

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

RONALD C. GULEZIAN : CIVIL ACTION  
 :  
 v. :  
 :  
 DREXEL UNIVERSITY : NO. 98-3004

M E M O R A N D U M

WALDMAN, J.

March 19, 1999

Plaintiff asserts claims for employment discrimination under the Age Discrimination Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 et seq. and for breach of contract. He alleges that he was denied tenure by defendant because of his age and in violation of the criteria for tenure set forth in defendant's Faculty and Administrators Handbook which he states constituted a contract. Defendant filed a Motion to Dismiss on the grounds that plaintiff failed to file a timely administrative charge with the EEOC and that his contract claim is facially barred by the statute of limitations.

In his complaint, plaintiff alleges that he was denied tenure by letter of April 19, 1994 from the Provost of Drexel and "filed a timely charge of age discrimination against Drexel with the Equal Employment Opportunity Commission ("EEOC") on or about February 2, 1995." He alleges that he received a right to sue letter less than ninety days before filing suit in the summer of 1998.

The filing of a charge with the EEOC within 300 days of the alleged discriminatory action is a prerequisite to the maintenance of an ADEA suit. See 29 U.S.C. § 626(d)(2); Courtney v. La Salle University, 124 F.3d 499, 502 (3d Cir. 1997). The limitations period for a claimant who alleges a discriminatory denial of tenure resulting in subsequent termination begins to run on the day he receives notice of the adverse tenure decision. See Delaware State College v. Ricks, 449 U.S. 250, 259 (1980). On its face, plaintiff's ADEA claim was not subject to dismissal.

Defendant asserted in its brief that the date of February 2, 1994 was "an error" and submitted evidence to substantiate the assertion. In its brief, defendant invited the court to consider matters beyond the complaint and to treat the motion as one for summary judgment. With his response, plaintiff submitted an affidavit as well as various exhibits and asked that the motion be treated as one for summary judgment. In its reply brief, defendant treated the motion as one for summary judgment.

Plaintiff acknowledged in his affidavit that he did not in fact file an EEOC charge on February 2, 1994. It would be impractical and unfair to predicate a ruling on timeliness on a facial allegation which plaintiff has now abandoned. As the parties have submitted the evidence on which each relies for their respective positions on the question of timeliness, it is

appropriate to treat the instant motion as one for summary judgment and the court will do so.

In deciding a motion for summary judgment on limitations grounds, a court construes the record in a light most favorable to plaintiff and determines whether there are genuine issues of material fact regarding the timeliness of the plaintiff's claims and whether defendant is entitled to judgment as a matter of law. While the parties draw different legal conclusions from the evidence presented, they rely on the same evidence and the underlying facts are thus essentially uncontroverted.<sup>1</sup> The pertinent facts are as follow.

Plaintiff was an assistant professor in defendant's College of Business and Administration. His services were engaged on an annual basis successively for the academic years of 1988-89 through 1994-95. By letter of April 19, 1994, defendant's Provost informed plaintiff that he would not receive

---

<sup>1</sup> Defendant does contend that the portion of plaintiff's affidavit regarding the date he received notice of the denial of tenure should be disregarded because it consists of conclusory statements and speculation. The court disagrees. While plaintiff does not have a specific recollection of the date he received the letter providing such notice, he avers that the earliest day would have been April 25, 1994. He bases this on his contemporaneous knowledge of the internal mail system through which it was delivered and the days he was at work in April 1994. These are matters he is competent to testify about and which provide an uncontroverted factual basis for his conclusion. Plaintiff's statement that he "may" have received notice as late as April 27, 1994 is more speculative, but is immaterial in view of the court's analysis.

tenure and that as a result his services would be terminated at the conclusion of the next academic year. At the time, plaintiff was 54 years old and satisfied the criteria for tenure described in defendant's Faculty and Administrators Handbook. The Provost's letter was sent through the University's internal mail delivery system. Plaintiff did not receive the letter until April 25, 1994.

