

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

JAMES HATCHER, :  
 :  
 Plaintiff, :  
 : CIVIL ACTION NO. 04-2130  
 v. :  
 :  
 JOHN E. POTTER, POSTMASTER :  
 GENERAL, UNITED STATES POSTAL :  
 SERVICE, :  
 :  
 Defendant. :

**MEMORANDUM**

BUCKWALTER, S.J.

December 7, 2005

Presently before the Court are Defendant's Motion for Summary Judgment on Second Amended Complaint and Opposition to Plaintiff's Emergency Motion (Docket No. 21), Defendant's Proposed Findings of Fact and Conclusions of Law (Docket No. 28) and Plaintiff's Memorandum of Law in Support of Plaintiff's Evidentiary Hearing Brief (Docket No. 30). As explained below, Defendant's Motion for Summary Judgment (Docket No. 21) is granted.

**I. PROCEDURAL HISTORY**

In his original Complaint, James Hatcher ("Plaintiff"), who pursues this lawsuit *pro se*,<sup>1</sup> alleges gender discrimination and disability discrimination against his employer, the United

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<sup>1</sup> Plaintiff pursues 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)). Courts must apply the applicable law, regardless of whether the *pro se* litigant cited the applicable law or referenced it by name. Id. at 248. While a *pro se* litigant is given some latitude with the respect to his pleadings, 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, 466 U.S. 147, 152 (1984), "[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."

States Postal Service (“Defendant”), for failing to allow him to use a mail cart when delivering mail and admonishing him for being late in returning from his mail route on August 2, 2003. Plaintiff requested pre-complaint processing on September 22, 2003, fifty-one days after the alleged incident of discrimination. Plaintiff’s EEO Complaint was dismissed pursuant to 29 C.F.R. § 1614.107(a)(2) for failure to contact an EEO counselor within forty-five days as required by 29 C.F.R. § 1614.105. (Dismissal of Formal EEO Compl. 1-2.)

After Plaintiff filed the instant suit in federal court, Defendant filed a Motion for Summary Judgment (Docket No. 6), claiming that Plaintiff did not exhaust his administrative remedies because he failed to contact an Equal Employment Opportunity (“EEO”) counselor within forty-five days of the complained of conduct. Plaintiff acknowledged that he contacted the EEO counselor fifty-one days after the conduct occurred but claimed that Defendant failed to provide him notice of the forty-five day requirement.

On March 22, 2005, this Court denied Defendant’s Motion for Summary Judgment because of lack of evidence as to whether Plaintiff had notice of the forty-five day deadline. The parties were given ninety days to conduct discovery on the issue of notice, and the Court scheduled an evidentiary hearing for determination of the notice issue.

On April 18, 2005 and June 10, 2005, respectively, Plaintiff filed his Amended Complaint (Docket No. 14) and Second Amended Complaint (Docket No. 19).<sup>2</sup> In his Second

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<sup>2</sup> Along with his Amended Complaint, Plaintiff filed his Motion to Amend the Pleadings (Docket No. 13). Plaintiff did not file a motion to amend with respect to his Second Amended Complaint (Docket No. 19). The Court never ruled on Plaintiff’s Motion to Amend the Pleadings (Docket No. 13). The Court will consider Plaintiff’s Second Amended Complaint (Docket No. 19) as it will not prejudice Defendant. The same time issue that applies to Plaintiff’s original claims also applies to the race discrimination claim added by Plaintiff in his Second Amended Complaint (Docket No. 19).

Amended Complaint, Plaintiff adds a claim of race discrimination. Defendant filed its Motion for Summary Judgment and Protective Order (Docket No. 17) on April 28, 2005 and Motion for Summary Judgment on Plaintiff's Second Amended Complaint and Opposition to Plaintiff's Emergency Motion (Docket No. 21) on June 21, 2005. An evidentiary hearing was held on June 22, 2005.

## **II. FINDINGS OF FACT**

An evidentiary hearing was held to determine whether plaintiff had notice of the forty-five day time limit of 29 C.F.R. § 1614.105.

