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

LOIS BUCKMAN,	)	
	)	Civil Action
Plaintiff	)	No. 04-CV-00489
	)	
vs.	)	
	)	
METROPOLITAN EDISON COMPANY; FIRSTENERGY CORPORATION; and GPU ENERGY,	)	
	)	
Defendants	)	

* * *

APPEARANCES:
DONALD P. RUSSO, ESQUIRE
On behalf of plaintiff,

JOSEPH D. SHELBY, ESQUIRE and
KENNETH D. KLEINMAN, ESQUIRE
On behalf of defendants

* * *

O P I N I O N

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on Defendants' Motion for Summary Judgment to Plaintiff's Complaint filed May 11, 2004.[1] For the reasons expressed below, we grant the motion, dismiss plaintiff's Complaint and enter judgment in favor of defendants and against plaintiff.

[1] On July 15, 2004, Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment was filed. On July 26, 2004, the Reply Memorandum in Support of Defendants' Motion for Summary Judgment and in Support of Motion to Strike was filed.

PROCEDURAL HISTORY

The within civil action was initiated on February 3, 2004, when defendants' filed a notice of removal from the Court of Common Pleas of Northampton County, Pennsylvania. See 28 U.S.C. §§ 1441, 1446. The removed Complaint was filed on December 8, 2003 after plaintiff initiated the state action by a Writ of Summons on May 29, 2003. In the Complaint, plaintiff asserts a claim under Title VII of the Civil Rights Act of 1964 as amended by the Civil Rights Act of 1991, 42 U.S.C. §§ 2000e to 2000e-17.

The action is before the court on federal question jurisdiction. See 28 U.S.C. § 1331. Venue is appropriate because this action is being removed from Northampton County and because defendant may be found in Berks County. See 28 U.S.C. §§ 118, 1391. Plaintiff has not demanded a trial by jury.

FACTS

Based upon the allegations in plaintiff's Complaint and the exhibits attached to defendants' motion, the following are the pertinent facts. On April 19, 1987, Lois Buckman, plaintiff,

was hired by defendant[2] as a Service Representative.[3] Currently, plaintiff is employed as a Layout Technician Senior by Jersey Central Power & Light ("JCP&L").[4] Since 1997 plaintiff has sought a transfer to defendants' Easton or Stroudsburg, Pennsylvania, facilities.[5]

Since 1997, defendants have had vacancies in designer positions at the Easton and Stroudsburg facilities.[6] Ms. Buckman has expressed an interest in these positions; however, FirstEnergy has not selected her for these positions because of her gender.[7]

FirstEnergy had no justifiable reason for not selecting plaintiff to an available position.[8] Defendants were aware of plaintiff's superior employment history within the company.[9]

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[2] Plaintiff does not identify which defendant initially hired her. In fact, throughout the Complaint, plaintiff makes averments against a singular defendant. Plaintiff does not aver the corporate interest between the three named defendants and does not specifically aver a unity of interest among the defendants. Nevertheless, defendants identify FirstEnergy Service, Co. as the parent company of all defendants and the true party in interest. Plaintiff does not refute this claim. Accordingly, henceforward we shall refer to either "defendants" or "FirstEnergy" when referring to the defendants named by plaintiff in the Complaint.

[3] Complaint, paragraph 3.

[4] Complaint, paragraph 4.

[5] Complaint, paragraph 5.

[6] Complaint, paragraph 6.

[7] Complaint, paragraphs 7, 11.

[8] Complaint, paragraph 10.

[9] Complaint, paragraph 13.

In December 2000, defendants required Ms. Buckman to take an EEI examination[10] for the position of Mapping Technician. Plaintiff did not pass the examination.[11] Although plaintiff avers that the examination itself is unfair and discriminatory, she also claims that individuals hired before 1994 are exempt from taking the examination under the collective bargaining agreement applicable between the parties.[12] Moreover, the examination is only given to entry-level employees.[13]

Plaintiff took and failed the examination again in June 2001.[14] Ms. Buckman has expressed an interest in taking the examination again, but has been denied the opportunity because defendant claims that plaintiff must have a job on which to bid in order to take the examination and that no job for which the test is required is open.[15] However, under the applicable collective bargaining agreement, plaintiff should be permitted to take the examination every three months.[16] In addition,

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[10] Plaintiff does not aver what an EEI examination is, but defendants describe it as "an examination developed by the Edison Electric Institute ("EEI"), an industry consortium. Memorandum of Law in Support of Defendants' Motion for Summary Judgment, page 2.

