

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

MARY M. O'MALLEY : CIVIL ACTION  
: :  
: :  
v. : :  
: :  
JOHN E. POTTER : NO. 05-CV-986

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

September 19, 2005

Plaintiff Mary O'Malley ("O'Malley") brought this action alleging violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000 e et seq. ("Title VII") and of the Rehabilitation Act of 1973, 29 U.S.C. § 791 et seq. Defendant John E. Potter ("Potter") is the Postmaster General. Plaintiff alleges (1) that the United States Postal Service ("Postal Service) discriminated against her on the basis of perceived disability and retaliated against her for prior EEO activity when it did not allow her to return to work in December, 2000; and (2) that it retaliated against her when it removed her from its employment rolls a few days after she sought pre-complaint EEO counseling at the end of 2002. Presently before the Court is Potter's motion to dismiss the complaint under Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted or, alternatively, for summary judgment under Rule of Civil Procedure 56. For the reasons below, the Court will grant summary judgment as to the plaintiff's claim regarding her

termination and deny it as to her claim regarding her removal from the Postal Service employment rolls.

## **I. FACTUAL BACKGROUND**

O'Malley is a former employee of the Postal Service. She started working for the Postal Service in 1993. (Declaration of Sandra L. Mitchell, Manager of EEO Compliance and Appeals for the Eastern Area of the United States Postal Service, Def's Exh. A ["Mitchell Decl."], ¶ 4.) Her most recent job title was Mailhandler. In June 1996, she was placed in non-duty status. (Pl's Decl., ¶ 3.) In February 1997, following a period of unexplained absences from work, the Postal Service issued O'Malley a Notice of Removal. (Pl.'s Decl., ¶ 4.) O'Malley promptly filed an EEO complaint claiming discrimination on the basis of disability; the EEOC dismissed the complaint. (Mitchell Decl., ¶ 5.) At the same time, O'Malley initiated a grievance through the Mailhandlers Union ("Union") under a negotiated grievance procedure. (Id. ¶ 7.) The grievance was resolved in December 1999, by a pre-arbitration settlement agreement, under which O'Malley would be returned to her position if, within 90 days, she provided independent medical evidence, including a psychiatric report, that she could return to work. (Id.; Def's Exh. C.)

O'Malley was visited by an independent psychiatrist in September 2000. In December of that year, the psychiatric report

produced by O'Malley was reviewed by the Postal Service's Area Medical Director, who cleared O'Malley for duty. (Pl.'s Decl. ¶¶ 9-10; Pl's Exh. C.) Nonetheless, the Postal Service did not return O'Malley to work. Instead, for reasons that are not clearly documented in the parties' submissions, the Postal Service and Union agreed that O'Malley should submit to another psychiatric evaluation. (Pl.'s Decl. ¶ 11; Def's Exh. D.) O'Malley refused to comply. (Pl.'s Decl. ¶ 13; Pl.'s Exh. D.)

On September 10, 2001, the Postal Service issued O'Malley a second Notice of Removal stating that it was terminating her because she had failed to comply with the terms of the pre-arbitration settlement agreement by not submitting to a second psychiatric exam. (Pl's Exh. F.) The Notice clearly stated that O'Malley's removal would be effective in 30 days. Id. O'Malley received the notice on September 20, 2001; the removal became effective on October 20, 2001. (Mitchell Decl. ¶ 11.) O'Malley did not initiate any EEO proceeding, but the Union filed another grievance on her behalf. (Pl.'s Decl. ¶ 16.)<sup>1</sup>

Under the terms of the agreement between the Postal Service and American Postal Workers Union, an employee may not be removed from the employment rolls of the Postal Service so long as a union grievance is pending, so O'Malley was not immediately

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<sup>1</sup>At oral argument on September 9, 2005, counsel for Potter stated employees can pursue union grievances and EEO procedures concurrently. O'Malley would have known this from the events in 1997, when she did just that.

removed from the rolls. (Decl. of Cynthia Jackson, Manager of Personnel Services for the Philadelphia Metropolitan Performance Cluster, Def's Exh. B ["Jackson Decl."], ¶¶ 3-4; Mitchell Decl. ¶¶ 12-13.)

Over a year later, on November 26, 2002, O'Malley sought EEO counseling regarding the Postal Service's failure to return her to work. (Pl.'s Exh. G.) On November 29, 2002, the Mailhandlers Union withdrew its pending grievance "for Failure to Comply With Arbitration Settlement Agreement." (Def.'s Exh. E.) On December 3, 2002 the Postal Service wrote to O'Malley's counsel that as a result of the termination of the Union's grievance, O'Malley had been removed from the Postal Service's employment rolls. (Pl.'s Exh. H.)<sup>2</sup> O'Malley exhausted her administrative remedies by pursuing a complaint with the EEOC until the case was dismissed in April 2004. (Pl.'s Exh. R.)