Plaintiff sought assistance in reversing the tenure decision from the American Association of University Professors and on December 19, 1994 engaged legal counsel. Plaintiff telephoned the EEOC on February 2, 1995 and again on February 7, 1995 to request an appointment to present a charge of age discrimination. He was offered an appointment for February 16, 1995. On February 16, 1995, plaintiff went to the EEOC to file a charge of age discrimination against Drexel. At that time he completed an Intake Questionnaire. In this form, plaintiff checked boxes indicating he was discriminated against by Drexel because of age. He stated that he was denied tenure, resulting in termination of employment. He provided no substantive details.

Plaintiff then met with an EEOC employee who was unable to complete a formal charge that day because of a backlog of interviews. The employee scheduled plaintiff for a follow-up interview on February 25, 1995. Plaintiff was given an

appointment notice which stated the appointment was "to have an intake interview with an Investigator concerning the possible filing of a charge of employment discrimination."

On February 21, 1995, plaintiff appeared for his appointment and related the basis of his charge to the EEOC interviewer. The interviewer told plaintiff to submit a written statement describing the basis he had related for the charge of discrimination. Plaintiff telefaxed a statement detailing the basis for his claim on February 23, 1995. After receiving this information, the EEOC officer drafted a formal charge and affidavit and mailed them to plaintiff with a cover letter dated March 7, 1995. The cover letter informed plaintiff that he should proceed promptly as "a charge must be filed within time limits imposed by law." Plaintiff executed the charge and affidavit on March 9, 1995 and delivered them to the EEOC on March 10, 1995.<sup>2</sup> The charge was filed and assigned a charge number on that day. On March 31, 1995, the EEOC notified Drexel of the charge and offered to provide conciliation. Internal EEOC intake records list February 16, 1995 as the "inquiry date" and "received date" for plaintiff's charge.

Contrary to plaintiff's contention, the presentation of

---

<sup>2</sup> It may reasonably be inferred that it took two days for plaintiff to receive the EEOC letter of March 7th. It thus appears he executed and delivered the charge form within 24 hours of receiving it.

an intake questionnaire does not automatically satisfy the administrative filing requirement. See, e.g., Diez v. Minnesota Mining and Mfg. Co., 88 F.3d 672, 677 (8th Cir. 1996)

(questionnaire not charge absent evidence to show it was intended to function as charge); Early v. Bankers Life and Cas. Co., 959 F.2d 75, 80 (7th Cir. 1992) (to treat intake questionnaires automatically as charges would dispense with the requirement of notification of prospective defendant); Kocian v. Getty Refining & Marketing Co., 707 F.2d 748, 754-55 (3d Cir.) (Title VII claim time barred where intake form presented within limitations period but formal charge filed after period expired), cert. denied, 464 U.S. 852 (1983).

A communication to the EEOC in or reduced to writing, including an intake questionnaire, may constitute a charge if it is "of a kind that would convince a reasonable person that the grievant has manifested an intent to activate the Act's machinery." Bihler v. Singer Co., 710 F.2d 96, 99 (3d Cir. 1983). In making such a determination, courts essentially consider the content and effect of the communication. Relevant considerations are "what the claimant and the EEOC personnel said to each other, what the questionnaire form said and what the EEOC actually did in response to the receipt of the questionnaire." Diez, 88 F.3d at 676 (noting Seventh Circuit test which "distinguish[es] between questionnaires that are preliminary to a charge and those that function as a charge").

Courts have held that intake questionnaires or other communications do not constitute a charge where the EEOC advises the grievant that he will need to provide further information and get back in touch with the agency to complete a formal charge and commence an investigation. See Diez, 88 F.3d at 677; Perkins v. Silverstein, 939 F.2d 463. 470 (7th Cir. 1991); Michelson v. Exxon Research and Engineering co., 808 F.2d 10-05, 1010 (3d Cir. 1987) (writing alleging age discrimination by employer did not constitute charge although it was assigned a charge number where EEOC advised complainant more information was needed and to get back in touch with the agency); Berger v. Institute of Pennsylvania Hospital, 1989 WL 48076, \*1 (E.D. Pa. May 8, 1989) (conclusory intake questionnaire did not constitute charge where EEOC informed complainant more information was required and after follow-up communications she filed a formal charge).

