

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

DOUGLAS E. THOMPSON, SR., )  
 )  
Plaintiff, )  
 )  
v. ) Civ. A. No. 02-020-SLR  
 )  
UNITED STATES POSTAL SERVICE, )  
SALLY DRYDEN, DONNA VOLZONE, )  
MIKE BEHNIGER, BILL COURTS, and )  
KEITH RUST, )  
 )  
Defendants. )

**MEMORANDUM ORDER**

**I. INTRODUCTION**

On January 7, 2002, plaintiff Douglas E. Thompson, Sr., an employee of the United States Postal Service, filed a complaint under Title VII of the Civil Rights Act of 1964, naming as defendants the United States Postal Service and five individuals employed by the Postal Service. (D.I. 4) Equitable and other relief are also sought under 42 U.S.C. § 2000e-5(g). (Id.) The court has jurisdiction over plaintiff's claims pursuant to 42 U.S.C. § 2000e-5.

On January 9, 2002, plaintiff's application to proceed in forma pauperis was granted. (D.I. 1) On the same day, plaintiff's motion for a temporary restraining order was denied. (D.I. 2) Defendants filed a motion to dismiss on March 28, 2002. (D.I. 14) On April 12, 2002, this court ordered that defendants'

motion to dismiss would be reviewed as a motion for summary judgment because matters outside of the pleadings were presented to the court. (D.I. 17) Plaintiff responded to defendants' motion on or about May 3, 2002. (D.I. 18)

## **II. BACKGROUND**

Plaintiff is an African-American employed at the Main Post Office ("MPO") facility in Newark, Delaware as a Mail Handler. (D.I. 16 at 1) Plaintiff alleges that a discriminatory act occurred on August 7, 2001, and plaintiff filed charges with the Postal Service Equal Employment Opportunity Office ("EEO") on the same date. (D.I. 4 at 2) The EEO responded on August 8, 2001 by requesting from plaintiff information for pre-complaint counseling. (Id., Ex. A) Plaintiff replied August 29, 2001 and EEO received the answer August 30, 2001. (D.I. 16 at 3, 1) Within the information for pre-complaint counseling, plaintiff alleges racial discrimination, claiming that he is the only full time African-American postal worker that works in the MPO during normal business hours and represents only 0.05% of the minority work force. (Id. at 4) Among other complaints, plaintiff alleges inequality, sex discrimination, physical discrimination, and retaliation for filing a grievance against the Postmaster. (Id.) Plaintiff also filed grievance forms alleging various instances of discrimination on August 15, October 4, October 9, October 22, November 7, November 19, November 21, and December 5,

2001.<sup>1</sup> (D.I. 4, Ex. D) On December 6, 2001, the EEO sent plaintiff a notice of right to file individual complaint, noting that plaintiff had 15 days from receipt of the notice to file a formal complaint. (D.I. 16 at 10-11) On December 11, 2001, plaintiff filed a motion for emergent ex parte formal hearing with the Equal Employment Opportunity Commission ("EEOC") in Philadelphia. (Id. at 12-16) The EEOC sent plaintiff a letter requesting that he first pursue remedies within the Postal Service before filing an EEOC complaint. (Id. at 17) Plaintiff filed this suit on January 7, 2002. (D.I. 4) He filed a formal complaint with the Postal Service on January 10, 2002. (D.I. 18, ¶ 2(j))

### **III. STANDARD OF REVIEW**

Since matters outside the pleadings have been introduced, the motion to dismiss will be considered under the standards applicable for summary judgment motions. See Fed. R. Civ. P. 12(b)(6); Camp v. Brennan, 219 F.3d 279, 280 (3d Cir. 2000) (consideration of matters beyond the complaint converts a motion to dismiss into a motion for summary judgment). A party is entitled to summary judgment only when the court concludes "that there is no genuine issue of material fact and that the party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

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<sup>1</sup>These grievances were apparently filed with the Postal Workers Union.

The moving party bears the burden of proving that no material issue of fact is in dispute. See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). Once the moving party has carried its initial burden, the nonmoving party "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Id. at 587 (quoting Fed. R. Civ. P. 56(e)). "Facts that could alter the outcome are 'material', and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." Horowitz v. Federal Kemper Life Assur. Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995). If the nonmoving party fails to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The mere existence of some evidence in support of the party will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury to reasonably to find for the nonmoving party on that factual issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). This court, however, must "view all the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pa. Coal Ass'n. v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995);

Pacitti v. Macy's, 193 F.3d 766, 772 (3d Cir. 1999). With respect to summary judgment in discrimination cases, the court's role is "to determine whether, upon reviewing all the facts and inferences to be drawn therefrom in the light most favorable to the plaintiff, there exists sufficient evidence to create a genuine issue of material fact as to whether the employer intentionally discriminated against the plaintiff." Revis v. Slocomb Indus., 814 F. Supp. 1209, 1215 (D. Del. 1993) (quoting Hankins v. Temple Univ., 829 F.2d 437, 440 (3d Cir. 1987)).

