starr are as follows. In June, 1983, Starr became a mail handler for the Postal Service. (Starr Dep. at 8.) In January, 1984, Starr applied for and was given the position of "Motor Vehicle Operator" ("Driver"). (Starr Dep. at 14; Pl.'s Mem. Opp'n at 1, Ex. A.) In September, 1985, Starr injured his back while at work. (Starr Dep. at 14.) Thereafter, the Postal Service placed Starr on "light duty" for approximately eighteen months. Id. In April, 1987, Starr was transferred to the Main Post Office. Id. at 14-15. In November 1987, Starr suffered from a ruptured and herniated disc and as a result discontinued work until January 1990. Id. at 21-23. Upon his return to work Starr was again put on "light duty." Id. at 23.

Based on a medical examination conducted by Starr's doctor and the concurrence of the Postal Service's doctor, the Postal Service found Starr to be "permanently unable to perform the essential duties of [his] former position as a full time truck Driver" and offered to reassign Starr from Driver to "Vehicle Dispatching Clerk/Modified" ("Modified Dispatch Clerk"). (Starr Dep. at 26; Pl.'s Mem. Opp'n at 1, Ex. A.) The offer stated that Starr had "the option to either accept or reject this offer" and that if Starr "believe[d] that this assignment [wa]s not a proper accommodation, [he could] submit any additional information pertaining to [his] case for review and consideration." (Pl.'s Mem. Opp'n, Ex. A.) Starr did not submit any additional information for consideration and accepted the job

offer because he agreed that the reassignment to the position of Modified Dispatch Clerk was a proper accommodation. (Starr Dep. at 124.)

As Modified Dispatch Clerk Starr was required to work in the "Outer Dispatch Office" or "Key Room" at the Postal Motor Vehicle Facility located across the street from the Main Post Office in Philadelphia, Pennsylvania, an office which Starr had seen before he accepted the reassignment to Modified Dispatch Clerk. (Starr Dep. at 35-36; Compl. ¶ 7; Pl.'s Mem. Opp'n at 2.) Starr's duties included handing out log books and keys to the truck drivers at the beginning of their shifts, collecting the log books and keys when the drivers returned, and completing other miscellaneous paperwork. (Starr Dep. at 28; Pl.'s Mem. Opp'n at 2.)

The Key Room was approximately thirteen feet, nine inches long and five feet, four inches wide.² (Pl.'s Mem. Opp'n at 2.) It is not clear what the height of the ceiling was. According to Starr, it was lower than his own height of six feet, five inches. As a result, Starr maintains that he had to bend or hunch over while performing his duties. (Compl. ¶ 7.) However, the Postal Service contends that the average height of the

2. At his deposition, Starr estimated the Key Room to be approximately five feet wide by ten feet long and the ceiling to be approximately five feet, ten inches high. (Starr Dep. at 43.) He also estimated the door to be approximately six feet high. Id. at 13.

ceiling was six feet, eight and three quarter inches high.³

(Starr Dep. at 45; Pl.'s Mem. Opp'n at 2.)

In September, 1992, Starr advised his superiors that the low height of the Key Room ceiling required him to continually bend over to do his work and that the constant bending was aggravating his back injury causing him pain. (Starr Dep. at 47; Compl. ¶ 8.) Starr requested that the ceiling be raised "about six inches," understanding that the supervisors he made the request to did not have the authority to have the ceiling raised. (Starr Dep. at 59.) Starr's supervisors responded that no changes would be made. (Starr Dep. at 47-61; Pl.'s Mem. Opp'n at 2.) Thereafter, Starr continued to complain about the height of the ceiling. (Pl.'s Mem. Opp'n at 2.)

In mid-December, 1992, Starr was again transferred to the Main Post Office where he worked until late December when the Postal Service transferred Starr back to the Key Room.⁴ (Starr Dep. at 46; Pl.'s Mem. Opp'n at 2.) Starr remained assigned to the Key Room until January 26, 1993, at which time Starr suffered further injury to his back and became unable to continue working.

3. Some time in 1994, the building in which the Key Room was located underwent renovations and the ceiling of the Key Room was removed, leaving only the "ceiling wall angle" anchored to the existing wall. (Def.'s Mem. Supp. Summ. J. at 4-5, n.1; Pl.'s Mem. Opp'n at 2, n.2.)

4. In his Complaint Starr stated that he was transferred to the Main Post Office on January 4, 1993. (Compl. ¶ 10.)

(Starr Dep. at 46, 72-75; Pl.'s Mem. Opp'n at 2; Compl. ¶ 13.)⁵
On April 24, 1996, Starr filed the instant suit.

