

I. Factual Background

Plaintiff James C. Gessner is a learning disabled and mentally retarded employee of the Postal Service. His verbal measure of functioning, as measured by the Slosson Intelligence Test, allegedly is in the six to eight year old range. Complaint ¶ 2 (filed document #1). Plaintiff was hired in May of 1996 as a part-time flexible mail handler at the Chester Post Office by the Postal Service pursuant to a program proposed by President Kennedy which was intended to select and train mentally retarded adults for appropriate employment with the Postal Service. Complaint ¶¶ 6,7. He alleges in his complaint that in May of 1974 he became eligible for full-time status as a mail handler, but was denied the promotion despite his allegedly performing his work capably and to the satisfaction of the Postal Service.¹ Plaintiff, however, did not complain at that time to anyone at his workplace or at the EEOC about his not being promoted.

On November 28, 1992, Plaintiff was converted to full-time status pursuant to a national labor settlement agreement between

¹Despite identical duties, the increased benefits available to full-time mail handlers were significantly higher than those of a part-time employee. Part-time flexible employees did not receive paid holidays, were not guaranteed 40-hour work weeks, and received less annual and sick leave due to the fewer hours worked. See Plaintiff's Memorandum of Points and Authorities in opposition to Defendant's Motion for Summary Judgment, Exhibit C, p. 10. On the other hand, part-time flexible employees earned a higher rate of pay than did full-time employees. Therefore, as a part-time flexible worker, Plaintiff probably earned a higher hourly wage than he would have as a full-time employee. See Defendant's Motion for Summary Judgment, Exhibit 2, Final Agency Decision, p. 3, n. 7.

the Postal Service and the National Postal Mail Handlers Union, yet the settlement agreement did not award Plaintiff any back pay for the period dating back to his original date of eligibility for full-time status, nor did the settlement agreement address any of Plaintiff's allegedly unpaid pension benefits. Complaint ¶ 20.

Plaintiff claims that during the period from May 1974 to November 28, 1992, he "did not know, nor did the Postal Service advise him, that he could seek EEO counseling to address his dissatisfaction with the Postal Service's decision not to promote him." Plaintiff's Memorandum of Points and Authority in Opposition to Defendant's Motion for Summary Judgment (filed document #15), p. 2; see also Complaint ¶ 19. He alleges that he did not become aware that EEO counseling was available to him until June, 1993 when he sought and received the assistance of an attorney for the Association for Retarded Citizens ("ARC"). Complaint ¶ 23. Immediately thereafter, on June 14, 1993, Plaintiff contacted an EEO counselor on June 14, 1993 and requested the requisite counseling. Complaint ¶ 24.

It is undisputed that the Postal Service had prominently posted at Plaintiff's work facility the required EEO posters which publicized the regulatory time requirements. Plaintiff claims, however, that the sole reason that he did not contact an EEO counselor prior to June of 1993 was because he was limited in his ability to comprehend and interpret the regulatory requirement for contacting an EEO counselor within 30 days as set

forth in the EEO poster. Plaintiff does not dispute that he was fairly independent, nor does he argue that his disability prevented him from carrying on many day-to-day activities by himself. Defendant's Final Agency Decision indicated that Plaintiff signed all employment-related forms, and that he always seemed aware of what he was signing. See Defendant's Motion for Summary Judgment, Exhibit 2 (filed document #11). From 1984 until 1990, Plaintiff lived alone and cared for himself. Id. While living alone, he cooked for himself and took public transportation back and forth to work. Id. Despite his ability to carry on day-to-day affairs, Plaintiff claims that he mentally was not able to comprehend the complex EEO filing process.

On December 11, 1993, Plaintiff filed a formal complaint of discrimination pursuant to 29 C.F.R. § 1614.106, and an investigation ensued. DePietropolo Declaration at ¶ 3(b), Defendant's Motion for Summary Judgment, Exhibit B (filed document #11). His formal complaint was dismissed, however, on March 26, 1994 by the Postal Service due to Plaintiff's failure to contact an EEO counselor within 30 days of his awareness of the allegedly discriminatory denial of the promotion to full-time status. Defendant claims that Plaintiff had 30 days from the date he became aware that he had suffered discrimination within which to contact an EEO counselor, and argues that Plaintiff's claim was more than 19 years old when it was brought to the attention of an EEO counselor. Defendant's Motion for Summary Judgment, p. 10.

