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

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| ALFONSO MARTIR RODRIGUEZ CASTILLO, | : | |
| Plaintiff, | : | |
| | : | CIVIL ACTION NO. 04-916 |
| v. | : | |
| UNITED STATES POSTAL SERVICE, | : | |
| Defendant. | : | |

**MEMORANDUM**

BUCKWALTER, S.J. March 1, 2005

Presently before the Court are Defendant's Motion to Dismiss or in the Alternative for Summary Judgment (Docket No. 7), Plaintiff's response thereto (Docket 8) and Plaintiff's Complaint (Docket No. 3).

## I. FACTUAL HISTORY

Plaintiff, a forty-three (43) year old Cuban-American suffering from depression and receiving Social Security disability benefits, alleged that he was wrongfully terminated from his casual position with Defendant. Plaintiff averred the following facts in his pleadings.

Plaintiff filed an application for employment with Defendant on May 15, 2003. In October 2003, a representative of Defendant's Human Resources Department, Kattie Russum, telephoned Plaintiff regarding his application. Plaintiff interviewed with Defendant on November 21, 2003, and on December 6, 2003, Defendant hired Plaintiff as a casual Christmas season employee, which Plaintiff thought was a twenty-one (21) day position.

Plaintiff commenced his employment with Defendant on December 7, 2003. Plaintiff's position required him to complete mail-handling duties, including lifting heavy items and pushing large hampers of mail.

On December 17, 2003, Defendant dismissed Plaintiff from his position. Beverly Jeffrey, a representative of Defendant's Human Resources Department, notified Plaintiff that he could not continue working for Defendant. When Plaintiff inquired as to why he was discharged, Beverly Jeffrey told him that Harvey White, a manager in Defendant's Human Resources Department, wrote in Plaintiff's personnel file in 2001 that Plaintiff could no longer work for Defendant because of an incident, which occurred in 1995, involving Plaintiff. Beverly Jeffrey then passed Plaintiff's personnel file on to Dianna Scott, a manager in Defendant's Human Resources Department, who told Plaintiff that he could not continue working for Defendant and that his folder had to be evaluated by other personnel of Defendant. To Plaintiff, the actions of Defendant and its employees appeared to be a discriminatory plot against him.

In his pleadings, Plaintiff indicated that he signed a settlement agreement with Defendant on April 8, 2003, by which he agreed to withdraw his case against Defendant in return for being hired by Defendant. Bernie Berry was the representative of Defendant in the negotiations. Plaintiff worked from May to October in 2003 because of the settlement agreement. Plaintiff had no knowledge as to whether Bernie Berry placed this settlement agreement in Plaintiff's personnel file.

Plaintiff believed that he was wrongfully discharged by Defendant, and in his Complaint, he sought either twenty-five (25) million dollars or a full-time job with Defendant. Plaintiff averred that his discharge increased his chronic emotional depression, which was

diagnosed by his psychiatrist. In his Complaint and Reply, with respect to his discharge on December 17, 2003, Plaintiff made no references to interacting with an Equal Employment Opportunity ("EEO") counselor, filing an EEO complaint against Defendant or notifying the EEOC ("Equal Employment Opportunity Commission") of his intention to sue.

## II. PROCEDURAL HISTORY

Appearing *pro se*, Plaintiff's first filing was on March 2, 2004, when he filed a Motion to Proceed *in Forma Pauperis*, which was granted by the Court. Plaintiff filed his Complaint against Defendant on March 10, 2004.

In response to Plaintiff's Complaint, Defendant filed a Motion to Dismiss. Attached to Defendant's Motion was an affidavit recounting Plaintiff's history of filing Equal Employment Opportunity complaints against Defendant. According to the affidavit, which was dated August 24, 2004, Defendant maintains a computer database of EEO complaints filed against Defendant. Defendant searched Plaintiff's social security number in the database and found that Plaintiff had filed EEO complaints against Defendant on three occasions: 1995, 1996 and 2000. All three cases were closed, with the last case being closed in 2000. As of August 26, 2004, the date the affidavit was signed, which was about 244 days after Plaintiff was discharged, there was no record of Plaintiff filing any EEO complaints against Defendant since 2000. According to Defendant, if Plaintiff would have filed an EEO complaint with respect to the instant 2003 discharge, it would have been found in the search.