II. STANDARD FOR SUMMARY JUDGMENT

The purpose behind summary judgment is to avoid a trial in cases where it is unnecessary and would only cause delay and expense. See Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977). Summary judgment is proper "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 judgment as a matter of law." Fed. R. Civ. P. 56(c). A disputed fact is "material" if its resolution might affect the outcome of the suit under the governing law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A "genuine" issue concerning a material fact exists when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Id. Any inferences are to be drawn in the nonmovant's favor. See id. at 255.

When the movant is a defendant, or the party without the burden of proof on the underlying claim, the movant does not have an obligation to produce evidence negating plaintiff's case.

5. Starr has not returned to work since January 26, 1993, and is currently receiving workmen's compensation and medical benefits. (Starr Dep. at 76.)

See Collins v. Bopson, 816 F. Supp. 335, 339 (E.D. Pa. 1993).

Rather, the moving party need only demonstrate that there is no evidence to support plaintiff's claim. See id.

In addition, Rule 56(e) does not permit the non-moving party to rely upon mere allegations, bare assertions, or denials of his pleading. See Anderson, 477 U.S. at 248; Fireman's Ins. Co. v. DuFresne, 676 F.2d 965, 969 (3d Cir. 1982). Rather, the non-moving party must offer specific facts contradicting the facts averred by the movant which indicate that there is a genuine issue for trial. See Lujan v. National Wildlife Fed'n, 497 U.S. 871, 888 (1990); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

III. DISCUSSION

A. Rehabilitation Act of 1973 Claim

In order to establish a prima facie case of discrimination under the Rehabilitation Act of 1973, a plaintiff bears the burden of demonstrating:

(1) that he or she has a disability; (2) that he or she is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) that he or she was nonetheless terminated or otherwise prevented from performing the job.

Shiring v. Runyon, 90 F.3d 827, 831 (3d Cir. 1996).

Starr claims the Postal Service failed to provide him with "reasonable accommodation" for his back condition in violation of the Rehabilitation Act. Specifically, he states:

the defendant, despite its knowledge of [Starr']s handicap, forced him to work in a room whose physical characteristics were such that he had to continually stoop causing him severe pain and, when advised of the situation, refused to make any accommodation in his working conditions.

(Pl.'s Mem. Opp'n at 6.) He bases his claim on the Postal Service's failure to raise the ceiling of the Key Room and its failure to reassign him to yet another position.

The Postal Service asserts, among other things, that because Starr failed to timely contact an EEO counselor following his assignment to the Key Room in June, 1991, and because no grounds for equitable tolling exist, Starr's Rehabilitation Act claim is time-barred. Therefore, contends the Postal Service, the court should grant it summary judgment on Starr's Rehabilitation Act claim. Starr responds stating that the issue of his timely exhaustion of his administrative remedies was fully and fairly litigated in an earlier action brought by him against the Postal Service, and that this court decided the issue in his favor. Therefore, argues Starr, under the doctrine of collateral estoppel or issue preclusion, the court should deny the motion for summary judgment on his Rehabilitation Act claim.

It is well-settled that "[f]iling a timely charge of discrimination with the [Equal Employment Opportunity Commission] 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." Schafer v. Board of Pub. Educ., 903 F.2d 243, 251 (3d Cir. 1990) (quoting Zipes v.

Trans World Airlines Inc., 455 U.S. 385, 393 (1982)); see also Robinson v. Dalton, 107 F.3d 1018, 1021-22 (3d Cir. 1997). Under the applicable regulation at the time of the alleged discriminatory conduct, Starr was obligated to contact an EEO "counselor within 30 days of the date of the alleged discriminatory event, the effective date of an alleged discriminatory personnel action, or the date that the aggrieved person knew or reasonably should have known of the discriminatory event." 29 C.F.R. § 1613.214(a);⁶ see also Robinson, 107 F.3d at 1021 (stating that "exhaustion requires both consultation with an agency counselor and filing a formal EEOC complaint within the required times").

The court concludes that the date which triggered the start of the thirty days was time in September 1992 when Starr knew that his request to have the Key Room ceiling raised was unambiguously denied. Hence, Starr had until sometime in October 1992 to contact an EEO counselor about the alleged discrimination. However, not only did Starr fail to contact an EEO counselor within thirty days of when Starr's supervisors denied his request to raise the ceiling, he failed to ever contact an EEO counselor about the issue at all. (Lynn Decl. ¶

6. On October 1, 1992, this regulation was amended to allow an aggrieved employee forty-five days to contact an EEO counselor. See 29 C.F.R. §§ 1614 et seq. Even applying the forty-five-day time limit, the court's judgment would not change.