Plaintiff appealed this decision to the Office of Federal Operations ("OFO") of the Equal Employment Opportunity Commission ("EEOC"). The OFO noted that the record was lacking any evidence on whether Plaintiff had the ability to take constructive notice of the poster which set forth the timeliness requirements for seeking EEO counseling. The EEOC, thereby, vacated the dismissal and remanded the matter, ordering the Postal Service to conduct a supplemental investigation with regard to this issue.

DePietropolo Dec. At ¶ 2(a); see also Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment, Exhibit C, p. 6 (filed document #15).

The Postal Service initially failed to conduct this supplemental investigation, but Plaintiff's complaint was finally received for processing and investigation, Complaint ¶ 29, and Plaintiff was given an opportunity for a hearing before an EEOC Administrative Judge. On June 13, 1996, Administrative Judge Julie Procopiow Todd found that Plaintiff had produced direct evidence that the Postal Service had discriminated against him because of his mental disability, and she recommended that Plaintiff be provided back pay, if any, plus interest and all other benefits for the period of May, 1974 to November 1992, and that this amount be determined within 60 days of her recommendation. She further recommended that Plaintiff be compensated for attorneys fees and costs of prosecuting his case. See Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment, Exhibit C,

Hearing Transcript, p. 22 (filed document #15).

Defendant claims that the Postal Service denied Plaintiff's promotion because of a request from Plaintiff's mother, dated May 22, 1974, that Plaintiff be kept on as a part-time mail handler. Complaint ¶ 12. Plaintiff's mother, however, was not Plaintiff's legal guardian, Complaint ¶ 13, and Judge Todd found that the reasons offered by the Postal Service for its failure to promote Plaintiff were merely a "pretext for discrimination due to his mental disability, to further the Postal Service's own convenience and to benefit its internal operations and other employees." Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment, Exhibit C (filed document #15).

On August 15, 1996 the Postal Service issued a Final Agency Decision rejecting Judge Todd's recommended finding of discrimination on a number of grounds including Plaintiff's failure to contact an EEO counselor in a timely manner. See Defendant's Motion for Summary Judgment, Exhibit 2 (filed document # 11). On November 7, 1996, Plaintiff filed the instant action pursuant to Section 501 of the Rehabilitation Act, 29 U.S.C. § 791, claiming that Defendant failed to promote him from part-time flexible status to full-time status solely because of his mental disability. Complaint ¶¶ 4, 15.

II. Discussion

A. Legal Standard

The Federal Rules of Civil Procedure provide that summary

judgment is appropriate "if the pleading, 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 judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. V. Catrett, 477 U.S. 317, 322 (1986); Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). A "genuine" issue of material fact exists where a reasonable jury could return a verdict in favor of the nonmoving party. See Anderson, 477 U.S. at 248. A court must consider the evidence, and all inferences drawn therefrom, in the light most favorable to the nonmoving party. Tigg Corp. V. Dow Corning Corp., 822 F.2d 358, 361 (3d Cir. 1987).

B. Analysis

1. There is No Genuine Issue As To Any Material Fact

Defendant correctly asserts that there is no genuine issue of material fact as to Plaintiff's failure to initiate his administrative complaint of discrimination in a timely manner. Because Defendant gave Plaintiff adequate constructive notice of the EEOC's regulatory time periods, that Plaintiff may not have actually known of these time periods does not give rise to a genuine issue of material fact.

Section 505(a)(1) of the Rehabilitation Act, 29 U.S.C. § 794a(a)(1) provides that the "remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-16) ... shall be available, with respect to any

complaint under Section 791 of this title to an employee or applicant..." The Third Circuit, in Spence v. Straw, held that "a party is barred from suing a federal agency for violation of Section 501 [of the Rehabilitation Act] if he or she has failed to exhaust administrative remedies under Title VII." 54 F.3d 196, 200 (1995).