## III. STANDARD

A motion to dismiss pursuant to Rule 12(b)(6) is granted where the plaintiff fails to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). This motion "may be

granted only if, accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief." Maio v. Aetna, Inc., 221 F.3d 472, 481 (3d Cir. 2000)(quoting In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1420 (3d Cir.1997))(citations omitted). While the Court must accept all factual allegations in the complaint as true, it "need not accept as true 'unsupported conclusions and unwarranted inferences.'" Doug Grant, Inc. v. Greater Bay Casino Corp., 232 F.3d 173, 184-85 (3d Cir. 2000)(quoting City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 263 n.13 (3d Cir. 1997))(citation omitted). In a 12(b)(6) motion, the defendant bears the burden of persuading the Court that no claim has been stated. Gould Elecs., Inc. v. United States, 220 F.3d 169, 178 (3d Cir. 2000).

A motion for summary judgment will be granted where all of the evidence demonstrates "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). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Because a grant of summary judgment will deny a party its chance in court, all inferences must be drawn in the light most favorable to the party opposing the motion. U.S. v. Diebold, Inc., 369 U.S. 654, 655 (1962).

The ultimate question in determining whether a motion for summary judgment should be granted is "whether reasonable minds may differ as to the verdict." Schoonejongen v. Curtiss-Wright Corp., 143 F.3d 120, 129 (3d Cir. 1998). "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, 477 U.S. at 248.

As noted above, Plaintiff pursued this lawsuit *pro se*. Courts have an obligation to read a *pro se* litigant's pleading liberally. Holley v. Dept. of Veterans Affairs, 165 F.3d 244, 247- 48 (3d. Cir. 1999)(citing Haines v. Kerner, 404 U.S. 519, 520-21 (1972)). *"[P]ro se* complaints are held to less stringent standards than formal pleadings drafted by lawyers...." Becker v. C.I.R., 751 F.2d 146, 149 (3d Cir. 1984)(citing Haines, 404 U.S. at 520-21). Furthermore, courts must apply the applicable law, regardless of whether the *pro se* litigant cited the applicable law or referenced it by name. Holley, 165 F.3d at 248. Finally, "[a] *pro se* complaint may be dismissed for failure to state a claim only if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Milhouse v. Carlson, 652 F.2d 371, 373 (3d Cir. 1981)(quoting Haines, 404 U.S. at 520-21).

Notwithstanding the standards cited above, a *pro se* plaintiff is not excused from complying with rules of procedural and substantive law. Faretta v. California, 422 U.S. 806, 835, n. 46 (1975). As the Supreme Court wrote in Baldwin County Welcome Center v. Brown, "[p]rocedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of vague sympathy for particular litigants." 466 U.S. 147, 152 (1984).

**IV. DISCUSSION**

In his Complaint, Plaintiff alleged that Defendant wrongfully discharged him. Based on Plaintiff's references to his Cuban-American lineage[1], Social Security disability and

1. As to Plaintiff's claim of discrimination based on his national origin, the Court will apply Title VII of the Civil Rights Act of 1964. Pursuant to 42 U.S.C. § 2000e-16, personnel actions affecting employees of the United States Postal Service must be "made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a) (2005).

psychological conditions[2], and age[3], the Court, reading Plaintiff's Complaint liberally, believes Plaintiff filed the instant suit under Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e-16 *et seq*., the Rehabilitation Act of 1973 ("Rehabilitation Act"), 29 U.S.C. § 701 *et seq.,* and finally, the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq*.[4]

**A. National Origin Discrimination Claim and Disability Discrimination Claim**

Claims brought by federal employees against the federal government under Title VII and the Rehabilitation Act are governed by the same administrative exhaustion requirements.[5] Because the administrative remedy requirements governing the national origin discrimination claim and disability discrimination claim are identical, the two claims will be discussed together. Before instituting a civil action in federal court, a plaintiff alleging

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2. With respect to Plaintiff's claim of discrimination based on his psychological condition and references to his receipt of Social Security disability, the Court will apply the Rehabilitation Act of 1973. Pursuant to 29 U.S.C. § 794(a), no person with a disability "shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." 29 U.S.C. § 794(a)(2005).

3. Regarding Plaintiff's claim of age discrimination, the Court will apply the Age Discrimination in Employment Act. Pursuant to 29 U.S.C. § 621a(a), personnel actions of the United States Postal Service "affecting employees or applicants for employment who are at least 40 years of age...shall be made free from any discrimination based on age." 29 U.S.C. § 633a(a)(2005).