3.)⁷ Therefore, Starr is unable to maintain the instant action.⁸ See, e.g., Bruno v. Brady, C.A. No. 91-2605, 1991 WL 258833 (E.D. Pa. Dec. 3, 1991) (granting summary judgment because plaintiff failed to contact and EEO counselor within thirty days of the alleged discriminatory personnel action); Riddle v. Department of Navy, C.A. No. 94-4656, 1994 WL 547840 (E.D. Pa. Oct. 4, 1994) (dismissing plaintiff's complaint sua sponte for failure to contact an EEO counselor within thirty days of the alleged discriminatory act).

With respect to Starr's contention that the issue of whether he timely exhausted his administrative remedies was fully and fairly litigated in a previous action and decided in his favor by this court, that contention is without merit. On

7. Citations to "Lynn Decl." refer to the October 24, 1996, declaration of Leo Lynn ("Lynn"), an Appeals Review/Examiner Analyst for the Allegheny Area of the Postal Service, which area includes the Philadelphia District of the Postal Service. In paragraph 3 of his declaration, Lynn states:

My review of the EEO records reveals that Mr. Starr has not timely filed an administrative EEO complaint of discrimination alleging that his June 1991 reassignment to the key room in the Motor Vehicle Section was discriminatory. No such EEO complaint was filed at the time of his acceptance of the modified position in the key room in June of 1991 or at any time thereafter.

(Lynn Decl. ¶ 3.)

8. The court notes that Starr is no stranger to the administrative process for pursuing employee grievances based on an employer's alleged discriminatory conduct. During his years with the Postal Service, Starr has filed at least four formal administrative complaints of discrimination. (Lynn Decl. ¶ 2.)

December 11, 1992, Starr timely notified the EEO office concerning his claim that the Postal Service discriminated against him when it transferred him from the Key Room to the Main Post Office on December 9, 1992. Starr v. Runyon, C.A. No. 94-5413, 1995 WL 455840, at *2 (E.D. Pa. July 28, 1995). The essence of Starr's claim regarding the December 9, 1992, transfer was that although he believed the transfer accommodated his back condition, he nonetheless felt that the transfer was discriminatory because other similarly-situated employees from his section were not transferred to the Main Post Office to accommodate their handicaps. Id. On April 20, 1993, Starr filed a formal administrative complaint with the EEO, stating that the charges contained therein stemmed from his December 9, 1992, transfer from the Key Room to the Main Post Office. Id.

On June 2, 1993, the Office of the EEO Compliance and Appeals sent Starr a letter informing him that the office had received his complaint and that the scope of the investigation would include only the issue of Starr's transfer from the Key Room to the Main Post Office. Id. The letter also informed Starr that if he did not agree with the issue as defined, he must notify the office within seven days of the receipt of the letter. Id. Starr did not notify the EEO office that he disagreed with the issue for investigation nor did he inform the office the he wished to include in the investigation the Postal Service's failure to raise Key Room ceiling. Id.

On March 10 and 14, 1994, a hearing was held before an administrative law judge. Id. At the conclusion of the hearing, the judge concluded that Starr was not discriminated against because of his disability when he was transferred on December 9, 1992. Id. The judge also concluded, even though the issue was not formally before the judge, that the Postal Service discriminated against Starr when it failed to accommodate his disability by having him work in a room with a ceiling five feet, eleven inches to six feet tall. Id. Further, when Starr introduced the issue to the judge, the judge made findings with respect to the height of the Key Room ceiling without requesting any evidence on the subject from the Postal Service. Id.

On August 31, 1994, Starr filed an action with this court based on the facts surrounding his transfer to the Key Room and its ceiling height. Subsequently, the Postal Service moved to dismiss Starr's complaint on the basis that he failed to exhaust his administrative remedies as to the subject. This court agreed, dismissing Starr's complaint without prejudice and remanding his claims to the administrative law judge for further proceedings in accordance with the court's decision.

