

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

MICHELLE WHITE	:	
Plaintiff	:	CIVIL ACTION
	:	No. 02-2364
V.	:	
	:	
GALLAGHER BASSETT SERVICES	:	
Defendant	:	

MEMORANDUM

Rufe, J.

February 4, 2003

Presently before the Court is Defendant’s Partial Motion to Dismiss certain claims alleged in plaintiff Michelle White’s Complaint for employment discrimination. For the reasons set forth below, Defendant’s Motion is granted in part and denied in part.

I. BACKGROUND

The following facts are set forth in the light most favorable to plaintiff (hereinafter “Ms. White”). Ms. White was hired by defendant (hereinafter “Gallagher Bassett”) on October 26, 1996 as a Senior Claims Representative with an annual salary of \$38,000. During the October 3, 2000 review process, Ms. White, the only black Senior Claim Representative, received a 3.5% salary increase. On October 4, 2000, Ms. White sent her manager, Ms. Wallace, an e-mail stating that she felt that the review process, and her 3.5% pay increase, was neither fair nor reasonable in light of the fact that “other employees in the office received 4.5% and higher.” Ms. White did not receive a response to this e-mail. Thereafter, Ms. White sent Ms. Wallace a second e-mail on November 3, 2000 stating that she did not receive an acknowledgment to her

October 4, 2000 e-mail. In this second e-mail, Ms. White also informed Ms. Wallace that her salary increase, which was to be effective on July 1, 2000 had not been implemented. Ms. White eventually received the increase in November 2000.

On December 21, 2000, Joe Coughlin, Assistant Vice President, sent an e-mail posting an opening for the position of Claims Supervisor. Ms. White responded by e-mail to Mr. Coughlin on December 27, 2000 explaining that she was interested in the posted position. On January 14, 2001, Ms. White interviewed with Mr. Coughlin for the Claims Supervisor position. However, Mr. Coughlin never contacted Ms. White with his decision regarding whether she would receive the position. Subsequent to Ms. White's interview, Ms. Wallace informed Ms. White that the Claims Supervisor position required three years of supervisory experience. At this time, Ms. White told Ms. Wallace that it was unfair to require her to have three years experience when Gallagher Bassett had previously hired at least three white supervisors without the three year requirement. Ms. White claims that Ms. Wallace acknowledged this fact and stated that she was only following Mr. Coughlin's instructions.

Ms. White re-applied for the still open position of Claims Supervisor on March 1, 2001. This time Ms. White applied in writing and specifically stated why she was qualified for the job. On March 9, 2001, Mr. Coughlin, in passing, mentioned to Ms. White that she was not selected for the supervisor position. Gallagher Bassett had selected Ms. McGinn, a white female, for the Claims Supervisor position in March 2001. During the same month that she received the Claims Supervisor position, Ms. McGinn was promoted to Branch Manager. On or about March 17, 2001, Ms. White spoke to Ms. McGinn about being considered for the supervisor position that Ms. McGinn had just vacated upon her promotion to Branch Manager. Ms. McGinn stated

that Mr. Coughlin was adhering to the three year supervising experience requirement and that two individuals had been selected from another office. Ms. White later learned that Alicia Lammatoes, a white female, was selected for the position.

Ms. White continued to work as a claims representative and on July 16, 2001, Ms. McGinn recommended a 7% salary increase for Ms. White. However, Mr. Coughlin rejected the 7% increase and instructed Ms. McGinn to give Plaintiff a 5% increase instead. As a result of the lower increase, Ms. White remained the lowest paid Senior Claims Representative at Gallagher Bassett. Although not specifically pled in Ms. White's Complaint, Ms. White filed her EEOC charge of discrimination on or about September 10, 2001. See EEOC Charge attached to Gallagher Bassett's Motion to Dismiss. In addition, Ms. White resigned from Gallagher Bassett on August 17, 2001.

On April 22, 2002, Ms. White filed her five count Complaint against Gallagher Bassett for race discrimination in violation of §1981 (Count I); retaliation in violation of Section 1981 (Count II); race discrimination in violation of Title VII (Count III); retaliation in violation of Title VII (Count IV); and race discrimination and retaliation in violation of the PHRA (Count V). Gallagher Bassett now moves this Court to dismiss, as untimely, Ms. White's Title VII claim based upon her lower pay raise in October 2000, and her PHRA claims premised upon the October 2000 pay raise and the March 9, 2001 denial of her promotion. Gallagher Bassett also moves this Court to dismiss Ms. White's retaliation claims in their entirety, contending that Ms. White has failed to exhaust her administrative remedies and has not alleged sufficient facts in order to state a prima facie case of retaliation.