[11] Complaint, paragraph 17.

[12] Complaint, paragraphs 17, 17(a).

[13] Complaint, paragraph 17(b).

[14] Complaint, paragraph 17(c).

[15] Complaint, paragraph 18.

[16] Complaint, paragraphs 19, 31.

plaintiff avers that two male employees, Matt Mooney and Chris Matecki, were permitted to retake the examination even though neither were bidding on a position.[17]

Plaintiff contends that she has not been permitted to review the results of her examination, but that male employees have reviewed their results.[18]

On different occasions, defendants have transferred Jerome Williams, Frank Vigone, Dan Baxter and Richard Horn to designer positions in Easton and have transferred Mark Warner to a designer position in Stroudsburg.[19] However, Jerome Williams, Frank Vigone, Dan Baxter and Richard Horn were not required to take the EEI examination prior to being offered the position.[20]

Plaintiff also contends that she was required to take an obsolete mechanical drawing class to meet the job specifications.[21] Male employees were not required to take the same class and were given the job.[22] In addition, one male employee, Mark Warner, was permitted to substitute a course in

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[17] Complaint, paragraph 20.

[18] Complaint, paragraph 17(d).

[19] Complaint, paragraph 21.

[20] Complaint, paragraph 22. Plaintiff also lists Jeff Matewsawitz, Rob Koble, Duane Eidleheiser, Greg Hunter, Rich Heller and G. Senderling as employees who were not required to take the EEI examination prior to being offered a job.

[21] Complaint, paragraph 26.

[22] Complaint, paragraph 29.

auto cad[23] for the obsolete mechanical drawing class.[24] Plaintiff had taken the auto cad class as well, but was not permitted to substitute the course.[25]

Defendant has not permitted a female to hold a Distribution Designer position in its Easton, Stroudsburg or Reading facilities.[26] Plaintiff has been denied employment opportunities at the Easton and Stroudsburg facilities on several occasions.[27] Moreover, lesser qualified males have been hired to employment opportunities at these facilities.[28]

On January 8, 2002, plaintiff filed a charge of discrimination with the New Jersey Division on Civil Rights.[29] Under a working-sharing agreement, the complaint was dually filed with the Equal Employment Opportunity Commission ("EEOC").[30]

On January 11, 2002, plaintiff filed a charge of discrimination with the EEOC. Under a work-sharing agreement, the complaint was dually filed with the Pennsylvania Human Rights

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[23] The parties do not aver what an auto cad class is.

[24] Complaint, paragraph 30.

[25] Complaint, paragraph 27.

[26] Complaint, paragraph 23.

[27] Complaint, paragraph 24.

[28] Complaint, supra.

[29] Defendants' Motion for Summary Judgment to Plaintiff's Complaint, Exhibit E.

[30] Defendants' Motion for Summary Judgment to Plaintiff's Complaint, Exhibit C.

Commission ("PHRC").[31]

The EEOC investigated the New Jersey complaint and concluded its inquiry when it issued a right-to-sue letter to plaintiff on July 10, 2002. The right-to-sue letter indicated that it was from the U.S. Equal Employment Opportunity Commission and informed plaintiff that she had 90 days after receipt of the letter in which to file a civil action in either federal or state court.[32]

However, the investigation of the EEOC-PHRA complaint continued despite the fact that the allegations raised in it were identical to those raised in the New Jersey complaint. The EEOC-PHRA complaint terminated on March 5, 2003 when the EEOC sent plaintiff a right-to-sue letter. This right-to-sue letter also indicated that it was from the U.S. Equal Employment Opportunity Commission and informed plaintiff that she had 90 days after receipt of the letter in which to file a civil action in either federal or state court.[33]

As stated above, this action was initiated on May 29, 2003 by a Writ of Summons in the Court of Common Pleas for

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[31] Defendants' Motion for Summary Judgment to Plaintiff's Complaint, Exhibit D.

[32] Defendants' Motion for Summary Judgment to Plaintiff's Complaint, Exhibit F. Because the EEOC commenced an investigation in regard to the New Jersey complaint, the New Jersey Division on Civil Rights closed its file. Defendants' Motion for Summary Judgment to Plaintiff's Complaint, Exhibit C.