The court remanded Starr's claims to the administrative law judge because they were not appropriately adjudicated before that judge. In particular, the court was concerned about the fact that the administrative law judge made findings regarding the height of the Key Room ceiling based on Starr's evidence alone. The Postal Service was not given the opportunity to

submit its own evidence regarding the issue. Therefore, because of the incomplete state of the record before it, this court concluded that it did not have jurisdiction over the matter because Starr's claims were not properly exhausted. The court made no determination with respect to whether Starr timely contacted an EEO counselor regarding his reassignment from Driver to Modified Dispatch Clerk. Contrary to Starr's assertion, timeliness was not fully and fairly litigated in the prior action and therefore the doctrine of collateral estoppel does not apply here. Because Starr did not timely contact an EEO counselor regarding his claims relating to his reassignment from Driver to Modified Dispatch Clerk and has shown no basis for waiver, estoppel, or equitable tolling, the court will grant the motion for summary judgment on Starr's Rehabilitation Act claim.⁹

B. Retaliation Claim

Starr also claims that he was assigned to the Key Room in retaliation for filing EEO complaints in 1985 and 1987. To

9. Even if Starr's claims surrounding his reassignment from Driver to Modified Dispatch Clerk had properly been before the administrative law judge, Starr lacks sufficient proof to withstand the motion for summary judgment because Starr has no evidence to counter the Postal Service's evidence that the height of the Key Room ceiling was on average six feet, eight and three quarter inches. Among the declarations submitted by Runyon is a copy of a report prepared and sealed by a registered architect concluding, based on his examination of the remains of the Key Room, that "the average room height would have been 6' - 8 - 3/4'". (Def.'s Mem. Supp. Summ. J., Ex. 3 (emphasis in original).) Starr offers no evidence on the height of the ceiling to counter Runyon's. Therefore, Starr fails to raise a genuine issue of material fact as to whether any reasonable accommodation was even necessary.

establish a prima facie claim of retaliation, a plaintiff must show: (1) that he was engaged in a protected activity; (2) that he was subjected to adverse employment action subsequent to or contemporaneously with such activity; and (3) that there was a causal link between the protected activity and the adverse action. See Azzaro v. County of Allegheny, 110 F.3d 968, 973 (3d Cir. 1997).

Starr fails to offer evidence on both the second and third elements of a retaliation claim. With respect to the second element, Starr has not shown that his reassignment from Driver to Modified Dispatch Clerk was an "adverse employment action." In fact, he willingly accepted the reassignment, acknowledging it as an accommodation for his back condition. Therefore, Starr cannot now argue that the assignment was adverse.

Moreover, even if the assignment to the Key Room was adverse, Starr fails to satisfy the third element of a retaliation claim because he fails to offer evidence of a causal link between his EEO complaints and his assignment to the Key Room. Approximately four years have lapsed between the time Starr filed his EEO complaints and the time the Postal Service assigned him to the Key Room. This significant lapse in time militates against an inference of causation in the absence of additional evidence. See Quiroga v. Hasbro, Inc., 934 F.2d 497, 501 (3d Cir.) (noting that in Jalil v. Avdel Corp., 873 F.2d 701, 709 (3d Cir. 1989), the court stopped short of creating an

inference of causation based on timing alone), cert. denied, 502 U.S. 940 (1991); Robinson v. S.E. Pa. Transp. Auth., 982 F.2d 892, 895 (3d Cir. 1993) (indicating doubt that employee's discharge that came two years after employee took protected action could be causally linked to that protected action absent intervening pattern of antagonism and retaliation); see also Harley v. McCoach, 928 F. Supp. 533, 542 (E.D. Pa. 1996) (granting summary judgment on retaliation claim because nine months was too great a lapse in time from employee's exercise of Title VII rights to the time of adverse employment action to support inference of causation). Starr lacks such additional evidence. Thus, without proof of the second and third elements of a retaliation claim, Starr fails to establish a prima facie case. Therefore, the court will grant Runyon's motion for summary judgment on Starr's retaliation claim as well.

IV. CONCLUSION

For all of the reasons stated above, the court will grant Runyon's motion for summary judgment.

An appropriate Order follows.

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

A. WILLIAM STARR	:	CIVIL ACTION
	:	
v.	:	
	:	
MARVIN T. RUNYON, JR.,	:	NO. 96-3209
POSTMASTER GENERAL	:	
UNITED STATES POSTAL SERVICE	:	

ORDER

AND NOW, TO WIT, this day of June, 1997, upon consideration of defendant Marvin T. Runyon's motion for summary judgment, and plaintiff A. William Starr's opposition thereto, IT IS ORDERED that said motion is GRANTED.

Judgment is entered in favor of defendant and against plaintiff.

LOUIS C. BECHTLE, J.