

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

JOSEPH R. WEBER	:	
Plaintiff	:	
	:	CIVIL ACTION
v.	:	
	:	
WILLIAM J. HENDERSON,	:	NO. 98-CV-2574
et al.,	:	
Defendants.	:	

**EXPLANATION and ORDER**

Before me is Defendants’ Motion for Summary Judgment.

Plaintiff Joseph Weber, an employee of the United States Postal Service (“USPS”), has brought this pro se action against William J. Henderson, Postmaster General of the United States, and Alexis M. Herman, Secretary of Labor, U.S. Department of Labor (“DOL”). Weber alleges that defendants discriminated against him in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 791,<sup>1</sup> by failing to return him to work in a limited duty position after he was disabled by a work-related injury. Weber alleges that defendants further violated the Rehabilitation Act by retaliating against him for filing Equal Employment Opportunity (“EEO”) and Equal Employment Opportunity Commission (“EEOC”) complaints. Additionally, plaintiff asserts that

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<sup>1</sup>The Rehabilitation Act is the exclusive means by which a federal employee may raise a claim for disability discrimination. See Spence v. Straw, 54 F.3d 196 (3d Cir. 1995).

defendants have violated “Merit Systems Principles,” 5 U.S.C. §§ 2301-2302, and the Administrative Procedures Act (“APA”), 5 U.S.C. §§ 701-706. For reasons explained below, I will grant defendants’ motion for summary judgment as to all of Weber’s claims.

Weber is no stranger to this court. Since December of 1997, he has brought six civil actions before me.<sup>2</sup> In those six cases, Weber has sought judicial relief for alleged mistreatment at the hands of the DOL and the USPS under a variety of legal theories. A review of the docket reveals that, from 1994 to 1997, Weber brought five other civil actions in the Eastern District of Pennsylvania. None of those five cases progressed beyond the pleadings stage.<sup>3</sup>

## **FACT CHRONOLOGY**

**February 11, 1994:** Weber injures his right shoulder, both feet, and right achilles tendon while working as a letter carrier for the USPS. Weber files a compensation claim with the Office of Workers’ Compensation Programs (“OWCP”) of the DOL.

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<sup>2</sup>In addition to the case now before me, Weber has filed: Weber v. Herman, case no. 97-cv-7880 (settled 11/2/98; Weber petitioned for enforcement order 7/17/00); Weber v. Henderson, 98-cv-6197 (Privacy Act claims; granted summary judgment for defendants 12/12/00); Weber v. Henderson, 99-cv-2763 (Rehabilitation Act claims; disposition pending); Weber v. Henderson, 00-cv-4029 (Rehabilitation Act claims; pending); Weber v. Henderson, 01-cv-40 (restating prior claims; pending).

<sup>3</sup>Weber v. National Association of Letter Carriers, case no. 94-cv-1204 (Judge Dalzell; stipulation of dismissal by plaintiff Weber 7/20/94); Weber v. National Association of Letter Carriers, 94-cv-7794 (Judge O’Neill; stipulation of dismissal by plaintiff Weber 9/18/95); Weber v. United States, 95-cv-577 (Judge Bechtle, stipulation of dismissal by plaintiff Weber 11/28/95); Weber v. Keystone Branch No. 157, 96-cv-3097 (Judge Reed, action dismissed with prejudice 12/22/97); Weber v. Runyon, 97-cv-4301 (Judge Dalzell, action dismissed with prejudice, 1/15/98).

- Feb. 11 - Aug. 1, 94:** Weber works in a limited duty position at the Roxborough Station.
- August 2, 1994:** Weber has surgery on his right shoulder. He begins receiving workers' compensation benefits under the Federal Employees Compensation Act ("FECA") for his shoulder injury.
- November 1994:** A USPS supervisor proposes a limited duty position for Weber. Weber does not receive any notice of the position at this time.
- July 1995:** In the course of conducting discovery for another civil action, Weber learns of the limited duty position proposed for him in November of 1994.
- September, 1995:** Weber undergoes a second surgery on his right shoulder.
- January 5, 1996:** Weber's surgeon, Dr. Williams, clears Weber to return to limited duty work. This is the first time that Weber has been cleared to work since his first shoulder surgery in August of 1994.
- January 10, 1996:** Weber sends copies of Dr. Williams' report to both the USPS and the OWCP. He asks to be returned to a limited duty position.
- Jan. - Oct. 1996:** Weber sends numerous letters to the OWCP, the Injury Compensation Unit of the USPS, the Roxborough Station manager, the Postmaster General, and the Secretary of Labor seeking action on his request for a limited duty position. His letters make reference to tort claims pending against the DOL and the USPS.
- February 10, 1998:** Weber contacts an EEO counselor, alleging that discrimination on the basis of physical disability and retaliation for filing an earlier EEO complaint explain the failure of the USPS to return him to work.