II. STANDARD OF REVIEW

A motion to dismiss will be granted if plaintiff has failed “to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). In deciding a motion to dismiss, this Court must accept all well pleaded facts as true and view them in the light most favorable to plaintiff. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). Under the federal notice pleading requirement, plaintiff is only required to provide “a short and plain statement of the claim showing that [she] is entitled to relief.” Fed. R. Civ. P. 8(a).

III. DISCUSSION

A. Title VII

Under Title VII of the Civil Rights Act of 1964 it is “an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1). The critical issue in this case is whether the totality of the discriminatory acts, as alleged by Ms. White, are timely under Title VII.

In order for an act to be timely under Title VII, a plaintiff must bring suit within 180 days of the alleged discriminatory act. Fala v. Perrier Group of Am., No. Civ.A.99-3319, 2000 WL 688175, at *8 (E.D. Pa. May 25, 2000)(relying on 42 U.S.C. § 2000e-5(e)). However, when the plaintiff “files a complaint with a state or local agency authorized to adjudicate the claim, the plaintiff is allotted 300 days from the date of the alleged discrimination to file a charge of employment discrimination.” Id. In the instant matter, Ms. White filed her charge with the EEOC on September 10, 2001. Gallagher Bassett contends that Ms. White’s Title VII claims are limited to conduct that occurred during the 300 days preceding Ms. White’s EEOC charge.

Hence, conduct occurring on or after November 14, 2000 is timely and any alleged discriminatory act occurring before this date is time barred. Ms. White argues that Gallagher Bassett's conduct represents a continuous pattern of discrimination and as such falls within the continuing violation exception.

The United States Court of Appeals for the Third Circuit has held that in order to establish the continuing violation exception, a plaintiff must show "more than the occurrence of isolated acts of intentional discrimination." Jewett v. Int'l Tel. & Tel. Corp., 653 F.2d 89, 91 (3d Cir. 1981). Hence, "the relevant distinction is between the occurrence of isolated intermittent acts of discrimination and a persistent ongoing pattern." Fala, 2000 WL 688175, at *10. The following factors are considered in determining whether a persistent ongoing pattern of discrimination, and therefore a continuing violation, exists: "(1) subject matter or whether the violations constitute the same type of discrimination; (2) frequency; and (3) permanence, or whether the nature of the violations should trigger the employee's awareness of the need to assert her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate." Id.

In a recent analysis of the continuing violation theory, the Supreme Court of the United States held that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging the act." Nat'l R.R. Passenger Corp. v. Morgan, 122 S. Ct. 2061, 2072 (2002).¹ In this vein, the Supreme Court stated, "[d]iscrete acts such as termination,

¹ In addition to a continuing violations theory, equitable doctrines such as tolling or estoppel remain as mechanisms to stop the time period from running. Morgan 122 S. Ct. at 2072. "[T]he time limitations set forth in Title VII are not jurisdictional . . . and are, therefore,

failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each adverse employment decision constitutes a separate actionable unlawful employment practice.” Id. (internal quotes omitted).

Clearly, the third factor outlined in Fala, whether the employee was aware of the need to assert her rights, and the Supreme Court’s holding that discrete discriminatory acts are not actionable if time barred, are meant to effectuate the “prompt processing of all charges of employment discrimination.” Morgan 122 S. Ct. at 2070. Unfortunately for Ms. White, she has not been prompt in her charge of discrimination with regard to her discriminatory salary structure claim arising out of her October 2000 pay raise.

Ms. White attempts to bootstrap the October 2000 discriminatory pay raise with her timely charges of discrimination. Yet, Ms. White’s claim, that she received a lower salary increase from other similarly situated white employees on October 3, 2000, was an easily identifiable discrete act that started the clock for filing a charge of discrimination. Moreover, Ms. White was aware of the need to assert her right as evidenced by the fact that she sent her manager an e-mail explaining how she believed that the review process was not fair or reasonable in light of other employees’ salary increases. Although her complaint to the manager may qualify as a protected activity under Title VII with regard to a retaliation claim, Title VII

subject to equitable modifications such as tolling. Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1387 (3d Cir. 1994). Generally, the following three situations provide for appropriate tolling: “(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.” Id. In the instant matter, none of these situations are present. In fact, equitable tolling is not appropriate here, where plaintiff was not vigilant in her charge of discrimination against Gallagher Bassett.

required Ms. White to file her charge of discrimination for the lower pay raise within 300 days of the alleged violation. Ms. White simply did not file her charge of discrimination within the specified time frame set forth by Title VII. In addition, Ms. White's issue of her salary increase, or lack thereof, in October of 2000 is nothing more than a possible isolated act of discrimination, which required a prompt filing. Therefore, this Court will dismiss Ms. White's Title VII claim to the extent that she seeks to recover for the October 3, 2000 pay increase. Ms White's Title VII claims premised upon the March 2001 denial of her promotion and her July 16, 2001 salary increase remain.

