

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

CHARLES VOLPINI, : CIVIL ACTION
 :
 Plaintiff, :
 :
 v. :
 :
 RESOLUTION TRUST CORPORATION :
 :
 and :
 :
 RICKI HELFER, Chairman, FDIC, :
 : NO. 96-7535
 Defendants. :

MEMORANDUM

R.F. KELLY, J. AUGUST , 1997

Defendants, Resolution Trust Corporation ("RTC") and Ricki Helfer,¹ have filed a Motion to Dismiss Plaintiff's Amended Complaint, or in the alternative, for Summary Judgment.²

Count I of Plaintiff's complaint alleges a cause of action under The Rehabilitation Act of 1973, 29 U.S.C. § 791 et sec., arising out of Plaintiff's employment in a temporary position at the RTC's Valley Forge office.

Count II and III of Plaintiff's complaint alleged tort claims for damages for the intentional (Count II) and negligence (Count III) infliction of emotional distress.

¹The RTC was terminated by statute on December 31, 1995. The corporate assets and liabilities of the RTC were transferred to the FSLIC Resolution Fund. 12 U.S.C. § 1441a(m)(1) and (2). The Federal Deposit Insurance Corporation ("FDIC") is manager of the FSLIC Resolution fund. 12 U.S.C. § 1821a(a)(1).

²The only difference between Plaintiff's original complaint and his amended complaint is the addition of chairman Helfer to the caption as a Defendant.

FACTUAL BACKGROUND

On December 27, 1993, Plaintiff Charles Volpini was hired by the RTC to work in a temporary position as an Asset Market Specialist in the RTC's Valley Forge Office. (Defense Exhibit A, Notification of Personal Action.) Plaintiff was discharged from that temporary position on October 11, 1994. (Defense Exhibit B, Notification of Personal Action). Plaintiff sought EEO's counseling in November 1994 alleging that he suffered from hearing loss and depression and was therefore disabled and that he had been discriminated against on that basis. (Defense Exhibit C). The matter was not resolved through counseling, and by letter dated July 11, 1995, Plaintiff was notified of his right to file a formal complaint of discrimination with Defendant RTC. At the same time, Plaintiff was informed of his rights and responsibilities in the formal discrimination complaint process, including the requirement that a formal complaint be submitted within fifteen (15) calendar days of Plaintiff's receipt of that Notice, as set forth in 29 C.F.R. § 1614.106(b). (Defense Exhibit D).

By letter dated July 21, 1995, Plaintiff's attorney notified all parties that Plaintiff would not proceed with the formal complaint process, but instead would file a complaint "directly with the Federal District Court." (Defense Exhibit E).

In response to this letter, Defendant RTC's Office of Equal Opportunity ("OEO") immediately informed Plaintiff's attorney that it was necessary for Plaintiff to file a formal complaint with the Defendant RTC before proceeding to court. (Defense Exhibit F).

Plaintiff did not file a formal complaint of discrimination before filing his complaint in the Federal District Court. (Defense Exhibit F, paragraph 9).

On August 14, 1995, Plaintiff filed a complaint in the United States District Court for the Eastern District of Pennsylvania Volpini v. Resolution Trust Corporation, Civil Action No. 95-5188, alleging disability discrimination and intentional and negligent infliction of emotional distress. (Defense Exhibit G). That complaint was dismissed for failure to exhaust administrative remedies.

On February 26, 1996, more than seven months after receiving the July 11, 1995 Notice of Right to File a Formal Discrimination Complaint, which included notice of the 15-day time limitation, Plaintiff finally filed a formal EEO administrative complaint with Defendant RTC. (Defense Exhibit I, RTC Formal Complaint of Discrimination).

On November 7, 1996, Plaintiff filed the present action raising identical claims of discrimination under the Rehabilitation Act and intentional and negligent infliction of emotional distress. Defendant RTC filed a motion to dismiss on February 10, 1997, and Plaintiff filed an amended complaint, adding only Defendant Helfer to the caption as a party in official capacity while that motion was pending. On April 30, 1997, this Court denied the RTC's motion as moot, without prejudice to refile a motion to dismiss Plaintiff's amended complaint.

Defendant first contends that Plaintiff's actions should

be dismissed because Plaintiff has failed to state a claim for which relief can be granted for failure to exhaust administrative remedies in a timely manner.

