

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

MICHAEL P. PUSCAR and JOHN	:	
J. PARDINI,	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	No. 96-CV-8442
	:	
HALE PRODUCTS, INC.,	:	
Defendant.	:	

MEMORANDUM ORDER

Presently before the Court are defendant's motion for summary judgment of Count III (Age Discrimination in Employment Act claim) and motion to dismiss Count IV (Pennsylvania Human Relations Act claim) of plaintiff Pardini's complaint.¹ Upon consideration of defendant's motions and plaintiff John J. Pardini's ("Pardini")

¹ Counts 1 and 2 of the complaint set forth the claims of plaintiff Puscar; said claims are not the subject of the pending motions.

response thereto, defendant's motions will be denied.

I. FACTS

The material facts are not in dispute. Pardini was employed by defendant Hale Products Inc., from on or about May 26, 1969, through August 23, 1993. On August 23, 1993, his position as Plant Manager for defendant's Equipment Division was terminated; his job responsibilities were reassigned to a younger employee and thereafter defendant failed to rehire him. Pardini timely filed a charge with the Equal Employment Opportunity Commission ("EEOC") claiming that the personnel decisions were made because of his age.

On September 28, 1995, Pardini signed a

return receipt for certified mail which contained a form of "right-to-sue letter." The EEOC did not send a copy of the "right-to-sue letter" to Pardini's counsel. The EEOC acknowledges that the "right-to-sue letter" was not intended but was inadvertently sent to Pardini as the result of a clerical error by the EEOC.² After

² In his affidavit, William D. Cook, Enforcement Manager for the Philadelphia District Office of the EEOC, states that the September 28, 1996 "right-to-sue letter" was issued as a result of clerical error. Mr. Cook states that Ms. Pinkey Lucas, the EEOC Investigator assigned to Pardini's charge, informed him that "she had been unaware of the September 28, 1995 Dismissal Notice and continued to process the Pardini charge thereafter as if it was an open charge."

Mr. Cook concludes "that the September 28, 1995 Dismissal and Notice of Rights for Charge 170941121, even if actually received by all parties, was issued in error. Clearly, staff from both the Enforcement Unit and the Legal Unit continued to

sending the September 28, 1995 "right-to-sue letter" to Pardini, the EEOC continued to investigate and to process Pardini's charge. Pardini's counsel continued to communicate with the EEOC and provide it with information regarding his charge of discrimination by defendant.

On December 16, 1996, after completion of the EEOC investigation, the EEOC sent Pardini and his counsel a right-to-sue letter. On December 18, 1996, Pardini filed his complaint. In his complaint,

process that charge thereafter in conjunction with the related Puscar charge and to treat both charges in the same manner, i.e., as open charges." Mr. Cook "recommended to the District Director that she issue a Notice of Reconsideration and Notice of Rescinding concerning the September 28, 1995 Dismissal and Notice of Rights" for Pardini's charge.

Pardini alleges that he was terminated and not rehired by defendant because of his age. Pardini also contends that defendant fired him in reckless disregard of his rights under the Age Discrimination in Employment Act, 42 U.S.C. § 621 et seq., and the Pennsylvania Human Relations Act, 42 Pa. C.S.A. § 951 et seq.

II. DISCUSSION

Under Rule 56(c), summary "judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986). All of the facts must be viewed in the light most favorable to the non-moving party and all reasonable inferences must be drawn in favor of the non-moving party. The facts material to this motion are not in dispute; however, defendant is not entitled to judgment as a matter of law.

The Age Discrimination in Employment Act states, in pertinent part,

If a charge filed with the Commission [the EEOC] under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

29 U.S.C. § 626(e). The ninety day period acts as a statute of limitations in which to bring the complaint in federal court. See Sperling v. Hoffmann-La Roche, Inc., 24 F.3d 463, 464 n.1 (3d Cir. 1994). The ninety day period begins to run when the EEOC notifies the charging party of his right to sue. Said notice is authorized only after the Commission has in fact dismissed the complainant's charges or in fact terminated its proceedings. 29 U.S.C. § 626(e). Although the EEOC sent Pardini the September 28, 1995 "right-to-sue letter," it did not dismiss his charge nor did it terminate its investigation into his charge. Defendant has not cited any authority which holds that the ninety day

period begins to run when the EEOC, as the result of a clerical error, unintentionally issues a "right-to-sue letter" to the charging party. Only after the EEOC completed its investigation and issued the December 16, 1996 right-to-sue letter did the ninety day period start to run.

Accordingly, Pardini's complaint is not time barred because no legal consequence attached to the September 28, 1995 letter.

Moreover, even if I assume, as defendant argues, that the ninety day period began to run upon Pardini's receipt of the unintended September 28, 1995 "right-to-sue letter," the manner in which the EEOC handled Pardini's charge effectively tolled the ninety day period. The ninety day

period "is subject to waiver, estoppel and equitable tolling." Schafer v. Board of Public Education, 903 F.2d 243, 251 (3d Cir. 1990)(quoting Zipes v. Trans World Airlines Inc., 455 U.S. 385, 393, 102 S. Ct. 1127, 1132 (1982)). The Third Circuit has stated that the ninety day period in which a complaint is to be filed may be 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." Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d

1380, 1387 (3d Cir. 1994). However, this list is not all inclusive. The EEOC's failure to abide by its procedures is sufficient reason to equitably toll the ninety day period; particularly, where as here, plaintiff continued to assert his rights before the EEOC. See Anderson v. Unisys Corp., 47 F.3d 302, 306-7 (8th Cir. 1995), cert. denied, 116 S. Ct. 299 (1995).³ Accordingly, defendant's motion for summary judgment of Count III will be denied. Additionally, this Court will continue to exercise supplemental jurisdiction over

³ Defendant argues that the EEOC is without authority to reconsider on its own motion. However, defendant does not address the EEOC's power to correct a "right-to-sue letter" which was issued through clerical error. Neither statutory nor regulatory language prevents the EEOC's from correcting a clerical error.

Pardini's Pennsylvania Human Relations Act claim. 28 U.S.C. § 1367(a). Defendant's motion to dismiss Count IV will also be denied

An appropriate order follows.

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HALE PRODUCTS, INC.,	:	
Defendant.	:	

ORDER

AND NOW, this 3rd day of September, 1997, upon consideration of defendant's motions and plaintiff Pardini's response thereto, IT IS HEREBY ORDERED that defendant's Motion for Summary Judgment of Count III of plaintiff complaint and Motion to Dismiss Count IV of plaintiff's complaint are DENIED.

BY THE COURT:

S.J.

CLIFFORD SCOTT GREEN,