[33] Defendants' Motion for Summary Judgment to Plaintiff's Complaint, Exhibit I.

Northampton County. Plaintiff filed her state court complaint on December 8, 2003. On February 3, 2004 defendants filed their notice of removal.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is proper when no genuine issue of material fact is in dispute and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Federal Home Loan Mortgage Corp. v. Scottsdate Insurance Company, 316 F.3d 431, 443 (3d Cir. 2003). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986); see Federal Home Loan Mortgage Corp., 316 F.3d at 443.

Thus, a "material" fact is one that is necessary to establish an element under the substantive law governing a claim. A fact is "genuine" if it is such that a reasonable factfinder could return a verdict for the non-moving party. Anderson, 477 U.S. at 248, 106 S.Ct. at 2510, 91 L.Ed.2d at 211.

DISCUSSION

Defendants contend that plaintiff's Complaint is time-barred because it was filed after the 90-day statute of limitations recited in the first right-to-sue letter issued by the EEOC. Specifically, defendants argue that the right-to-sue letter was issued on July 10, 2002 and that the state court Writ of Summons was not issued until May 29, 2003, almost eleven months later.

Plaintiff responds that the 90-day statute of limitations should be calculated from the second EEOC right-to-sue letter, which was issued March 5, 2003. Alternatively, plaintiff requests the court to equitably toll the statute of limitations because plaintiff's failure to timely bring suit within the time allotted by the first right-to-sue letter was due to mistake and lack of sophistication (plaintiff was acting pro se during the EEOC complaint process).

We agree with defendants that the first right-to-sue letter triggered the 90-day statute of limitations. We find the facts presented herein analogous to those in Soso Liang Lo v. Pan American World Airways, Inc., 787 F.2d 827 (2d Cir. 1986). In that action, Ms. Liang Lo received a right-to-sue letter on February 9, 1979; however, she failed to file suit within 90 days. Thereafter, she sought a second right-to-sue letter, which was issued on November 30, 1979. Thence, she filed an action

within 90 days. The United States Court of Appeals for the Second Circuit decided that to permit Ms. Liang Lo to proceed in the civil action would render the time limitations in 42 U.S.C. § 2000e-5(f)(1) meaningless. Accordingly, the court held the action to be time-barred.

Plaintiff attempts to distinguish Liango Lo and like cases, see Vitello v. Liturgy Training Publications, 932 F. Supp. 1093 (N.D. Ill. 1996) , Brown v. Walt Disney World Company, 805 F. Supp. 1554 (M.D. Fla. 1992), and Ivy v. Meridian Coca-Cola Bottling Company, 108 F.R.D. 118 (S.D. Miss. 1985), by contending that the factual scenarios in those cases depict plaintiffs who are attempting to "game the system". However, in each of those cases a plaintiff, having failed to file suit on a particular claim after receiving an initial right-to-sue letter, attempted to file suit on the same claim upon receiving a subsequent right-to-sue letter. There is no mention in any of the opinions of an intent to deceive by the respective plaintiffs. Accordingly, we can find no support for plaintiff's contention that these cases are distinguishable on that basis.

In addition to the foregoing, we note that plaintiff has neither averred nor argued a continuing violation or any other means by which plaintiff could remedy her failure to file suit after having received the first right-to-sue letter. Consequently, we conclude that there is no basis to begin the

statute of limitations clock at the time of plaintiff's receipt of the second letter. Accordingly, we conclude that the clock must run from the first right-to-sue letter and that plaintiff's Complaint is untimely.

We next address plaintiff's request for the equitable tolling of the time between her receipt of the first right-to-sue letter and her filing of the state court Writ of Summons.

A plaintiff must exhaust her administrative remedies before seeking judicial relief for Title VII claims. Robinson v. Dalton, 107 F.3d 1018, 1020 (3d Cir. 1997). Accordingly, a plaintiff may not file suit without first receiving a right-to-sue letter. Anjelino v. New York Times Co., 200 F.3d 73, 87 (3d Cir. 1999). However, a reviewing court should not view the failure to exhaust administrative remedies as a jurisdictional bar, but rather as a statute of limitations issue. See Anjelino, 200 F.3d at 87; Seitzinger v. Reading Hospital and Medical Center, 165 F.3d 236, 239-240 (3d Cir. 1999). The practical result of the differing approach is to permit the doctrine of equitable tolling to be applicable in appropriate circumstances. Seitzinger, 165 F.3d at 240; see Anjelino, 200 F.3d at 87.