4. Defendant, in its Motion to Dismiss or in the Alternative for Summary Judgement, attempted to construe the claims put forth by Plaintiff and determined there were three basic causes of action: wrongful discharge based on discrimination, wrongful discharge and breach of contract. The Court disagrees with Defendant's interpretation. As explained in the following paragraph, the Court finds that, read liberally, the Plaintiff's Complaint solely alleged wrongful discharge based on discrimination.

The Court will not address the wrongful discharge apart from the discrimination claims because the Court believes they are one in the same; Plaintiff alleged that discrimination was the cause of his discharge. With respect to the breach of contract claim, the Court will not address this claim apart from the discrimination claims as the Court believes, even reading the Plaintiff's pleading liberally, that the Plaintiff did not allege a separate breach of contract claim.

5. Pursuant to 29 U.S.C. § 794a, complaints brought under the Rehabilitation Act use the administrative remedy procedures of Title VII. 29 U.S.C. § 794a(a)(1)(2005).

employment discrimination under either Title VII or the Rehabilitation Act must exhaust his administrative remedies. 42 U.S.C. § 2000e-16(c); United Air Lines v. Evans, 431 U.S. 553, 555 (1977); 29 U.S.C. § 794a(a)(1)(Title VII procedures applicable to claims under the Rehabilitation Act); Spence v. Straw, 54 F.3d 196, 201 (3d. Cir. 1996)(holding that a plaintiff must exhaust Title VII remedies before bringing suit under the Rehabilitation Act). In the instant case, Plaintiff failed to exhaust his administrative remedies as required by Title VII and the Rehabilitation Act before filing this suit with the Court. Therefore, as explained below, the Court grants summary judgment in favor of Defendant as to the two claims.

As cited above, before a federal employee may file a claim in federal court based on the respective acts, he must exhaust his administrative remedies. Initially, a federal employee intending to pursue a Title VII claim or Rehabilitation Act claim against a government agency must contact an EEO counselor within forty-five (45) days of the discriminatory incident or effective date of the action. 29 C.F.R. § 1614.105(a)(1)(2005). Within thirty (30) days of the initial contact, the EEO counselor must conduct a final interview and notify the aggrieved person of his or her right to file a discrimination complaint.[6] 29 C.F.R. § 1614.105(d)(2005). This notice, which is referred to as the Notice of Final Interview, must "inform the complainant of the right to file a discrimination complaint within 15 days of receipt of the notice, of the appropriate official with whom to file a complaint and of the complainant's duty to assure that the agency is informed immediately if the complainant retains counsel or a representative." 29 C.F.R. §

6. Before the thirty (30) day period ends, the aggrieved employee may agree to extend the counseling period for no more than sixty (60) days. 29 C.F.R. § 1614.105(e)(2005). Under 29 C.F.R. § 1614.105(2005), the aggrieved employee also has the right to enter into alternative dispute resolution procedures where such programs are offered. 29 C.F.R. § 1614.105((b)(2)(2005). If the aggrieved employee agrees to participate in the ADR program and his claim has not been resolved within ninety (90) days of the initial contact, the notice of the right to file a discrimination complaint must be issued. 29 C.F.R. § 1614.105(f)(2005).

1614.105(d)(2005). A plaintiff cannot bypass these initial steps, or any of the other mandatory administrative procedures, and file a Title VII claim or Rehabilitation Act claim directly with a federal court. 42 U.S.C. § 2000e-16(c)(2005); United Air Lines, 431 U.S. at 555; 29 U.S.C. § 794a(a)(1)(2005); Spence, 54 F.3d at 201.

In the instant case, Plaintiff failed to file an EEO complaint as evidenced by the affidavit submitted by Defendant, which is described above and accepted by the Court. As of August 26, 2003, about 244 days after his discharge, Plaintiff had not filed an EEO complaint. Under every conceivable scenario,[7] Plaintiff had to file his EEO complaint within approximately 153 days of his discharge. Because Plaintiff failed to exhaust his Title VII and Rehabilitation Act administrative remedies before filing in federal court, the Court must grant summary judgment in favor of Defendant.[8]