- March 19, 1998:** Weber files a formal EEO complaint against the USPS for discrimination on the basis of disability and retaliation.
- April 23, 1998:** The USPS offers Weber a rehabilitation job at the Roxborough Station.
- May 9, 1998:** Weber returns to work in the rehabilitation job at the Roxborough Station.
- February 18, 1999:** The EEOC affirms the decision of the USPS to dismiss Weber's discrimination and retaliation claims.
- May 19, 1999:** Weber files the instant civil action, no. 99-2574, following the EEOC's final decision to dismiss his discrimination and retaliation claims.

## **DISCUSSION**

### **1. Summary Judgment Standard**

Summary judgment shall be granted 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). The role of the trial court is to determine whether there are material factual issues that merit a trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). If the record “could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

At summary judgment, the court must give the nonmoving party the benefit of all reasonable inferences that can be drawn from the underlying facts. See Matsushita, 475 U.S. at 587; Sempier v. Johnson and Higgins, 45 F.3d 724, 727 (3d Cir. 1995)(en banc). The

nonmoving party, however, must “do more than simply show that there is some metaphysical doubt as to the material facts.” Matsushita, 475 U.S. at 586. A nonmoving party cannot rely upon conclusory allegations to establish a genuine issue of fact. See Pastore v. Bell Telephone Co. of Pennsylvania, 24 F.3d 508, 511 (3d Cir. 1994). Rule 56 states that the nonmoving party “must set forth specific facts showing that there is a genuine issue for trial.” Fed.R.Civ.P. 56(e). A court must grant summary judgment if the nonmoving party fails to make a factual showing “sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof a trial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

**2. Weber cannot state claims of discrimination or retaliation under the Rehabilitation Act, as he did not exhaust administrative remedies in a timely manner.**

“A plaintiff must exhaust all required administrative remedies before bringing a claim for judicial relief.” Robinson v. Dalton, 107 F.2d 1018, 1020 (3d Cir. 1997)(citing McCart v. United States, 395 U.S. 185, 193 (1969)). The Third Circuit has held that a plaintiff must exhaust Title VII remedies before bringing suit under the Rehabilitation Act. Spence v. Straw, 54 F.3d 196, 201 (3d Cir. 1996). A complaint submitted under the Rehabilitation Act or Title VII does not state a claim unless it asserts the satisfaction of the precondition to suit: prior submission of the claim to the EEOC for conciliation and resolution. See Robinson, 107 F.3d at 1022 (quoting Hornsby v. United States Postal Service, 787 F.2d 87, 90 (3d Cir. 1986)). Failure to timely exhaust administrative remedies is grounds for dismissal or summary judgment for failure to

state a claim. See Robinson, 107 F.2d at 1022; Volpini v. Resolution Trust Corp., 1997 WL 476347 (E.D.Pa. Aug. 19, 1997).

Under the applicable EEO regulations, an employee of a federal agency must bring his claim of discrimination to the attention of an EEO counselor “within 45 days of the date of the matter alleged to be discriminatory.” 29 C.F.R. § 1614.105(a)(1). The 45-day time limit for presenting a claim is not jurisdictional, but rather akin to a statute of limitations and thus subject to equitable modifications such as tolling. Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95-96 (1990). To determine if Weber exhausted required administrative remedies before filing this civil action, I must decide: a) whether the EEO complaint was filed in a timely manner, and b) if not, whether the equitable tolling doctrine may excuse Weber’s failure to comply with the time limit.

**A) Did Weber comply with the time limit imposed by the applicable regulations?**

Generally, a statute of limitations begins to run when plaintiff’s cause of action accrues: not when plaintiff understands that his injury constitutes a legal wrong, but when “he is aware, or should be aware, of the existence of and source of an injury.” Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1386 (3d Cir. 1994). Weber’s claim accrued when he knew that he was not being put back to work despite the fact that he could work. Dr. Williams cleared Weber for work in a limited duty position on January 5, 1996; Weber claims that defendants unjustly

denied him gainful employment from January 6, 1996 until his ultimate reinstatement.<sup>4</sup> Yet Weber did not contact an EEO counselor until February 10, 1998, more than two years after the allegedly discriminatory failure to return him to work.

That EEO contact would be timely only if Weber could show that his cause of action accrued no more than 45 days before February 10, 1998. He cannot make such a showing. The record demonstrates that Weber knew he was not being put back to work long before he contacted the EEO counselor. From January to October of 1996, Weber sent numerous letters to defendants seeking action on his request for a job assignment. He filed tort claims and grievances against defendants. In all of those communications and complaints, Weber asserted that defendants' failure to reinstate him violated his rights. As "a federal cause of action arises as soon as a potential claimant is aware, or should be aware, of the existence of and source of an injury," Oshiver, 38 F.3d at 1386, Weber's cause of action accrued in 1996, and his February 10, 1998 EEO contact was untimely.

