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

ELLIOT R. EISENBERG,	:	
Plaintiff	:	**No. 3:00CV301**
	:	
v.	:	
	:	**(Judge Munley)**
THE PENNSYLVANIA	:	
STATE UNIVERSITY,	:	
Defendant	:	

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MEMORANDUM

Before the court for disposition is the defendant's motion for partial summary judgment in the instant employment discrimination case. The plaintiff is Elliot R. Eisenberg, and the defendant is the Pennsylvania State University (hereinafter "Penn State" or "defendant.") The matter is ripe for disposition having been fully briefed and argued.

Background

Defendant Penn State University is an institution of higher learning with twenty-four campuses. Plaintiff commenced employment with the defendant in 1972 as an engineering instructor at its Hazleton campus and has worked there since. Plaintiff's initial annual salary was $9,288.00. Plaintiff has received annual salary increases every year of his employment with the defendant. However, he claims that his salary has always been less than the average salary of his peers, and the salary increments did not always reflect actual contributions he has made to the university for a given year.

Plaintiff filed a two count complaint alleging that the disparity in pay between him and his peers is based upon religious discrimination. The complaint avers violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. (hereinafter "Title VII") and the Pennsylvania Human Relations Act, 43 P.S. § 951 et seq. (hereinafter "PHRA"). Subsequent to the close of discovery, defendant filed the instant motion for summary judgment alleging that much of plaintiff's claim is time barred, which brings the action to its present posture.

Standard of review

The granting of summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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. See Knabe v. Boury, 114 F.3d 407, 410 n.4 (3d Cir. 1997) (citing Fed.R.Civ.P. 56(c)). "[T]his standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original).

In considering a motion for summary judgment, the court must examine the facts in the light most favorable to the party opposing the motion. International Raw Materials, Ltd. v. Stauffer Chemical Co., 898 F.2d 946, 949 (3d Cir. 1990). The burden is on the moving party to demonstrate that the evidence is such that a reasonable jury could not return a verdict

for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact is material when it might affect the outcome of the suit under the governing law. Id. Where the non-moving party will bear the burden of proof at trial, the party moving for summary judgment may meet its burden by establishing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the non-movant's burden of proof at trial. Celotex, 477 U.S. at 322. Once the moving party satisfies its burden, the burden shifts to the nonmoving party, who must go beyond its pleadings, and designate specific facts by the use of affidavits, depositions, admissions, or answers to interrogatories demonstrating that there is a genuine issue for trial. Id. at 324.

Discussion

Defendant raises two arguments in its motion for summary judgment. The first issue is whether the complaint is untimely as to any acts that are alleged to have occurred prior to May 15, 1998. The second issue is whether plaintiff is statutorily barred from recovering back pay prior to March 11, 1996. We shall address each issue separately.

1. Is the complaint timely as to any acts that are alleged to have occurred prior to May 15, 1998?

The filing of a timely administrative complaint with the Equal Employment Opportunity Commission (hereinafter "EEOC") is a prerequisite to commencing a civil suit pursuant to Title VII. According to 42 U.S.C. § 2000e-5(e), a charge of employment discrimination under Title VII must be filed with the appropriate administrative agency

within 300 days after the alleged unlawful employment practice occurred in order to be timely. Plaintiff filed charges with the EEOC on March 11, 1999. Therefore, his 300-day period reaches back to May 15, 1998, and defendant avers that any actions that occurred before May 15, 1998 are time barred.

Plaintiff's position is that the general rule is that charges must be filed within 300 days. Exceptions to the general rule exist, however, and two of the exceptions are relevant here. Those exceptions are the continuing violation theory and equitable tolling. We address these issues *seriatim* below.

A. Continuing violation theory

First the plaintiff advances the continuing violation theory. Under this theory, a plaintiff may pursue claims for discriminatory conduct that occurred prior to the 300-day filing period where that conduct is part of an on-going or continuing pattern or practice of discrimination. See Rush v. Scott Specialty Gases, Inc., 113 F.3d 476, 481 (3d Cir. 1997). The law provides as follows:

> To demonstrate a continuing violation, the plaintiff first must show that at least one discriminatory act occurred within the 300-day period. Second, the plaintiff must show that the harassment is more than the occurrence of isolated or sporadic acts of intentional discrimination, and instead must demonstrate a continuing pattern of discrimination. A plaintiff satisfying these requirements may present evidence and recover damages for the entire continuing violation and the 300-day filing period will not act as a bar. (internal quotations and citations omitted).

Id.