As Plaintiff points out, Defendant concedes that Plaintiff did not have actual notice. Plaintiff also states in his Memorandum of Law that "granted, Mr. Hatcher [Plaintiff] was 6 days late when he contacted an EEO counselor on 22 September 2003." (Pl.'s Mem. 3; Tr. 4.)

Thus, the hearing was held to determine, as Plaintiff puts it, "whether [P]laintiff can be charged with having had constructive notice of the existence of poster 72," a poster notifying postal workers of the forty-five day time limit at issue in this case (hereafter "EEO poster").

Based upon the hearing, the Court finds the following facts:

1. From June 20, 2002 to August 2, 2003, Plaintiff delivered mail on Route 2602 at the Logan Station Post Office. (Tr. 11.)
2. Plaintiff did not see the EEO poster at Logan Station. Id. at 14.
3. Plaintiff testified that, as the assigned letter carrier on Route 2602, he was required to check out apartment keys in the morning and return the keys to the post office at night and sign them in and out at the "key desk." Id. at 11.
4. Sharon Roby-Wilson was the Manager of Customer Service at Logan Station Post

Office from 1989 to her retirement on January 31, 2004. Id. at 18-19.

5. Ms. Roby-Wilson oversaw the duties of four supervisors, approximately seventy-five carriers, twelve clerks, and maintenance employees. Primarily, her duties and responsibilities were the overall running of the station. Id. at 19.

6. Ms. Roby-Wilson managed Plaintiff from June 28, 2002 to August 2, 2003. Id. at 20.

7. Posting EEO rights posters was a mandatory duty for station managers. Id. at 19.

8. Discipline could result to managers who repeatedly failed to observe posting requirements for EEO posters. Id.

9. Station managers were required to ensure that posters were posted and easily available in areas that the employees could see. Id. at 20.

10. Periodically, Ms. Roby-Wilson would check to see that posters were in good condition, that there was no graffiti on them, that they were more or less visible to employees, and, during safety talks or service talks, would refer the employees to where the posters were located. Id. at 20.

11. Government Exhibits 3, 4 and 5 are standard EEO posters explaining how to file a complaint and how to present it. (Def.'s Ex. 3-5; Tr. 21.)

12. Those three EEO rights posters were posted from June 20, 2002 to August 2, 2003 at the Logan Station Post Office. (Tr. 21.)

13. Government Exhibit 3 was posted in an alcove leading down to the employee's swing [lunch] room. Id. at 21-22.

14. Government Exhibit 4 was posted outside of the key desk area which is adjacent

to the manager's office, and this was posted in an area where also employee job opportunities and safety issues were posted. Id. at 21.

15. Government Exhibit 4 was posted outside the key desk because the carriers on a daily basis would pick up their keys and they would have waiting time so it was in a good area where they could stop peruse before they got waited on. Id. at 21-22.

16. Government Exhibit 5 was posted on the back wall of the station, also outside the manager's office. Id. at 22.

17. Plaintiff's Exhibit P-1 was Plaintiff's handwritten map of Logan Station Post Office. Id. at 22-23.

18. Ms. Roby-Wilson identified and marked on Plaintiff's Exhibit P-1 where Government Exhibit 3 was located on the map in the alcove heading down to the lunch area. Id. at 23. Ms. Roby-Wilson marked the word "alcove" to identify the location. Id. at 24.

19. Ms. Roby-Wilson identified and marked on Plaintiff's Exhibit P-1 where Government Exhibit 4 was located on the map as the "key desk area." Id.

20. Ms. Roby-Wilson identified and marked on Plaintiff's Exhibit P-1 where Government Exhibit 5 was located on the map as "outside the manager's office." Id.

21. Ms. Roby-Wilson identified the location of Government Exhibits 3, 4 and 5 on Plaintiff's Exhibits P-2, P-3 and P-4, which are photographs of Logan Station Post Office in December 2004. Id. at 24-25.

22. Ms. Roby-Wilson testified she was certain that Government Exhibits 3, 4 and 5 were posted at Logan Station from June 20, 2002 to August 2, 2003 because she remembers posting them herself. Id. at 25.