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7. Under the ADR alternative, if the aggrieved employee waited forty-five (45) days to contact the EEO counselor, the notice of right to file a discrimination complaint would have been issued by ninety (90) days after the initial contact, and the aggrieved would have had fifteen (15) days from his receipt of the notice to file his EEO complaint. Three (3) days must be added to the 150 day total to account for the time it could have possibly taken the notice to reach the aggrieved. The Third Circuit has applied this three (3) day assumption in the Title VII context. See Seitzinger v. Reading Hospital and Medical Center, 165 F.3d 236, 239 (3d. Cir. 1999)(in absence of other evidence, Circuit assumed plaintiff received right-to-sue letter three (3) days after the EEOC mailed it, referencing FED. R. CIV. P. 6(e)). Three (3) days will not be added to the fifteen (15) day deadline for consideration of mail delivery of the EEO complaint by the aggrieved employee because the Circuit has strictly applied the deadlines of Title VII. See Mosel v. Hills Dep't Store, Inc., 789 F.2d 251, 253 (refusing to apply FED. R. CIV. P. 6(e) and therefore extend a Title VII limitation period). Therefore, the aggrieved employee would have filed his EEO Complaint within approximately 153 days of the personnel action.

Under the non-ADR alternative, if the aggrieved employee waited forty-five (45) days to contact the EEO counselor and agreed to extend his thirty (30) day consulting period an extra sixty (60) days, the notice of right to file a discrimination complaint would have been issued within 135 days of the discharge, and the aggrieved employee would have had fifteen (15) days from his receipt of the notice to file his EEO complaint. Therefore, including the three (3) day mailing time discussed in the preceding paragraph, the aggrieved employee would have filed his EEO complaint within approximately 153 days of the personnel action.

8. The time limitations set forth by Title VII are not jurisdictional but instead are similar to statutes of limitations and subject to equitable modifications, including tolling. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982). As to the Title VII and the Rehabilitation Act claims, the Court will not toll the deadlines set forth in the statutes.

As for when courts should employ equitable tolling, the Supreme Court wrote, "[w]e have allowed (continued...)

**B. Age Discrimination**

Plaintiff's Complaint can also be read to include an age discrimination claim. The ADEA protects workers over the age of forty (40), which would include Plaintiff as he stated his age as forty-three (43). The ADEA affords aggrieved federal employees two alternative routes for pursuing an age discrimination claim. First, the federal employee may pursue his claim through the administrative process. 29 U.S.C. § 633a(b)(2005). Under this alternative, only after the employee exhausts his administrative remedies, which includes filing an EEO complaint against the particular agency, may he file in federal court. 29 U.S.C. §§ 633a(b), 633a(c)(2005).

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8. (...continued)
equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." Irwin v. Dept. of Veterans Affairs, 498 U.S. 89, 96 (1990). The Third Circuit has primarily applied tolling in three situations: "(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 own rights; (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum." Oshver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1387 (3d. Cir. 1994)(citing School District of City of Allentown v. Marshall, 657 F.2s 16, 19-20 (3d. Cir. 1981))(citations omitted). According to the Third Circuit, "courts must be sparing in their use of equitable tolling." Seitzinger v. Reading Hosp. & Med. Ctr., 165 F.3d 236, 239 (3d. Cir. 1999).

Applying the standards of the Supreme Court and Third Circuit, the Court believes that tolling the deadlines of Title VII and the Rehabilitation Act is not appropriate in this case for two reasons. First, in his Complaint and Reply, Plaintiff failed to articulate any reasons and set forth no facts which necessitate tolling the deadlines. Specifically, no information was included by Plaintiff as to why he failed to pursue his administrative remedies. Second, as shown by Plaintiff's filing of three prior EEO Complaints, Plaintiff, despite his *pro se* status, was aware of the administrative options available to him. A litigant's experience with administrative procedures has been relied on by the Third Circuit as a reason for denying tolling. Robinson v. Dalton, 107 F.3d 1018, 1023-24 (3d. Cir. 1997)(Circuit noted that plaintiff was not inexperienced in the procedures for filing a discrimination complaint, as he had filed complaints on three prior occasions; this served as one factor in the Circuit's decision to deny tolling); Kocian v. Getty Refining & Marketing Co., 707 F.2d 748, 755 (3d. Cir. 1983)(refusing to toll the applicable limitations period partly because plaintiff knew the applicable limitations period as she had filed a charge against a previous employer)(overruled for other reasons by Colgan v. Fisher Scientific Co., 935 F.2d 1407 (3d. Cir. 1991)).