However, the court also stated that "[t]o allow a stale claim to proceed would be inconsistent with the administrative procedure established by Title VII which contemplates prompt filing of charges so that discrimination controversies may be resolved promptly." Id. at 485.

Courts examine the following factors to determine whether a plaintiff has demonstrated a continuing violation:

1) Subject matter. Do the alleged discriminatory acts involve the same type of discrimination tending to connect them in a continuing violation?

2)Frequency. Are the alleged acts recurring or more in the nature of an isolated work assignment or employment decision?

3)Degree of permanence. Does the discriminatory act have the degree of permanence which should trigger an employee's awareness of, and duty to assert, his or her rights or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate? Id. at 481-82.

The third factor, permanence, is perhaps the most important. Id. at 482. The permanence factor basically refers to what the plaintiff knew or should have known at the time of the discriminatory act. Sabree v. United Brothers of Carpenters and Joiners Local 33, 921 F.2d 396, 402 (1st Cir. 1990). Defendants' argument is that the plaintiff suspected religious discrimination long before he took any formal action. Therefore, the permanence

factor weighs in Penn State's favor and is dispositive of the plaintiff's claim with respect to any alleged discrimination prior to May 15, 1998.

Plaintiff's position is that it is not unusual for the continuing violation theory to be applied to equal pay cases and that the Third Circuit Court of Appeals has noted that "[m]ost courts appear to treat pay discrimination claims as continuing violations." Miller v. Beneficial Management Corp., 977 F.2d 834, 843 (3d Cir. 1992). After a careful review of the Miller decision, we find that neither party is completely accurate in its arguments.

The Miller case dealt with two separate issues that are involved in employment discrimination cases such as the instant case. The first issue is accrual of the action, and the second is the continuing violation theory. The plaintiff's cause of action does not accrue until he discovers he has been the victim of discrimination. Id. The relevant question is when did the plaintiff know or when should he have known that he was being discriminated against. Id. Accordingly, the statute of limitations for filing the initial complaint with the EEOC does not begin to run until the plaintiff discovers discrimination.

In Miller, the court found that the jury could believe that the plaintiff did not know, and should not have known of the disparity in compensation until September 30, 1988. Id. She filed her complaint with the EEOC in February 1989 which was within the 300-day limit. Id. at 841. The court found that as a material issue of fact existed as to when the employee knew or should have known about the discrimination, the case could not be dismissed as untimely. Id.

Only after finding that the plaintiff may have filed her complaint timely did the court proceed to discuss the continuing violation theory. The Miller court held that pay discrimination claims should be treated as continuing violations. The court stated that to hold otherwise, would allow perpetual wage discrimination by an employer whose violation has lasted without attack for the statute of limitations period. Id. at 843.

Therefore, the Miller court instructs us to first determine when the plaintiff's claim accrued. If the plaintiff knew or should have known of the discrimination outside of the limitations period, the claim will be time barred. This conclusion is in accord with the following explanation from the United States Supreme Court regarding the statute of limitations: "The limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past." Delaware State College v. Ricks, 449 U.S. 250, 256-57 (1980). However, if the action is timely filed, the continuing violation theory will apply.

The Eastern District of Pennsylvania has recognized the Miller holding. In Battaglio v. General Electric Corp., 1995 WL 11980 (E.D. Pa.), the court held that the plaintiff's claim accrues when he learns of the discrimination, and the continuing violation theory does not apply where the employee learns of wage discrimination and does not file a claim within the appropriate time limit. Id. at * 2. Likewise, the First Circuit Court of Appeals has held that no continuing violation can be found where the plaintiff was aware of the alleged

discrimination outside of the time for filing a charge. Landrau-Romero v. Banco Populat De Puerto Rico, 212 F.2d 607, 612 (1st Cir. 2000).

Accordingly, to determine if the continuing violation theory is applicable, the time at which the plaintiff knew or should have known of the alleged discrimination must be ascertained. We cannot decide on the record before us when the plaintiff knew or should have known of the alleged discrimination as it is a question of fact.

Evidence has been presented that plaintiff knew of the disparity in pay for years before filing his complaint, but that he suspected discrimination was the reason for the disparity only in 1997.[1] Plaintiff testified at his deposition, however, that he formed the belief that his salary was negatively affected by religious discrimination in the late spring of 1998 when he had collected certain data regarding salary. Plaintiff's Deposition at 21-22. Therefore, it will be the task of the fact finder to determine when he knew or should have known of the discrimination. If he first knew or should have known about the discrimination within the 300-day period for filing with the EEOC then the continuing violation theory will apply.

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[1]The following exchange between defense counsel and the plaintiff occurred at the plaintiff's deposition:

Q. As of February 25, 1997, you had at least some thought that the low salary that you had experienced at Penn State was a result of anti-Semitism; is that a fair statement?