#### **IV. DISCUSSION**

Certain preconditions attach to a federal employee's right to file an action in federal district court alleging employment discrimination. See Brown v. General Services Administration, 425 U.S. 820, 832 (1979). In particular, a federal employee must exhaust all administrative remedies before bringing an action in federal court under Title VII. See, e.g., Freed v. Consolidated Rail Corp., 201 F.3d 188, 191 (3rd Cir. 2000) (internal citation omitted).

The requisite administrative steps are set forth in 29 C.F.R. §§ 1614.101 et seq. First, an aggrieved party "must consult [an EEO] Counselor prior to filing [a formal] complaint in order to try to informally resolve the matter." 29 C.F.R. § 1614.105(a). If the matter is not resolved informally, a complainant must next file a formal complaint within 15 days of

receipt of the notice of right to file a formal complaint. See 29 C.F.R. § 1614.106(b). Once a formal complaint is filed, the employing agency conducts an investigation, prepares an investigatory file, and provides a copy to complainant. See 29 C.F.R. § 1614.108. The complainant may then either request a final agency decision or a hearing before an EEOC administrative judge. See 29 C.F.R. § 1614.108(f).

A complainant who is a federal employee may not file a civil action in federal court unless: (a) he has obtained a final agency decision; or (b) 180 days have passed since the formal complaint was filed with the agency if an appeal has not been filed and final action has not been taken.<sup>2</sup> See 29 C.F.R. § 1614.407. The 180-day time period was established to encourage federal agencies to deal with employee complaints in a timely manner. See 57 F.R. 12634, \*12635 ("One major reason for proposing part 1614 was to eliminate the time delays and backlogs[.]"). If neither of the requirements within 29 C.F.R. § 1614.407 are fulfilled, a district court does not have jurisdiction over the action and the complaint will be dismissed. See Elsberry v. Rice, 820 F.Supp 824, 829 (D. Del. 1993) ("[T]he

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<sup>2</sup>The court notes that the 180-day time period starts with complainant filing a formal complaint with the agency. Pre-complaint counseling or alternative dispute processes prior to filing a formal complaint do not start the 180-day clock running. See, EEOC, Federal Sector Information, Management Directive 110, Appendix B, ¶ k.

statutory condition precedent for this Court's exercise of jurisdiction over plaintiff's Title VII claim has not been satisfied.").

In the present case, plaintiff had not exhausted his administrative remedies prior to filing the instant lawsuit. Specifically, although plaintiff satisfied the first step in the required administrative process by filing with the Postal Service a request for pre-complaint counseling pursuant to 29 C.F.R. § 1614.105(a), he failed to file a formal complaint with the Postal Service before he filed the instant litigation, contrary to the filing prerequisites of 29 C.F.R. § 1614.105(b). Therefore, defendants' motion to dismiss is granted subject, however, to the following caveat. Plaintiff ultimately did file a formal complaint with the Postal Service on January 10, 2002, some three days after filing this lawsuit. More than 180 days have passed since the filing of said complaint. If plaintiff's complaint was deemed to be filed timely by the Postal Service and is still pending, there may be grounds to allow the matter to proceed, rather than require dismissal of the instant litigation and the initiation of a virtually identical lawsuit based on the new jurisdictional facts.<sup>3</sup>

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<sup>3</sup>The court also notes that defendants' argument that the only appropriate defendant in a Title VII suit by a Postal Service employee is the Postmaster General is correct. Should this action continue in this court, plaintiff should name only the Postmaster General as defendant.

**V. CONCLUSION**

THEREFORE, at Wilmington this 29th day of October, 2002,  
IT IS ORDERED that defendants' motion for summary judgment (D.I. 14) is granted unless, on or before November 15, 2002, plaintiff confirms that his formal complaint was accepted by the Postal Service and is still pending. Defendants may respond to the plaintiff's submission, if any, on or before November 30, 2002.

Sue L. Robinson  
United States District Judge