23. Ms. Roby-Wilson testified that she also remembered that there were “several audits during that, right around that time frame.” Id. She testified “[t]his was after 9-11-2001 and during that time not only was it labor relations posters but there were safety posters, there were posters referring to bomb threats, there were a whole lot of issue[s] that mandatory postings had to be made.” Id. She also testified that these audits took place “every four months.” Id. at 26.

24. Ms. Roby-Wilson testified that the recurring audits, her recollection that she regularly inspected the posters for graffiti, and her personal recollection that she posted the EEO rights posters at Logan Station between June 20, 2002 and August 2, 2003 all combined to make her confident that the EEO posters were posted in the above referenced locations at the relevant time period. Id.

25. Government Exhibits 3, 4 and 5 state that a claimant has forty-five days to file an EEO complaint. Id. at 27.

Based upon the above facts, the Court finds that the EEO posters were posted in areas where employees worked and by which they regularly passed. Further, the Court finds that the content of the posters was reasonably geared to notify employees of the forty-five day limitations period, giving Plaintiff had constructive notice of the forty-five day limit.

### **III. CONCLUSIONS OF LAW**

Defendant moves for summary judgment based on Plaintiff’s failure to timely exhaust his administrative remedies. Plaintiff acknowledges that he filed his claim after the forty-five day deadline set forth by 29 C.F.R. § 1614.105(a)(1), but Plaintiff claims that he did not receive notice of the deadline and thus the extension provisions of 29 C.F.R. § 1614.105(a)(2) should

apply. Plaintiff also claims that equitable tolling should apply. After a brief discussion of the forty-five day deadline of 29 C.F.R. § 1614.105, the Court will analyze Plaintiff's arguments for extending the forty-five day deadline.

**A. Forty-Five Day Limit of 29 C.F.R. § 1614.105**

In his Second Amended Complaint, Plaintiff alleges race, disability and gender discrimination against Defendant. Before filing his Title VII claims (race and gender) and Rehabilitation Act of 1973 claim (disability) in federal court, Plaintiff was required to exhaust his administrative remedies. Robinson v. Dalton, 107 F.3d 1018, 1020 (3d Cir. 1997) (plaintiff bringing Title VII action must exhaust his administrative remedies); Spence v. Straw, 54 F.3d 196, 201 (3d Cir. 1995) (plaintiff pursuing action under the Rehabilitation Act must first exhaust his administrative remedies). “[E]xhaustion requires both consultation with an agency counselor and filing a . . . complaint within the required times.” Robinson, 107 F.3d at 1021.

A person pursuing an employment discrimination claim must initiate contact with an EEO counselor within forty-five days of the alleged discriminatory action. 29 C.F.R. § 1614.105(a)(1). To notify employees of the forty-five day requirement, employers are required to:

publicize to all employees and post at all times the names, business telephone numbers and business addresses of the EEO Counselors (unless the counseling function is centralized, in which case only the telephone number and address need be publicized and posted), a notice of the time limits and necessity of contacting a Counselor before filing a complaint and the telephone numbers and addresses of the EEO Director, EEO Officer(s) and Special Emphasis Program Managers.

29 C.F.R. § 1614.102(b)(7). This forty-five day requirement is not jurisdictional; it is construed as a statute of limitations. Robinson, 107 F.3d at 1021-22. Section 1614.105(a)(2) provides

several bases for extending the forty-five day limit, including where employees were not notified of the forty-five day limit and where circumstances beyond an employee's control prevented him from contacting a counselor within forty-five days. The section reads as follows:

The agency or the Commission shall extend the 45-day time limit in paragraph (a)(1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

29 C.F.R. § 1614.105(a)(2).

### **B. Lack of Notice as to the Forty-Five Day Requirement**

The Court will first examine Plaintiff's allegation that he did not receive notice of the forty-five day requirement. In determining whether to extend the forty-five day deadline for lack of notice, courts have applied a two-part test. First, the Court must determine if the requisite EEO posters, which would provide information as to the forty-five day requirement, were posted, thus providing constructive notice. Clark v. Runyon, 116 F.3d 275, 277 (7th Cir. 1997); Johnson v. Runyon, 47 F.3d 911, 918 (7th Cir. 1995). Second, the Court must determine, by analyzing the placement of the posters, if the posters were reasonably geared to inform the complainant of the time limits. Clark, 116 F.3d at 277; Johnson, 47 F.3d at 918. Posters displayed in locations where postal employees work and by which they regularly pass are considered to pass this "reasonably geared" threshold. Clark, 116 F.3d at 277.<sup>3</sup>