A. (Plaintiff) It was a possible thought. It was a possible conclusion.

Plaintiff's Deposition at 101.

Moreover, in a correspondence to Wayne R. Hager of the Pennsylvania State University, dated February 25, 1997, plaintiff noted with regard to the pay situation "I would not want to think that it has been the result of some form of intended discrimination." Def. Ex. D.

B. Equitable Tolling

Plaintiff also claims that the statute of limitations should be equitably tolled. Equitable tolling is appropriate where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights. Meyer v. Riegel Products Corp., 720 F.2d 303, 309 (3d Cir. 1983) cert. denied 465 U.S. 1091. Plaintiff alleges that the defendant lulled him into a state of trust and belief that it would rectify the wrong that had been done to him and compensate him accordingly. Defendant, on the other hand, claims that plaintiff has not presented the type of proof necessary to establish that equitable tolling is appropriate. After a careful review, we are in agreement with the defendant.

Under the law:

> Equitable tolling functions to stop the statute of limitations from running where the claim's accrual date has already passed. ...[T]here are three principal, though not exclusive, situations in which equitable tolling may be appropriate: (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. (internal citations omitted).

Oshiver v. Levin, 38 F.3d 1380, 1387 (3d Cir. 1994).

In other words, equitable tolling is appropriate when the principles of equity would make a rigid application of the statute of limitations unfair. Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616, 618 (3d Cir. 1998). The United States Supreme Court has repeatedly recognized the equitable tolling doctrine, but it has also cautioned that

"[p]rocedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by the courts out of a vague sympathy for particular litigants." Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 151 (1984) quoted in Seitzinger v. Reading Hospital and Medical Ctr., 165 F.3d 236 (3d Cir. 1999).

Plaintiff has the burden of establishing by clear and convincing evidence that there has been fraud or concealment, and the fraud need not be intentional. The Third Circuit Court of Appeals has explained as follows:

> Under Pennsylvania law governing the doctrine of equitable tolling, it is clear that "the courts have not required fraud in the strictest sense, encompassing an intent to deceive, but rather have defined fraud in the broadest sense to include an unintentional deception." Nesbit v. Erie Coach Co., 416 Pa. 89, 96, 204 A.2d 473, 476 (1964). Even under this broad interpretation of fraud, however, it is clear that, in order for the doctrine of equitable tolling to apply, the defendants' actions must have amounted "to an affirmative inducement to plaintiff to delay bringing the action." Ciccarelli v. Carey Canadian Mines, Ltd., 757 F.2d 548, 556 (3d Cir.1985). The intent of the defendant in making this affirmative inducement is irrelevant; "it is the effect upon the plaintiff, not the intention of the defendant, that is pertinent." Swietlowich v. County of Bucks, 610 F.2d 1157, 1162 (3d Cir.1979). The burden of proving fraud or concealment, whether intentional or not, rests upon the party making the claim. The evidence presented must be clear, precise and convincing. "[M]ere mistake, misunderstanding, or lack of knowledge is not sufficient to toll the statute of limitations." Molineaux v. Reed, 516 Pa. 398, 403, 532 A.2d 792, 794 (1987).

Connors v. Beth Energy Mines, Inc., 920 F.2d 205, 211 (3d Cir. 1990).

After a careful review of the record, we find the plaintiff has not met his burden of establishing any "lulling", fraud or concealment on the part of the defendant. Thus, the

equitable tolling argument lacks merit. Plaintiff cites his own deposition to establish that Penn State lulled him into inaction. A summary of this evidence follows:

Plaintiff states that he discussed his salary concerns with his supervisors in 1980. Plaintiff's supervisors did not deny that his salary was low and said that they would try to do something. Plaintiff's Deposition at 24. In approximately 1995, plaintiff met with Associate Dean of the College of Engineering George McMurtry, who was not formally involved with salaries of the engineering faculty on the campuses. However, he looked into the salary matter and informed the plaintiff that when compared to his peers his salary was a few thousand dollars low. Id. at 105-106.