Prior to October 1, 1992, these remedies were described at 29 C.F.R. § 1613. On October 1, 1992, 29 C.F.R. § 1613 was superseded by 29 C.F.R. § 1614. 57 Fed. Reg. 12634 (April 10, 1992). When Plaintiff's claim arose, the regulations required an aggrieved employee to bring "to the attention of the Equal Employment counselor[,] the matter causing him/her to believe he/she had been discriminated against within 30 calendar days of the date of the alleged discriminatory event, the effective date of an alleged personnel action, or the date that the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action ..." 29 C.F.R. § 1613.214(a)(1)(i). New regulations have extended this time period to 45 days. 29 C.F.R. § 1614.105(a)(1). Among other things, the EEO counselor then must inform the aggrieved party of the party's right to request a hearing and of the right to file suit. 29 C.F.R. § 1614.105(b). Both the old and new regulations require a complainant to file a formal complaint of discrimination within 15 days of this notice of the right to file suit. 29 C.F.R. § 1613.214(a)(1)(ii); 29 C.F.R. § 1614.106(b). In order for a complainant to exhaust his administrative remedies he must both

consult an agency counselor and file a formal complaint, both within the required time periods. See Robinson v. Dalton, 107 F.3d 1018, 1021 (3d Cir. 1997).

Plaintiff does not dispute these deadlines nor the fact that he did not contact an EEO counselor within 30 days of the allegedly discriminatory event. Plaintiff argues, however, that there is a genuine factual dispute over whether he actually was aware of the EEO time periods and whether the Postal Service actually gave him notice of the regulatory requirements of filing a discrimination complaint. Plaintiff contends that the alleged genuine dispute over this fact precludes entry of summary judgment. Ettinger v. Johnson, 556 F.2d 692 (3d Cir. 1977); see also Bayer v. U.S. Dept. Of Treasury, 956 F.2d 330, 333 (D.C. Cir. 1992)(the issue of plaintiff's awareness presents a credibility question not susceptible to summary adjudication).

Plaintiff contends that he did not have knowledge of the existence of EEO counseling within the Postal Service until June, 1993, when he was so advised by an attorney for the Association of Retarded Citizens ("ARC"). He further claims that within 30 days thereafter, he requested EEO counseling. Consequently, Plaintiff argues that this time limit should be equitably tolled because his mental disability precluded him from comprehending and interpreting the regulatory deadlines. He points to additional language in the regulation which states that an agency shall equitably toll these arbitrary time limits

when the complainant shows that he/she was not notified of

the time limits and was not otherwise aware of them, was prevented by circumstances beyond the complainant's control from submitting the matter within the time limits; or for other reasons considered sufficient by the agency. 29 C.F.R. § 1613.214(a)(4); see also Mackay v. U.S. Postal Service, 607 F. Supp. 271, 276 (E.D. Pa. 1985).

Plaintiff's mere statement that he had no actual knowledge of the time limits, however, does not give rise to any genuine issue of fact on the issue of notice where the plaintiff does not dispute that the Postal Service posted adequate notice of his EEO rights. See Posey v. Skyline Corp., 702 F.2d 102, 106 (7th Cir. 1983), cert. denied, 464 U.S. 960 (1983); Poff v. General Electric Co., 1990 WL 18911 (E.D. Pa.) (court found a genuine issue of material fact where there was a dispute as to whether a notice was posted at all, and gave plaintiff the benefit of an inference that the notice had not been posted when plaintiff alleged that he had not seen one).

While there may be some dispute as to whether Plaintiff actually knew of the deadlines, as a matter of law the regulation does not require that Plaintiff have actual knowledge of the EEO complaint process, nor of its regulatory deadlines. Neither does the regulation require an employer to actually explain the entire process to an employee. The regulation merely requires constructive notice "reasonably geared to inform the complainant of the time limits before the complainant is estopped from asserting ignorance as an excuse for late filing." Myles v. Schlesinger, 436 F. Supp. 8, 17 (E.D. Pa. 1977). The regulation specifically requires an employer to

publicize to all employees and post at all times the names, business telephone numbers and business addresses of the EEO counselors ... a notice of the time limits and necessity of contacting a counselor before filing a complaint and the telephone numbers and addresses of the EEO Director, EEO Officer(s) and Special Emphasis Program Managers. 29 C.F.R. Part 1614.102(b)(6).