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<sup>3</sup> Plaintiff cites an unreported Third Circuit case, Shenkan v. Potter, 71 Fed. Appx. 893, 896 (3d Cir. 2003), for the proposition that 29 C.F.R. § 1614.105(a)(2) should be interpreted to mean that if Plaintiff "could prove that he was never notified and that he was not otherwise aware of the time limits, his claims would not in fact be barred for his failure to contact the counselor within the proscribed [forty-five] days." The Third Circuit did not go on to explain this



In the instant matter, utilizing the test applied in both Clark and Johnson to the facts gathered at the June 22, 2005 hearing, the Court concludes that the deadline should not be extended because of lack of notice. First, with respect to constructive notice, three EEO posters, which are Government Exhibits 3, 4 and 5, specifically stated, among other important information on how to file an EEO complaint, that a claimant had forty-five days to contact an EEO counselor. These posters provided constructive notice of the forty-five day period.

With respect to the second part of the test, based on the evidence gathered at the hearing, the three EEO posters were placed in areas where employees worked and by which they regularly passed. Government Exhibit 3 was posted in an alcove leading down to the employee's lunch room. (Tr. 21, 22.) Government Exhibit 4 was posted outside of the key desk area because the carriers on a daily basis would pick up their keys there and would also congregate there. (Tr. 22.) Government Exhibit 5 was posted on the back wall of the station outside of the manager's office. (Tr. 22.) In examining the evidence gathered at the hearing, it is clear that these posters were displayed in areas where postal employees, including Plaintiff, worked and by which they

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statement. Instead, the Third Circuit focused on the fact that the plaintiff in the case did not aver that he was unaware of the forty-five day period and the fact that he was represented by an attorney. Id. Because his attorney should have been aware of the forty-five day period, the Third Circuit found that the plaintiff should have been aware of the period too. Id. The Third Circuit found no reason to disturb the district court's decision to dismiss the case for failure to exhaust his administrative remedies. Id.

The Court finds more persuasive the reported case, Bonham v. Dresser Industries, Inc., 569 F.2d 187 (3d Cir. 1977). In that case, the Third Circuit, applying an analogous notice requirement under the Age Discrimination in Employment Act, 29 U.S.C. § 621, et. seq, wrote, "[i]f the employer complied with the relevant posting regulations, an employee's assertion that he never saw any notices should not itself require tolling of the 180 day period in which to file a notice of intent to sue." Bonham, 569 F.2d at 193 n.7. The Court employs the test used in both Clark and Johnson, which parallels the test of Bonham, because the notice provisions of 29 C.F.R. § 1614.105(a)(2) were specifically applied in Clark and Johnson.

regularly passed. The second part of the test is satisfied.

Because the Court finds that the placement of the EEO posters and the content of the posters were reasonably geared to notify employees of the forty-five day limitations period, both parts of the test applied in Clark and Johnson are met, and therefore the Court will not extend the forty-five day deadline of 29 C.F.R. § 1614.105 due to lack of notice.

### **C. Equitable Tolling of the Forty-Five Day Period**

The Court will next examine Plaintiff's argument regarding equitable tolling. According to Dougherty v. Henderson, 155 F. Supp. 2d 269, 275 (E.D. Pa. 2001), the Third Circuit has ruled that the forty-five day time limit of 29 C.F.R. § 1614.105(a)(2) may be equitably tolled "(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." (quoting Robinson, 107 F.3d at 1022) (citation omitted) (internal quotations omitted).

In his Memorandum of Law In Support of Plaintiff's Post Evidentiary Hearing Brief, Plaintiff argues that the second exception should apply. Specifically, Plaintiff, for the first time, claims that health issues prevented him from contacting an EEO counselor within the forty-five day period. Notably, Plaintiff failed to make this argument on previous occasions.<sup>4</sup>

The Court finds Plaintiff's health excuse unconvincing.<sup>5</sup> While the Court does not mean

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<sup>4</sup> Specifically, Plaintiff failed to raise this health argument in previous briefs (Docket Nos. 9, 11) when he replied to Defendant's initial Motion for Summary Judgment (Docket No. 6) and Defendant's Reply (Docket No. 10).