However, the equitable tolling doctrine is to be utilized sparingly and not out of a "vague sympathy for particular litigants." Baldwin County Welcome Center v. Brown, 466 U.S. 147, 152, 104 S. Ct. 1723, 1726, 80 L. Ed. 2d 196, 202

(1984). The Supreme Court and the Third Circuit Court of Appeals have authorized the use of the doctrine in only a small number of circumstances:

> when a claimant received inadequate notice of her right to file suit, where a motion for appointment of counsel is pending, or where the court has misled the plaintiff into believing that she had done everything required of her[,]...when the defendant has actively misled the plaintiff; when the plaintiff "in some extraordinary way" was prevented from asserting her rights; or when the plaintiff timely asserted her rights in the wrong forum.

Seitzinger, 165 F.3d at 240 (internal citations omitted).

Plaintiff does not argue that her circumstances fall within those in which the appellate courts have found the doctrine applicable, but rather argues for an expansion of the doctrine to include errors committed by unsophisticated plaintiffs acting pro se before the EEOC.

While we are not unsympathetic to plaintiff, the expansion of the equitable tolling doctrine that she seeks is untenable.

There is no allegation of fraud or misrepresentation upon plaintiff by any third party. Rather, it appears that plaintiff mistakenly filed multiple employment discrimination actions with the New Jersey Division on Civil Rights, the PHRA and the EEOC. Additionally, it appears that plaintiff misunderstood the right-to-sue letter, which quite clearly identified itself as being generated by the EEOC and described

plaintiff's rights as follows:

> This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit **must be filed <u>WITHIN 90 DAYS</u> from your receipt of this Notice**; otherwise, your right to sue on this charge will be lost.

Defendants' Motion for Summary Judgment to Plaintiff's Complaint, Exhibit F (emphasis in original). It appears that plaintiff disregarded this letter and pursued the same charges filed before the EEOC-PHRA.

We conclude that plaintiff's actions are tantamount to forum shopping for a better-perceived administrative outcome for her two complaints. There is no ambiguity in the language of the first right-to-sue letter. In fact, it is identical to the language found in the second right-to-sue letter, after receipt of which plaintiff resolved to seek counsel and file her civil action.

Under these circumstances, we conclude that an extension of the doctrine of equitable tolling is not warranted. Accordingly, we conclude that plaintiff's Complaint was filed after the statute of limitations had elapsed.

<u>CONCLUSION</u>

For all the foregoing reasons, we grant defendants' motion for summary judgment, dismiss plaintiff's Complaint and

enter judgment in favor of defendants and against plaintiff. We conclude that, because plaintiff's Complaint was not filed within 90 days of the first right-to-sue letter dated July 10, 2002, plaintiff's Complaint is barred by the applicable statute of limitations. Furthermore, we find no grounds upon which to equitably toll the applicable statute of limitations.

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	)	Civil Action
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vs.	)	
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METROPOLITAN EDISON COMPANY;	)	
FIRSTENERGY CORPORATION; and	)	
GPU ENERGY,	)	
	)	
Defendants	)	

O R D E R

NOW, this 28th day of September, 2004, upon consideration of Defendants' Motion for Summary Judgment to Plaintiff's Complaint filed May 11, 2004; upon consideration of Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment filed July 15, 2004; upon consideration of Defendants' Motion for Leave to File a Reply Brief in Support of Its Motion for Summary Judgment filed July 19, 2004; upon consideration of the Reply Memorandum in Support of Defendants' Motion for Summary Judgment and in Support of Motion to Strike

filed July 26, 2004; and for the reasons expressed in the accompanying Opinion,

IT IS ORDERED that defendant's motion for leave to file a reply brief is granted.

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment is granted.

IT IS FURTHER ORDERED that plaintiff's Complaint is dismissed.

IT IS FURTHER ORDERED that judgment is entered in favor of defendants and against plaintiff.

BY THE COURT:

James Knoll Gardner
United States District Judge