B. PHRA

Gallagher Bassett also moves to dismiss Ms. White's PHRA claims premised upon the October 2000 pay raise and March 2001 denial of a promotion. "The PHRA is analyzed in the same way as Title VII cases." Van Horn v. Elbeco Inc., No. Civ.A.94-2720, 1996 WL 385630, at *4 n.8. (E.D. Pa. July 10, 1996). Given that the PHRA was modeled after Title VII and is consistently enforced in the same manner, the analysis afforded to Title VII will apply for Ms. White's PHRA claims of discrimination based on race as well. The only difference in this Court's analysis is that "[u]nder the PHRA, a charge of discrimination must be filed within 180 days of the act of discrimination complained of." Fala, 2000 WL 688175, at *8.

Ms. White's PHRA claim is also premised upon conduct taking place beyond the PHRA's filing deadline. Ms. White was required to file her charge of discrimination within 180 days of any alleged discriminatory acts. Ms White filed her charge of discrimination on September 10, 2001; thus, the alleged discriminatory act had to occur on or after March 14, 2001. Ms. White has pled that she was discriminated against on October 3, 2000 with regard to her

salary and again on March 9, 2001 when she was denied a promotion. Both of these events occurred prior to March 14, 2001, the 180 day cut off date. Ms. White was aware of the need to assert her right as evidenced by the fact that she promptly informed her manager that she disagreed with her salary increase and the three year supervisory requirement for the supervisor's position was unfairly applied to her. These alleged acts of discrimination were discrete and easily identifiable. Therefore, the clock began to run on October 3, 2000, for the salary claim, and on March 9, 2001, for the denial of Ms. White's promotion.

Although equitable tolling is available to extend the 180-day filing period under the PHRA, "restrictions on equitable tolling . . . must be scrupulously observed." Shaver v. Corry Heibert Corp., 936 F. Supp 313, 317 (W.D. Pa. 1996) (quoting Sch. Dist. of Allentown v. Marshall, 657 F.2d 16, 19 (3d Cir. 1981) (internal quotes omitted). "In the absence of a recognized equitable consideration, the court cannot extend the limitations period by even one day." McCain v. Independence Chrysler-Plymouth Inc., No Civ.A.02-863, 2002 WL 1835650, at *2 (E.D. Pa. 2002) (quoting Mosel v. Hills Dep't Store, Inc., 789 F.2d 251, 253 (3d Cir 1986). Moreover, "[c]ourts generally disfavor equitable tolling where the plaintiff missed the deadline because of a lack of due diligence." Brennan v. Nat'l Tel. Dir. Corp. 850 F. Supp 331, 341 (E.D. Pa. 1994). Here, it is true that Ms. White missed the 180 day PHRA filing period by only 4 days. However, she fails to show that she exercised reasonable diligence in pursuing her claim. Thus, her charge of discrimination is not prompt and her PHRA claim is dismissed to the extent that it is premised upon her salary increase in October of 2000 and the denial of her promotion in March of 2001. Ms. White's discriminatory salary structure claim of July 16, 2001 remains.

B. RETALIATION

Ms. White seeks to recover for retaliation in violation of §1981, Title VII and the PHRA. Gallagher Bassett moves this Court to dismiss Ms. White's retaliation claims contending that Ms. White has failed to state a claim upon which relief can be granted. In addition, Gallagher Bassett argues that Ms. White has failed to exhaust administrative remedies as to her Title VII and PHRA claims. This Court disagrees with Gallagher Bassett on both fronts and denies its motion to dismiss Ms. White's retaliation claims.

Section 704(a), 42 U.S.C. § 2000e-3(a) of Title VII states:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

Hence, an employer is prohibited from taking retaliatory action against an employee when that employee complains of a practice that would violate Title VII. Similarly, it is unlawful under § 1981 and the PHRA for an employer to retaliate against an employee when that employee opposes a practice of discrimination based on race. See Cardenas v. Massey, 269 F.3d 251, 263 (3d Cir. 2001) (explaining the requirements that a plaintiff must satisfy in order to sufficiently allege a claim for retaliation under § 1981); Bailey v. Storlazzi, 729 A.2d 1206, 1214 (Pa. Super. Ct. 1999) (explaining retaliation under the PHRA, 43 P.S. § 955(d)).