**B) Can equitable tolling save Weber's untimely Rehabilitation Act claims?**

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<sup>4</sup>Weber has also alleged that defendants unlawfully failed to return him to work between December 3, 1994 and September 20, 1995. However, the record indicates that Weber and his doctors believed him to be totally disabled during that period. On July 12, 1995, Weber wrote to the OWCP: "Dr. Arena is still my physician, and has not upgraded my disability to partially disabled. According to Dr. Arena and Dr. Lazarus' reports, I'm still totally disabled. The only physician who informed the Office that I'm capable of limited duty that I know of is Dr. Didizian, and as far as I'm concerned I do not care what this physician's opinion is." Defendant's Statement of Undisputed Facts, Exhibit 3 at 3-4.

Weber, if totally disabled, could not have accepted any kind of job; therefore, defendants' alleged failure to offer him a limited duty position from December 3, 1994 to September 20, 1995 does not constitute an actionable injury.

Weber also contends that his untimely EEO contact should be excused by equitable tolling principles. The Third Circuit has explained that 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 timely asserted his or her rights mistakenly in the wrong forum.” Oshiver, 38 F.3d at 1387. The burden is on the plaintiff to demonstrate facts that support tolling the limitations period. See Byers v. Follmer Trucking Co., 763 F.2d 599, 600-01 (3d Cir. 1985). That burden is substantial: federal courts have typically extended equitable relief only sparingly, allowing it in situations where the claimant has filed a defective pleading during the statutory period, or where the filing deadline passes as a result of the adversary’s trickery. Irwin, 498 U.S. at 96 (collecting cases). “We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.” Id. (citing Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984)).

In denying defendants’ motion to dismiss this claim, I suggested that Weber could justify tolling by showing that because of defendants’ deception, he could not have discovered, by reasonable diligence, the essential factual information bearing on his claim. See Oshiver, 38 F.3d at 1390. Weber has not made such a showing. He does not claim that he discovered new information in February of 1998 that allowed him to state claims under the Rehabilitation Act. Rather, the Rehabilitation Act claims are based on facts that were known to Weber in 1996.

Weber has not provided any facts to support tolling the limitations period. Having failed to exhaust his administrative remedies, Weber cannot state claims under the Rehabilitation Act. Therefore, I will grant summary judgment for defendants as to those claims.

**3. Plaintiff cannot state a claim under the “Merit System Principles” in 5 U.S.C. §§ 2301-02**

Section 2301 is part of the Civil Service Reform Act (“CSRA”), a comprehensive effort to regulate employee-management relations in the federal government. The CSRA sets out an administrative claims procedure, but does not provide plaintiff with a private right of action. See Alasevich v. U.S. Air Force Reserve, 1997 WL 152816 \*6 (E.D.Pa. Mar. 26, 1997).<sup>5</sup> Weber has not shown that he is entitled to remedies under the CSRA; nor has he shown that he exhausted the administrative remedies provided in the CSRA. Accordingly, I will grant defendants’ motion for summary judgment on these claims.

**4. Defendants are entitled to summary judgment with respect to plaintiff’s claims under the APA**

Nor can plaintiff state a claim under the APA. Weber has an adequate remedy for his discrimination and retaliation claims under the Rehabilitation Act, which allows his to seek de novo review of the EEOC decision in federal court. See Adams v. United States Equal Employment Opportunity Commission, 932 F.Supp. 660, 664-65 (E.D.Pa. 1996).

Nor can Weber secure judicial review of his workers’ compensation claims under the APA. FECA contains a broad preclusion-of-review provision which bars judicial review of matters arising within its scope. See 5 U.S.C. § 8128(b). The Supreme Court has found that

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<sup>5</sup>The CSRA provides a claims procedure for government employees; through the Merit Systems Protection Board and the Office of Special Counsel, the CSRA seeks to ensure the protection of whistleblowers against retaliation. A government employee could only seek judicial relief after a final order of the Board. Alasevich, 1997 WL 152816 \*6.

when Congress uses preclusive language of the type used in FECA, it “intends to bar judicial review altogether.” Lindahl v. Office of Personnel Management, 470 U.S. 81, 90. This court does not have jurisdiction to review Weber’s workers’ compensation claim under the APA. Therefore, I will grant defendants’ motion for summary judgment on this claim as well.

**5. Claims not alleged in Weber’s complaint must be dismissed**

Weber also seeks relief under the Privacy Act, 5 U.S.C. § 552a, and under various criminal statutes, 18 U.S.C. §§ 241, 287 and 1001. Weber did not comply with Rule 15 of the Federal Rules of Civil Procedure to properly amend his complaint to include these claims. Therefore, I will dismiss these claims without discussing of their merits.

For those reasons, I grant Defendants’ Motion for Summary Judgment. An appropriate order follows.

**AND NOW**, this      day of January, 2001, having considered Defendants' Motion for Summary Judgment, Plaintiff's "Motion in Opposition to Defendants' Motion for Summary Judgment," and Defendants' Reply Brief, it is **ORDERED** that:

- 1) Defendants' Motion for Summary Judgment (docket entry no. 21) is **GRANTED**;
- 2) Plaintiff's "Motion in Opposition to Defendants' Motion for Summary Judgment" (docket entry no. 23) is **DENIED**.

It is **FURTHER ORDERED** that the Clerk shall close this case statistically.

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ANITA B. BRODY, J.

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