The EEOC clearly alerted plaintiff on February 16, 1995 that further information and follow-up on his part were required to initiate a charge and gave plaintiff a written notice of a future appointment for an interview "concerning the possible filing of a charge of discrimination." It is clear that the EEOC at that time did not regard or treat plaintiff's intake questionnaire as a charge and no reasonable complainant could have perceived otherwise. The EEOC interviewer made clear to plaintiff on February 21, 1995 that he needed to provide the

agency with a written statement describing the basis for his claim of age discrimination. The first submission by plaintiff to the EEOC which may reasonably be characterized as a charge was the statement telefaxed on February 23, 1995. This was 304 days after plaintiff received the Provost's letter.<sup>3</sup>

The 300 day filing requirement, however, is not jurisdictional. It is akin to a statute of limitations and is thus subject to equitable tolling. See Zipes v. Trans World Airlines, 455 U.S. 385, 393 (1982); Robinson v. Dalton, 107 F.3d 1018, 1021 (3d Cir. 1997). Although a plaintiff need not expressly plead the doctrine, his allegations or averments must be "sufficient to activate the doctrine of equitable tolling." Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1392 (3d Cir. 1994). Plaintiff's uncontroverted averments about his interaction with the EEOC are sufficient to implicate the doctrine in this case.

A plaintiff may justifiably rely on formal communications from the EEOC. See Robinson, 107 F.3d at 1023. The time for filing a charge may be extended if the complainant "was prevented by circumstances beyond his control from submitting the matter within the time limits." Id. at 1022 (citing EEOC regulations). Equitable tolling has been applied

---

<sup>3</sup> Even assuming plaintiff received the Provost's letter on April 27, 1994, this would be 302 days later.

where plaintiffs appeared at the EEOC ready to make a timely charge and were mistakenly led to believe by the scheduling of a follow-up meeting beyond the limitations period that their subsequent filing of a charge would be proper. See Gray v. Phillips Petroleum Co., 858 F.2d 610, 616 (10th Cir. 1988).

Equitable tolling may be justified when the EEOC's conduct misleads a plaintiff to delay his filing of a charge. Kocian, 707 F.2d at 754 n.9. The plaintiff in Kocian filled out an EEOC intake form within the limitations period and met with an EEOC officer to prepare a formal charge. The officer mailed the charge to the plaintiff for her signature one day after the time limit. It was at least fourteen days later that the plaintiff mailed a signed formal charge to the EEOC. EEOC records showed that the charge was not received by the agency until twenty-five days later. The Court found that equitable tolling in these circumstances was not justified.

Significantly, however, the Court in Kocian noted that the result might well be different if the plaintiff had filed her charge several days late because of "bureaucratic delay" rather than her own neglect. Id. at 754. The Court noted that "there is no allegation that the EEOC refused to process Ms. Kocian's charge when she initially visited the agency." Id. at 755 n.10.

Plaintiff timely appeared at the EEOC to file a discrimination charge. He first sought an appointment for that purpose on February 2, 1995 but the earliest appointment he was offered was February 16th. A charge could not be completed on

that date because of a backlog of interviews. Plaintiff returned on February 21, 1995, the earliest follow-up appointment he was offered. Rather than completing a charge at that time, the EEOC officer asked plaintiff to submit a written statement detailing the basis of his claim as related to the officer. Plaintiff did so within 48 hours. When he received the March 7th letter with the charge form and affidavit prepared by the EEOC, he executed and returned them with alacrity.

Plaintiff was diligent in his interaction with the EEOC. He was led to believe at each turn from February 2, 1995 that he was properly following EEOC procedures. He went to the EEOC on February 16, 1995 for the purpose of filing a charge. But for the bureaucratic delay in providing the initial requested appointment and in processing plaintiff's claim when he did appear, he clearly could have filed a timely charge. That he was prevented from doing so for reasons of bureaucratic delay beyond his control is a sufficiently extraordinary circumstance to warrant the application of equitable tolling from February 16, 1995 to the filing of a charge.<sup>4</sup>

---

<sup>4</sup> Defendant fairly notes the distinction some courts have drawn between unrepresented claimants and those represented by counsel who are presumed to be knowledgeable about applicable filing requirements. It would be prudent for counsel to count 300 days from the earliest date notice conceivably could be found and to ensure his client contacts the EEOC well in advance of the close of that period. As a review of numerous reported cases shows, however, the filing of charges in the last few days of the period is not unusual and scheduling an appointment on the 288th day for the purpose of filing a charge on the 297th day is not per se dilatory.