## **II. DISCUSSION**

Potter moves for dismissal of O'Malley's claims, or in the alternative for summary judgment, on two grounds: (1) as to O'Malley's allegation that she was terminated in 2001 for discriminatory and retaliatory reasons, O'Malley did not seek EEO

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<sup>2</sup>According to the declaration of Cynthia Jackson, Manager of Personnel Services for the Philadelphia Metropolitan Performance Cluster, O'Malley was removed from the rolls on December 4, 2002. (Jackson Decl., ¶ 7.)

counseling or otherwise initiate any EEO process until November 2002, beyond the statutory 45-day requirement, and therefore failed timely to exhaust administrative remedies; (2) as to O'Malley's removal from the Postal Service's employment rolls in 2002, this was not an "adverse action" and cannot form the basis of a complaint.

Because the Court was asked to consider material outside the complaint, Potter's motion will be treated as one for summary judgment.<sup>3</sup> Fed. R. Civ. P. 12; see JM Mechanical Corp. v. U.S. by U.S. Dept. of Housing & Urban Development, 716 F.2d 190, 197 (3d Cir. 1983) (if the court considers material outside the pleading, it must treat the motion as a motion for summary judgment under Rule 56 and afford the plaintiff a reasonable opportunity to present all material made pertinent to such a motion by Rule 56); Kuromiya v. U.S., 37 F. Supp. 2d 717, 730 (E.D. Pa. 1999) (same).

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Only a factual dispute that might affect the outcome under governing law precludes the entry of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). When reviewing a motion for summary judgment, a court must evaluate the facts in a light most favorable to the nonmoving party and drawing all reasonable

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<sup>3</sup>At oral argument on September 9, 2005 all parties agreed that the motion could be treated as one for summary judgment.

inferences in that party's favor. Id. at 255.

**a. O'Malley's Removal in October 2001**

O'Malley's first claim is that the Postal Service discriminated against her on the basis of her perceived psychiatric disability and retaliated against her for protected EEO activity by not allowing her to return to work after the end of 2000 although a psychiatrist and the Postal Service's own Area Medical Director certified that she was able to return to duty. The Postal Service seeks summary judgment because O'Malley did not timely exhaust her administrative remedies.

The facts pertaining to O'Malley's removal from the Postal Service in October 2001 are undisputed in all material respects. O'Malley was declared fit to return to work in December 2000. The following September, she received a notice of removal that became effective October 21, 2001, but did not seek EEO counseling regarding this event until November 26, 2002, over a year later. Because no issue of material fact remains, the only issue is whether the defendant is entitled to judgment at a matter of law.

A plaintiff bringing an action under Title VII must first exhaust available administrative remedies. Robinson v. Dalton, 107 F.3d 1018, 1020 (3d Cir. 1997). The same restriction applies to claims brought under the Rehabilitation Act. Spence v. Straw, 54 F.3d 196, 201 (3d Cir. 1995). Timely exhaustion of remedies "requires both consultation with an agency counselor and filing a

formal EEOC complaint within the required times." Robinson, 107 F.3d at 1021. Under current EEO regulations, a plaintiff must initiate contact with an EEO counselor within 45 days of the alleged discriminatory conduct. See 29 C.F.R. § 1614.105. The 45-day period should be extended only where the aggrieved person demonstrates that she was not aware of the time limitations or was prevented from timely contact despite due diligence. 29 C.F.R. § 1614.105(a)(2). Johnson v. Gober, 83 Fed. Appx. 455, 460-61 (3d Cir. 2003) (affirming summary judgment for defendant employer where plaintiff had failed to make contact with an EEO counselor within 45 days of the alleged discriminatory conduct and could not show any basis to excuse his untimeliness).

In cases where an employee is terminated, the act occurs-and time starts running-when the employee is unequivocally notified of the termination. Delaware State Coll. v. Ricks, 449 U.S. 250, 258 (1980). Here, the alleged discriminatory event occurred on September 20, 2001, when O'Malley received the Notice of Removal, but O'Malley failed to initiate any contact with an EEO counselor until November 26, 2002, over one year later and clearly beyond the 45-day time limit.<sup>4</sup> O'Malley does not argue that she should be excused from the 45-day deadline because she was not aware of it or because of the intervention of some factor that defeated her due diligence. (It would be difficult for her

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<sup>4</sup>O'Malley does not specify when she received the Notice of Removal dated September 10, 2001, but does not contest the Postal Service's statement that she received it ten days later.

to argue lack of awareness since she had already pursued EEO procedures in 1997.) Rather, she argues that her initial request for EEO counseling in November 2002 was timely because the Postal Service's alleged discriminatory conduct is a "continuing violation," repeated each day that O'Malley was not returned to her duties.