<sup>5</sup> Plaintiff cites Harris v. Potter, No. 03-3522, 2004 WL 1613578 (E.D. Pa. July 16, 2004), for the proposition that his health issues, and his inability to file on time because of them, should serve to "unbar" his claim. (Pl.'s Mem. 9.) The Court disagrees with Plaintiff's reliance

to minimize Plaintiff's health problems, it is clear that Plaintiff could have filed on time despite his health issues. As he writes in his brief, Plaintiff returned to his job at Logan Station in Philadelphia to complete a worker's compensation application on August 28, 2003. (Pl.'s Mem. 9.) The fact that Plaintiff filed for worker's compensation during the forty-five day period shows that he could have contacted an EEO counselor. See Clark, 116 F.3d 275 at 278-279 (affirming the district court's ruling that health issues did not prevent an employee from contacting an EEO counselor when, during the forty-five day period, she filed for unemployment compensation, visited the swing room of her former place of employment, made phone calls and was able to leave her house sporadically). Second, Plaintiff's evidence, which consists of a doctor's note indicating that Plaintiff had high blood pressure and that stress and aggravation from his job contributed to his cardiac problems, is unconvincing as it does not comment on Plaintiff's ability to carry on his affairs. Therefore, the Court finds no reason to extend the forty-five day period because of Plaintiff's health issues.

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on Harris. The case involved an employee who failed to contact an EEO counselor within the forty-five day limit due to her mental illness. Harris, 2004 WL 1613578, \*2. The district court applied the concept of equitable tolling. Id. at 3-4.

Based on the persuasive evidence presented by the plaintiff in Harris, in which the plaintiff's mental illness was described as "severe in nature" and having "markedly compromised her functioning," among other evidence, the district court found that the plaintiff's mental illness was debilitating and that the mental illness had prevented her from exercising her rights. Id. at 5-6.

Such is not the case in the instant matter. First, Plaintiff's health issue did not involve mental illness. Second, Plaintiff's health issue was not as debilitating as the plaintiff in Harris. In the instant matter, Plaintiff was still able to file for unemployment, among other things. Third, Plaintiff's evidence, which consists of a doctor's note indicating that Plaintiff had high blood pressure and that stress and aggravation from his job contributed to his cardiac problems, is insufficient. This note makes no mention of his inability to carry on his affairs as the evidence in Harris did.

#### **IV. CONCLUSION**

For the foregoing reasons, Defendant's Motion for Summary Judgment on Plaintiff's Second Amended Complaint is granted because Plaintiff failed to exhaust his administrative remedies. An order follows.

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

|                               |   |                          |
|-------------------------------|---|--------------------------|
| JAMES HATCHER,                | : |                          |
|                               | : |                          |
| Plaintiff,                    | : |                          |
|                               | : | CIVIL ACTION NO. 04-2130 |
| v.                            | : |                          |
|                               | : |                          |
| JOHN E. POTTER, POSTMASTER    | : |                          |
| GENERAL, UNITED STATES POSTAL | : |                          |
| SERVICE,                      | : |                          |
|                               | : |                          |
| Defendant.                    | : |                          |

**ORDER**

AND NOW, this 7<sup>th</sup> day of December, 2005, upon consideration of Defendant's Motion for Summary Judgment on Second Amended Complaint and Opposition to Plaintiff's Emergency Motion (Docket No. 21), Defendant's Proposed Findings of Fact and Conclusions of Law (Docket No. 28) and Plaintiff's Memorandum of Law in Support of Plaintiff's Evidentiary Hearing Brief (Docket No. 30), it is hereby **ORDERED** that Defendant's Motion for Summary Judgment on Second Amended Complaint and Opposition to Plaintiff's Emergency Motion (Docket No. 21) is **GRANTED**. Judgment is therefore entered in favor of defendant John Potter and against plaintiff James Hatcher.

This case is **CLOSED**.

BY THE COURT:

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RONALD L. BUCKWALTER, S.J.