In a correspondence to Wayne R. Hager of the Pennsylvania State University, dated February 25, 1997, plaintiff noted with regard to the alleged salary inequity: "I would not want to think that it has been the result of some form of intended discrimination." Def. Ex. D. In 1997, plaintiff met with Dr. John Leathers, an interim CEO of the campus. He discussed the substance of the letter with Dr. Leathers. Id. at 105. Leathers subsequently met with other Penn State officials to discuss plaintiff's concerns of a history of salary inequity. After the meeting, Dr. Leathers informed plaintiff that the committee had concluded that there was no history of salary inequity and that no action would be taken. Id. at 107-108. Plaintiff was very upset by the finding of the committee and told Dr. Leathers that he did not accept their finding and that he would pursue obtaining more information. Id. at 109. Dean McMurtry wrote a letter of request for plaintiff to obtain salary information for

some past years. Id. at 110. Plaintiff stated in his deposition that "nothing was hidden. The goal was to simply secure the data." Id. at 111. Further plaintiff explained: "I would go to the local ... administration and bring up the question of salary, equity and there was never a denial that I was low. And I was assured at first that they would do something, then it go to the point where, as I referred to, it was kind of, well, if you don't like it leave." Id. at 122.

This evidence presented by the plaintiff simply does not rise to the level of conduct needed to justify equitable estoppel. No indication is present that the school attempted to hide information from him. On the contrary, it appears that the defendant aided plaintiff in his search to determine if a salary disparity existed. Accordingly, the plaintiff's argument is rejected, and we will not apply equitable tolling.

2. Is Plaintiff barred from recovering back pay prior to March 11, 1996?

Defendant next claims that even if plaintiff's complaint was timely filed, he is nonetheless limited in the amount of back pay he can be awarded. Although plaintiff seeks to be compensated for discrimination since 1972, defendant claims he is limited to only two years of back pay under Title VII and three years under PHRA. After a careful review, we agree.

Title VII provides that a plaintiff may only recover for back pay for up to two years from when charges were filed with the EEOC. 42 U.S.C. § 2000e-5(g). The PHRA prevents an award of back pay for greater than three years prior to the filing of a complaint. 43 Pa.C.S.A. § 962(c).

Plaintiff claims that the defendant misconstrues his claim for back pay and that he does not seek back pay for a period before March 11, 1996. However, he claims that he has a "current claim" for back pay exceeding $100,000.00. Plaintiff concludes his brief with the following: "In the instant case, the issue that will be presented to the jury is the amount and method of calculation of the back pay. Consequently, the argument raised by Penn State regarding the time limitation on the award of back pay is moot." Plaintiff's opposition brief at 13. While plaintiff contends that he agrees that the limitations on back pay should apply, we want to make clear that regardless of his "current claim" for back pay, the limitation is applicable.

Even the principle case cited by the plaintiff, which is from the United States Supreme Court recognizes the limitations period. Plaintiff cites Albermerle Paper Co. v. Moody, which acknowledges in footnotes that the statute of limitations exists. Albermerle Paper Co. v. Moody, 422 U.S. 405, 410 n. 3 (1975)("Under Title VII back pay liability exists only for practices occurring after the effective date of the Act, July 2, 1965, and accrues only from a date two years prior to the filing of a charge with the EEOC") see also Id. at 421, n. 13.

None of the other cases cited by the plaintiff deal with the issue of the limitation on back pay as it is presented in the instant case. Cases do exist, however, that address it. The District Court for the Western District of Pennsylvania has held that "[t]he court is constrained...from awarding relief under Title VII which goes back more than two years from the date of filing of a charge of discrimination with the EEOC, even where there is a

continuing violation." Garland v. USAir, Inc., 767 F. Supp. 715, 727 (W.D. Pa. 1991).

Accordingly, we find that the plaintiff can be awarded back pay under Title VII for a period of no more than two years and no more than three years under the PHRA. Our conclusion is based on the plain language of the statute and the case law, including the United States Supreme Court precedent acknowledging the statute of limitations. See Albermerle, supra.

Conclusion

In conclusion, we find that the continuing violation theory may apply in the instant case depending on how the jury determines the question of fact regarding when plaintiff knew or should have known of the alleged discrimination. The doctrine of equitable estoppel, however, is not applicable. In addition, the provisions of Title VII and the PHRA will limit the amount of back pay that the plaintiff will be able to recover.

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Plaintiff	:	**No. 3:00CV301**
	:	
v.	:	
	:	**(Judge Munley)**
THE PENNSYLVANIA	:	
STATE UNIVERSITY,	:	
Defendant	:	

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ORDER

AND NOW, to wit, this 28th day of February 2001, the defendant's motion for partial summary judgment [13-1] is hereby **GRANTED in part** as we find that equitable tolling is not applicable and the fact finder will have to determine whether the continuing violation theory applies. Further, the limitations on back pay as set forth in Title VII and the PHRA will be enforced as set forth in the accompanying memorandum. In all other respects, the motion is **DENIED**.

BY THE COURT:

_____
JUDGE JAMES M. MUNLEY
United States District Court

Filed: 2/28/01