In actions based on employment discrimination, the clock starts running at the time of the allegedly discriminatory act; it is not reset each day that the alleged violation is not corrected. "The emphasis is not upon the effects of earlier employment decisions; rather, it is upon whether any present violation exists." Delaware State Coll., 449 U.S. at 258. See also Zdiech v. DaimlerChrysler Corp., 2004 WL 2203979 (3d Cir. June 6, 2003) (alleged discrimination occurred on the day plaintiff employee was denied accommodation and was not revived by the employee's subsequent, continued requests for reconsideration). In this case, the Postal Service's alleged discriminatory act occurred on September 20, 2000, when O'Malley was notified that she would be removed, and did not reoccur each day thereafter.

O'Malley failed to exhaust administrative remedies by waiting to contact an EEO counselor for over a year after the alleged discriminatory action took place. The plaintiff's motion for summary judgment is granted with respect to O'Malley's claim of discrimination and retaliation arising from her removal from

the Postal Service in 2001.

**b. O'Malley's removal from the employment rolls of the Postal Service in 2002**

O'Malley's second claim is that the Postal Service retaliated against her by removing her from its employment rolls on December 4, 2002, just a few days after she sought contact with an EEO counselor on November 26, 2002. The defendant argues: first, that O'Malley's removal from the Postal Service's employment rolls is a pure administrative formality not an adverse employment action; and second, that it was triggered by the Union's withdrawal of its grievance rather than by retaliatory animus.

There are factual disagreements between the parties with respect to the significance of the removal of an employee's name from the employment rolls and to the causal connection between O'Malley's request for EEO counseling and the removal of her name from the rolls. Although Potter's motion called the removal an "administrative formality," at oral argument counsel for the Postal Service suggested that removal from the rolls equates to termination of employment and admitted that an employee's removal from the rolls precludes ability to continue a union grievance. While O'Malley does not dispute that the Union withdrew its grievance, she alleges that it was induced to do so by the Postal Service. (Pl.'s Decl. ¶ 35.)

Summary judgment is not appropriate when genuine disputes of

material fact are unresolved. Fed. R. Civ. P. 56(c). A material fact is one that might affect the outcome of the case under governing law. Anderson, 477 U.S. at 248 (1986); Fakete v. Aetna, Inc., 308 F.3d 335, 337 (3d Cir. 2002). Under the law governing claims of retaliation under Title VII, a plaintiff attempting to advance a prima facie case of retaliation must show that: (1) the employee engaged in a protected employee activity; (2) the employee suffered an adverse employment action after or contemporaneous with that protected activity; and (3) a causal link exists between the protected activity and the employer's adverse action. Farrell v. Planters Lifesavers Co., 206 F.3d 271, 279 (3d Cir. 2000). Without further discovery as to the effects of a removal from the employment rolls and the circumstances of the Union's withdrawal of its grievance on O'Malley's behalf, it is impossible to determine as a matter of law whether O'Malley suffered an adverse employment action and whether the action was caused by protected EEO activity. Summary judgment is not appropriate at this time.

### **III. CONCLUSION**

Defendant's motion for summary judgment as to plaintiff's removal in October 2001, will be granted because plaintiff did not timely exhaust her administrative remedies. Defendant's motion for summary judgment as to plaintiff's removal from defendant's employment rolls in December 2002, will be denied

without prejudice pending discovery, because genuine issues of material fact remain (whether removal from the employment rolls constitutes an adverse employment action and whether there was a causal link between her protected EEO activity and her removal from the employment rolls of the Postal Service). An appropriate order follows.

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| v.            | : |               |
|               | : |               |
| JOHN E.POTTER | : | NO. 05-CV-986 |

ORDER

AND NOW, this 19th day of September, 2005, upon consideration of defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment (Paper No. 6), plaintiff's response thereto (Paper No. 10), and oral argument thereon, and for the reasons set forth in the foregoing MEMORANDUM, it is ORDERED that:

1. Defendant's Motion for Summary Judgment is **GRANTED** as to the claim of discrimination and retaliation for Plaintiff's termination in October 2001;

2. Defendant's Motion for Summary Judgment is **DENIED** as to the claim of retaliation for Defendant's removal of Plaintiff from Defendant's employment rolls in December 2002.

/s/ Norma L. Shapiro  
Norma L. Shapiro, S.J.