Other than this form of constructive notice, the regulation does not impose any additional notification obligations on an employer employing an individual with a known learning disability or who is mentally retarded. See Everage v. Runyon, 998 F.2d 1016 (3d Cir. 1993)(where court concluded that plaintiff's relatively poor reading abilities and his professed ignorance of relevant administrative time limits did not justify tolling the time limit because plaintiff was given constructive notice of the applicable time limits by way of posted notices on bulletin boards at his workplace); Trynor v. Dalton, 1994 WL 44317 (D. Me.)(where court refused to permit equitable tolling when woman claimed that she was ignorant of the appropriate statute of limitation because of her low I.Q.); Barrow v. New Orleans, 932 F.2d 473, 478 (5th Cir. 1991)(ignorance of legal rights and illiteracy are not grounds for equitable tolling); Larson v. American Wheel and Brake, Inc., 610 F.2d 506, 510 (8th Cir. 1979)(ignorance of legal rights does not toll a statute of limitations; it is irrelevant whether ignorance is due to illiteracy or another reason).

Neither party disputes that Defendant properly displayed the required EEO posters in Plaintiff's work facility, at the Chester Post Office, during the time he claims he was aggrieved. In an

affidavit, the supervisor at Plaintiff's work facility swore that "as far back as ten (10) years an EEO poster has been posted, visible, clear, not obstructed in any way and accessible for all employees to view and read anytime." See Decision of EEOC, Defendant's Motion for Summary Judgment, Exhibit B, p. 2 (filed document #11). He further attests that the posters contained the time limits for contacting an EEO counselor. Id. This being so, I find that Defendant gave Plaintiff constructive notice of the EEO's deadline for an aggrieved employee to contact an EEO counselor. Defendant was under no additional obligation to make Plaintiff aware of the process even though Defendant was well aware of Plaintiff's learning and mental disabilities. Consequently, there is no genuine issue of material fact warranting denial of Defendant's Motion for Summary Judgment.

2. Award of Back Pay

Because I do not find any genuine issue as to any material fact upon which to substantiate a denial of Defendant's Motion for Summary Judgment, I need not address the issue of the amount of back pay to which Plaintiff would be entitled other than to say that Title VII and consequently the Rehabilitation Act generally entitle an aggrieved party to two years of back pay. 42 U.S.C. § 2000e-5(g), 29 C.F.R. § 1614.501(c)(1). Back pay may not extend from a date earlier than two years prior to the date on which the formal complaint of discrimination was filed. 29 C.F.R. § 1614.501(c)(1). A court, however, has equitable powers to reformulate the period for which back pay may be awarded.

Franklin v. Gwinnett County Public School, 503 U.S. 60, 66, 112 S. Ct. 1028, 1033, 117 L. Ed. 2d 208 (1992), citing, Bell v. Hood, 327 U.S. 678, 684, 66 S. Ct. 773, 777, 90 L. Ed. 939 (1946)("where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong.")

The Third Circuit said, in Squires v. Bonser, that in the context of discrimination actions arising under Title VII, it is well established that the district court's consideration of equitable remedies is to be guided by the statute's central goals of making the aggrieved party whole and of deterrence. 54 F.3d 168, 171 (1995). Because Defendant meets the regulatory notice requirements, I need not analyze the issue of back pay as it pertains to this case.

III. Conclusion

Because Defendant has fulfilled his notice obligations under the Rehabilitation Act by posting the requisite posters in Plaintiff's work area, and there being no additional obligations imposed upon Defendant to notify Plaintiff of the EEO complaint procedures, I find that there are no genuine issues of material fact to defeat Defendant's summary judgment motion. Consequently, Defendant's Motion for Summary Judgment will be granted.

An appropriate Order follows.

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

JAMES C. GESSNER, : CIVIL ACTION
 Plaintiff :
 :
 v. :
 :
MARVIN RUNYON, :
 Defendant. : No. 96-7521

ORDER

For the reasons set forth in the accompanying Memorandum, it is **ORDERED** that Defendant's Motion for Summary Judgment is hereby **GRANTED**. Judgment is entered in favor of Defendant Marvin Runyon and against Plaintiff James C. Gessner on Plaintiff's complaint.

BY THE COURT,

Donald W. VanArtsdalen, S.J.

October 22, 1997