Under the Third Circuit's recent decision in Robinson v. Dalton, 107 F.3d 1018 (3d Cir. 1997), a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) is considered an appropriate vehicle when a plaintiff has failed to exhaust administrative remedies that are a prerequisite to his suit. "'A complaint does not state a claim upon which relief may be granted unless it asserts the satisfaction of the precondition to suit specified by Title VII: prior submission of the complaint to the EEOC [] for conciliation or resolution.'" ID, 107 F.3d at 1022, quoting Hornsby v. United States Postal Service, 787 F.2d 87, 90 (3d Cir. 1986).

A Plaintiff must exhaust administrative remedies before bringing suit under the Rehabilitation Act. Spence v. Straw, 54 F.3d 196, 200 (3d Cir. 1995). Accordingly, a federal employee filing a complaint charging discrimination under the Rehabilitation Act must satisfy the same administrative requirements as those governing a complaint of race or gender discrimination under Title VII.

Both Title VII and the Rehabilitation Act have an administrative exhaustion requirement with which federal employees must timely comply before filing a civil action in federal court. Thaxton v. Runyon, 1995 WL 128031, *2 (E.D. Pa. March 25, 1995). Failure to exhaust administrative remedies is grounds for dismissal or summary judgment for failure to state a claim. See Robinson,

supra.

To start the administrative process for a claim under the Rehabilitation Act, a federal employee must contact an EEO counselor within forty-five days of the alleged discriminatory conduct, to attempt to resolve the matter in an informal procedure. 29 C.F.R. § 1614.105(a)(1). If the matter is not resolved through this informal procedure, the employee must then file a formal administrative complaint with the agency within fifteen days of receiving notice of his right to do so. 29 C.F.R. § 1614.106(b). Failure to file a formal administrative complaint in a timely manner bars an action in federal court, absent an adequate showing by the employee of waiver, estoppel, or equitable tolling. See Thaxton, supra, Mackay v. United States Postal Service, 607 F. Supp. 271, 276 (E.D. Pa. 1985), Keene v. Costle, 589 F. Supp. 687 (E.D. Pa. 1984). The defense does not deny that Plaintiff started the informal administrative process by contacting an EEO counselor on or about November 9, 1994. However, after receiving his Notice of Right to File a Formal Discrimination Complaint, which included notice of the 15-day time limit and the appropriate forms, Plaintiff never took the requisite next step of filing a formal administrative complaint. Plaintiff never filed a formal administrative complaint until February 26, 1996, approximately seven months past the 15-day time limit.

The question as to whether Plaintiff had exhausted his administrative remedies was decided by this Court in Volpini v. Resolution Trust Corp., 1996 WL 312216 (E.D.Pa. Jan. 25,

1996)("Volpini I"), which was based upon a complaint and a procedural history virtually identical to the ones presented in this present action. The belated filing of Plaintiff's formal administrative complaint, after the dismissal of the prior action, is of no legal consequence. The only difference between the two cases is that, when I dismissed Plaintiff's first complaint, Plaintiff had not filed a formal administrative complaint. He has in the intervening periods filed a formal complaint but it is untimely. Consequently, I find that due to the untimely filing of the Plaintiff's formal administrative complaint, Plaintiff has failed to state a claim under the Rehabilitation Act.

Plaintiff's failure to timely file the administrative complaint cannot be excused by waiver, tolling or estoppel. The applicable EEOC regulation provides that the agency "shall extend the time limits [for filing a complaint] when the complainant shows that he/she was not notified of the time limits and was not otherwise aware of them, was prevented by circumstances beyond the complainant's control from submitting the matter within the time limits; or for other reasons considered sufficient by the agency." 29 C.F.R. § 1613.214(a)(4) 1990. The Plaintiff in this case has failed to exercise due diligence in pursuant of this claim. He received explicit written notice of his rights, obligations and time limits with respect to the formal EEOC complaint process. Despite this, Plaintiff, who was represented by counsel, consciously elected to bypass the formal complaint process, despite a follow-up telephone call from the RTC's Office of Employment

Opportunity warning of the necessity to exhaust administrative remedies. See Defendant's Exhibits E, F and G. I find that there is no basis to toll the 15-day time limit for the filing of a formal complaint as required by 29 C.F.R. § 1614(b). Nothing has changed since the filing of my Memorandum and Order of January 25, 1996 under Charles Volpini v. Resolution Trust Corporation, No. 95-5188.

Accordingly, Defendant's request that Plaintiff's claim under the Rehabilitation Act will be DISMISSED.