Accordingly, the motion for summary judgment on the ADEA claim will be denied. The contract claim is another matter.

Under Pennsylvania law a cause of action for breach of a written contract is subject to a four year statute of limitations. See 42 Pa. C.S. § 5525(8); Packer Soc'y Hill Travel Agency, Inc. v. Presbyterian Univ. of Pa. Med. Ctr., 635 A.2d 649, 652 (Pa. Super. 1993) (action for breach of written services agreement subject to four year statute of limitations). A claim for breach of contract accrues at the time of the alleged breach. See Romeo & Sons v. P.C. Yezbak & Son, 652 A.2d 830, 832 (Pa. 1995) ("in an action for breach of contract the statute of limitations begins to run from the time of the breach"). Plaintiff argues that his claim did not accrue until the final day before his services were terminated on June 30, 1995.

Plaintiff alleges that defendant's "refusal to grant Dr. Gulezian tenure and its resulting termination of his employment constituted a breach of Dr. Gulezian's contract with the University." The only contract set forth is the alleged agreement to provide tenure consistent with criteria articulated in defendant's Handbook. Apart from this alleged right to tenure, plaintiff presents nothing to show or even suggest that defendant had any contractual duty to retain him beyond the next academic year. The termination of plaintiff's services and any damages related thereto resulted from the denial of tenure and it

is this action, if any, which constitutes a breach of contract. As such, plaintiff's claim accrued no later than his receipt of the notice of denial of tenure on April 25, 1994 and his claim is time barred.<sup>5</sup>

Because plaintiff's contract claim is clearly barred by the statute of limitations, it is not necessary to resolve defendant's contention that the Handbook plainly did not create an enforceable contract. The court does note, however, that an employer's handbook does not create contractual rights absent a clear representation that it is to have such an effect. See Luteran v. Loral Fairchild Cor., 688 A.2d 211, 215 (Pa. Super. 1997), appeal denied, 701 A.2d 578 (Pa. 1997); Small v. Juniata College, 682 A.2d 350, 353 (Pa. Super. 1996); Martin v. Capital Cities Media, Inc., 511 A.2d 830, 840 (Pa. Super. 1985), appeal denied, 523 A.2d 1132 (Pa. 1987). See also Gronowicz v. Pennsylvania State University, 1997 WL 799438, \*3 (E.D. Pa. Dec.

---

<sup>5</sup> The cases cited by plaintiff to the contrary are inapposite. In Kenis v. Perini Corp., 682 A.2d 845, 849 (Pa. Super. 1996), the Court merely determined that a lawyer's quantum meruit claim arose once his representation was terminated by his client. In Baird v. Marley Co., 537 F. Supp. 156, 157 (E.D. Pa. 1982) and DeLuca v. Mountain View School Dist., 72 D&C.2d 350, 355 (1974), the Courts determined that an employee's action for breach of a services contract against an employer who changed the level of compensation arose when the employee was first paid at the reduced rate. This, of course, was the first time that each employee was denied compensation to which he was allegedly entitled. This is not an anticipatory breach case. Plaintiff was denied the tenure to which he claims contractual entitlement in April 1994.

29, 1997); Miller v. University of Pennsylvania, 1993 WL 313508, \*3 (E.D. Pa. July 30, 1993). It appears from the pertinent language in the Handbook that defendant merely articulated in generalized terms the factors considered when making tenure decisions, that there was a tenure quota, that tenure was discretionary and that no professor was assured of obtaining tenure.

Consistent with the foregoing, defendant's motion will be granted in part and denied in part. An appropriate order will be entered.

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

RONALD C. GULEZIAN : CIVIL ACTION  
 :  
 v. :  
 :  
 DREXEL UNIVERSITY : NO. 98-3004

O R D E R

AND NOW, this day of March, 1999 upon consideration of defendant's Motion to Dismiss (Doc. #4), which, at the invitation of the parties who submitted matters beyond the pleadings, the court has treated as a motion for summary judgment, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** as to Count II (plaintiff's breach of contract claim) and **DENIED** as to Count I (plaintiff's ADEA claim).

BY THE COURT:

---

JAY C. WALDMAN, J.