In order to succeed on a retaliation claim, plaintiff must show that: "(1) the employee engaged in a protected employee activity; (2) the employer took an adverse

employment action after or contemporaneous with the employee's protected activity; and (3) a causal link exists between the employee's protected activity and the employer's adverse action." Abramson v. William Paterson College of N.J., 260 F.3d 265, 286 (3d Cir. 2001). Gallagher Bassett contends that Ms. White has failed to allege any protected activity sufficient to make out a prima facie case of retaliation. The Court disagrees.

With respect to whether Ms. White has engaged in a protected activity, the Third Circuit has explained that informal complaints to management may constitute "protected activity." Id. at 287-88. See also Barber v. CSX Distrib. Servs., 68 F.3d 694, 702 (3d Cir. 1995) (same). Ms. White has alleged in her complaint that she complained of her unfair treatment to management on at least two separate occasions. On October 4, 2000, Ms. White sent an e-mail to her manager stating that she felt her performance review was "not fair nor reasonable" given the salary increases of other employees. See Plaintiff's Complaint at ¶ 12. In addition, Ms. White told her manager that it was unfair to require that she have three years of supervisory experience when "at least three white supervisors" had been hired without meeting that specific qualification. See id. at ¶ 18. These informal complaints were clearly sufficient to put Gallagher Bassett on notice of the fact that Ms. White felt she was being discriminated against with regard to her race.

Furthermore, interpreting the facts in a light most favorable to plaintiff, Gallagher Bassett never explained to Ms. White why she received less of a pay increase than other similarly situated employees. Discrimination with regard to compensation is indeed an adverse employment action and Ms. White's remaining discrimination claim based on the July 16, 2001 salary increase did occur after Ms. White complained to her manager that she was being treated

unfairly. Even though Ms. White may not recover under Title VII for her discrimination based on the October 2000 salary increase, and is prevented from recovering for the October 2000 salary increase and March 2001 denial of her promotion under the PHRA, Ms. White's complaints to her manager regarding these matters may allow a reasonable jury to conclude that a sufficient causal nexus exists between some or all of these acts and to Ms. White's lower salary increase on July 16, 2001. See Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1085-86 (3d Cir. 1996) (explaining that the mere passage of time is not legally conclusive proof against retaliation). In the end, this Court finds that Ms. White has alleged sufficient facts in order to state a claim for retaliation under § 1981, Title VII and the PHRA.

With respect to Gallagher Bassett's claim that Ms. White has failed to exhaust her administrative remedies, this Court finds Gallagher Bassett's argument unpersuasive. The Third Circuit has held that "a district court may assume jurisdiction over additional charges if they are reasonably within the scope of the complaint's original charges and if a reasonable investigation by the EEOC would have encompassed the new claims." Howze v. Jones & Laughlin Steel Corp., 750 F.2d 1208, 1212 (3d Cir. 1984) (explaining that a retaliation charge is not beyond the scope of plaintiff's failure to promote discrimination claim); See also Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398-99 (3d Cir. 1976) (same). Although Ms. White may not have clarified her retaliation claim on her original discrimination filing, a proper EEOC investigation would indeed reveal that retaliation is within the scope of Ms. White's charge of discrimination based on Gallagher Bassett's improper salary structure and Ms. White's prior complaints to her manager. In the EEOC charge itself, Ms. White states that she sent her manager an e-mail in which she raised concerns that her performance review was neither fair nor reasonable. See

EEOC Charge of Discrimination Form at ¶ 1. Accordingly, Gallagher Bassett's Motion to Dismiss Ms. White's retaliation claims in their entirety is denied.

An appropriate Order follows.

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

MICHELLE WHITE	:	
Plaintiff	:	CIVIL ACTION
	:	No. 02-2364
V.	:	
	:	
GALLAGHER BASSETT SERVICES	:	
Defendant	:	

ORDER

AND NOW, this 4th day of February, 2003, upon consideration of Defendant Gallagher Bassett Services, Inc.'s Motion for Partial Dismissal [doc. no. 7], and Plaintiff Michelle White's response thereto [doc. no. 8], including the memoranda of law submitted by the parties, **IT IS HEREBY ORDERED AND DECREED** that the Motion is **GRANTED** in part and **DENIED** in part. It is further Ordered that:

1. Plaintiff's Title VII claim in Count III of her Complaint is **DISMISSED** with prejudice to the extent that it is premised upon acts that took place prior to November 14, 2000;
2. Plaintiff's PHRA claim in Count V is **DISMISSED** with prejudice to the

extent that it is premised upon acts that took place prior to March 14, 2001; and

3. Defendant's Motion is **DENIED** as to all other claims.

BY THE COURT:

CYNTHIA M. RUFÉ, J.