In Counts I and II of the complaint, Plaintiff seeks damages for intentional and negligent infliction of emotional distress. These claims are for injuries allegedly sustained while he was acting in the scope of his federal employment. Plaintiff's exclusive remedies, if any, are provided by the Federal Employment Compensation Act ("FECA"), 5 U.S.C. § 8101 et seq. When an individual brings a tort action against the United States for injuries allegedly sustained while he was a federal employee, and the injuries are within the scope of FECA, that statute provides the exclusive remedy. 5 U.S.C. § 8102(a). If an injury is within the scope of FECA's coverage, its remedies are exclusive, and the employee may not bring any other claim for compensation against the government. Lockheed Aircraft Corp. v. United States, 460 U.S. 190, 194 (1983); Ezekiel v. Michael, 66 F.3d 894 (7th Cir. 1995). For federal employees, FECA provides "a substitute for and not a supplement to tort actions." Cardwell v. United States, 1992 WL 368495, at *5 n.3 (E.D. Pa. Dec. 3, 1992), aff'd, 6 F.3d 778 (3d

Cir. 1993, cert. denied, 114 S.Ct. 1610 (1994). As the court pointed out in the case of Heilman v. United States, 731 F.2d 1104, 1109 (1984), "Indeed, if a claim is covered under FECA, then the federal courts have no subject matter jurisdiction to entertain the action, since the United States has not otherwise waived its sovereign immunity to suit. See Joyce v. United States, 474 F.2d 215, 292 (3d Cir. 1973)."

The Secretary of Labor's decision on whether FECA covers a particular injury is final and not reviewable by the courts. Heilman, supra; DiPippa v. United States, 687 F.2d 14, 16 (3d Cir. 1982). See also 5 U.S.C. § 8128(b).

Recent cases hold that emotional distress is covered under FECA. See Swafford v. United States, 998 F.2d 837 (10th Cir. 1993); Klescewski v. United States, 843 F.Supp. 543 (D.S.D. 1993); Cardwell, supra; McDaniel v. United States, 970 F.2d 194, 197 (6th Cir. 1992). In any event, the claim must first be pursued under FECA, and as the Third Circuit has held, only the Secretary of Labor, and not the courts, may decide whether it comes within the scope of FECA.

I therefore find that this Court lacks jurisdiction over Plaintiff's claim for intentional and negligence infliction of emotional distress.

Even if FECA was not the exclusive remedy for Plaintiff to pursue his tort claims, this Court would still lack subject matter jurisdiction over those claims because he failed to comply with the strict administrative exhaustion requirements of the

Federal Tort Claims Act ("FTCA"). Plaintiff's claims for intentional and negligent infliction of emotional distress sound in common law tort, and, were it not for FECA, would be governed by the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) & 2671-2680. The FTCA is the exclusive remedy for claims for money damages sounding in tort for injuries resulting from acts of federal agencies or employees. Plaintiff has failed to comply with the administrative claim requirements of 28 U.S.C. § 2675(a), which deprives this Court of subject matter jurisdiction.

In any event, Plaintiff's complaint does not state a claim for intentional infliction of emotional distress. Section 46 of the Restatement (Second) of Torts, which has been adopted by the State of Pennsylvania, provides that "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such distress..." The "essence" of the tort is "outrageous" conduct by the tortfeasor. Clark v. Township of Falls, 890 F.2d 611, 623 (3d Cir. 1989), citing Kazatsky v. King David Memorial Park, Inc., 527 A.2d 988, 991 (Pa. 1987); Hightower v. Philadelphia, 1995 WL 678661, at *4 (E.D. Pa. Nov. 13, 1995). Moreover, to constitute the tort of intentional infliction of emotional distress, conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be atrocious, and utterly intolerable in a civilized community." Formica v. Galantino, 1989 WL 100836 (E.D. Pa. Aug. 29, 1989), quoting Madreperla v. Williard Co., 606 F.Supp. 874, 880 (E.D. Pa. 1985).

Plaintiff's complaint does not allege facts that amount to outrageous or extreme conduct on the part of the RTC. The complaint alleges only that the RTC failed to reasonably accommodate his disabilities and that they discharged him. For this reason, Count III of Plaintiff's complaint fails to state a claim under Pennsylvania law for intentional infliction of emotional distress.

I will therefore enter the following Order.

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 RICKI HELFER, Chairman, FDIC, :
 : NO. 96-7535
 Defendants. :
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O R D E R

AND NOW, this day of August, 1997, upon consideration of Defendants' Motion to Dismiss Plaintiff's Amended Complaint, or in the Alternative, for Summary Judgment, and the Memorandum of Law in support thereof, it is hereby ORDERED that Defendants' motion is GRANTED, and Plaintiff's amended complaint is DISMISSED with prejudice.

BY THE COURT:

Robert F. Kelly,

J.