As to the other equitable modifications, the Court believes estoppel and waiver do not apply. Equitable estoppel, which serves as the first part of the Third Circuit's equitable tolling test, is not applicable to the instant case because the Defendant's conduct does not implicate such a remedy. See Oshiver, 38 F.3d at 1389, n. 7 ("The doctrine which the Seventh Circuit describes as 'equitable estoppel' [in Cada v. Baxter Healthcare Corp., 920 F.2d 446 (7th Cir. 1990)] appears to be the same, in all important respects, as our 'equitable tolling' insofar as our 'equitable tolling' excuses a late filing where it is caused by defendant's active deception"). The Court finds waiver inappropriate as Defendant timely raised the issue. Figueroa v. Buccaneer Hotel Inc., 188 F.3d 172, 176 (3d. Cir. 1999)(finding that appellant's, who was the plaintiff in the case, argument of waiver lacked merit where all three appellees timely asserted statute of limitations as an affirmative defense in answering appellant's complaint).

Second, differing from Title VII and Rehabilitation Act claims, the aggrieved federal employee may file an age discrimination claim directly in the federal court. 29 U.S.C. § 633a(d)(2005). As a prerequisite for filing the complaint in federal court, the aggrieved must notify the EEOC of his intent to sue no less than thirty (30) days prior to the commencement of the suit. 29 U.S.C. § 663a(d)(2005). The aggrieved must file his notice of his intention to file suit with the EEOC within 180 days of the alleged unlawful practice. 29 U.S.C. § 663a(d)(2005).

The Court cannot grant summary judgment on this claim. Although the Court believes Defendant's affidavit shows that the search conducted by Defendant includes EEO complaints filed against Defendant and therefore proves Plaintiff failed to pursue his administrative alternative, the Court, based on a plain reading of the affidavit, cannot conclude that the database searched includes notices of an intention to file suit. This uncertainty concerning a material fact prevents the Court from granting summary judgment on this claim.

However, as to Plaintiff's age discrimination claim, the Court grants Defendant's Motion to Dismiss for failure to state a claim. In his pleadings, plaintiff makes no reference to notifying the EEOC of his intention to sue prior to filing his Complaint or to filing an EEO complaint in order to take advantage of his administrative remedies. As articulated above, a plaintiff must complete one of these alternatives as a precondition to filing in federal court. 29 U.S.C. § 663a(d) (2005). The Third Circuit has determined that in cases involving Title VII claims, "[a] complaint does not state a claim upon which relief may be granted unless it asserts the satisfaction of the precondition to suit...." Robinson v. Dalton, 107 F.3d 1018, 1022 (quoting Hornsby v. United State Postal Service, 787 F.2d, 87, 90 (3d. Cir. 1986)). Applying this standard

to Plaintiff's ADEA claim,[9] Plaintiff was required to aver that he met the precondition to suit. Because Plaintiff failed to aver that he exhausted his administrative remedies or that he notified the EEOC of his intention to file suit, the Court must dismiss this claim.

## V. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgement as to Plaintiff's claims of discrimination under Title VII and the Rehabilitation Act is granted. Further, Defendant's Motion to Dismiss Plaintiff's claim of discrimination under the ADEA is granted.

An appropriate order follows.

9. As the Third Circuit stated in Barber v. CSX Distribution Services, "[b]ecause the prohibition against age discrimination contained in the ADEA is similar in text, tone, and purpose to the prohibition against discrimination contained in Title VII, courts routinely look to law developed under Title VII to guide an inquiry under the ADEA." 68 F.3d 694 (3d. Cir. 1995)(Circuit applied evidentiary framework first set forth by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

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| Plaintiff, | : | |
| | : | CIVIL ACTION NO. 04-916 |
| v. | : | |
| UNITED STATES POSTAL SERVICE, | : | |
| Defendant. | : | |

**ORDER**

AND NOW, this 1st day of March, 2005, upon consideration of Defendant's Motion to Dismiss or in the Alternative for Summary Judgment (Docket No. 7), Plaintiff's response thereto (Docket 8) and Plaintiff's Complaint (Docket No. 3), it is hereby **ORDERED:**

With respect to Plaintiff's claims of national origin discrimination under Title VII and disability discrimination based on the Rehabilitation Act, Defendant's Motion for Summary Judgment is **GRANTED**.

With respect to Plaintiff's claim of age discrimination under the ADEA, Defendant's Motion to Dismiss for failure to state a claim is **GRANTED**, and this claim is **DISMISSED, with prejudice**.

This case is **CLOSED**.

BY THE COURT:

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RONALD L. BUCKWALTER, S.J.