IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

THOMAS C. DAVIS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 01-153 GMS
	)	
SMITHKLINE BEECHAM CORPORATION,	)	
	)	
Defendant.	)	

M E M O R A N D U M A N D O R D E R

I. INTRODUCTION

The plaintiff, Thomas C. Davis ("Davis"), filed suit against his former employer, SmithKline Beecham, Corp. ("SmithKline Beecham"), alleging that it violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq. and 42 U.S.C. § 1981 by discriminating against him because of his race. Presently before the court is SmithKline Beecham's motion for summary judgment based on the timeliness of Davis' claims. The court will grant the motion as it relates to the § 1981 claim, but will deny the motion as to the Title VII claim.

II. BACKGROUND

Davis was employed as a General Mechanic at SmithKline Beecham. Over the course of his employment, Davis alleges that SmithKline Beecham denied him the opportunity to work the overtime hours his Caucasian coworkers were given. He also alleges that his direct supervisor subjected him to racial epithets and unfair disparate treatment because of his race. Davis contends that he was unable to work in such an atmosphere, and was therefore forced to resign on September 29, 1997.

In February 1998, approximately five months after he resigned, Davis commenced the process of

filing a claim with the Equal Employment Opportunity Commission ("EEOC"). Shortly thereafter, the EEOC sent the him various questionnaires. He filled these out and returned them in a timely fashion. On February 20, 1998, the EEOC sent him a letter and a Charge Information Questionnaire. Davis filled out the questionnaire and returned it to the EEOC on March 18, 1998. The EEOC wrote Davis a letter on March 30, 1998, informing him that it had received his completed questionnaire. The letter further stated that if the EEOC subsequently determined he had an eligible charge, it would prepare a draft charge and forward it to him for his approval. In that letter, the EEOC noted that it had a backlog of cases, and a delay in preparing his charge was possible. Finally, on January 3, 2000, in the first communication between the EEOC and Davis since March 30, 1998, the EEOC sent Davis a letter informing him that a draft charge had been prepared for him. Davis reviewed the draft and made changes. He returned the signed and dated draft to the EEOC office on January 13, 2000. The EEOC notified SmithKline Beecham of the charges against it on February 4, 2000.

Following notification of the charges against it, SmithKline Beecham contacted the EEOC to determine if these charges had been timely filed. The EEOC replied by letter dated April 11, 2000 that, although the last incident of harm alleged had occurred in September1997 and Davis had not signed the final charge until January 13, 2000, his initial intake questionnaire forms had been received by the EEOC on March 18, 1998. As such, the EEOC deemed Davis' charge to be timely filed.

Davis commenced this action under Title VII and § 1981 on March 7, 2001.

III. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(c) provides that a movant is entitled to summary judgment 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. . . ." *See* Fed. R. Civ. P. 56(c). An issue is "genuine" if, given the evidence, the jury could return a verdict in favor of the non-moving party. *See Nannay v. Rowan College*, F. Supp. 2d 272, 281 (D. N.J. 2000) (citing *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248 (1986). A fact is "material" if, under the governing law, it might affect the outcome of the case. *See Nannay*, 101 F. Supp 2d at 281. On summary judgment, the court must consider the evidence in the light most favorable to the non-moving party, resolving all reasonable doubts and drawing all reasonable inferences in that party's favor. *See Paoli v. University of Delaware*, 695 F. Supp. 171, 171-72 (D. Del. 1988).

IV. DISCUSSION

A. Limitations Period for the § 1981 Claim

In general, a federal court must adopt as the statute of limitations for a § 1981 claim the state statute of limitations for a personal injury claim. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660-62 (1987) (the forum state's statute of limitations for personal injury actions provides the appropriate limitations period for claims arising under § 1981). Davis, however, suggests that the four-year, general purpose limitations period established by Congress in 1990 for 28 U.S.C. § 1658 should apply to his § 1981 claim. *See* 28 U.S.C. § 1658 (2001). Section 1658 provides a default four-year limitations period for any "civil action arising under an Act of Congress enacted after the date of the enactment of this section." *See id*. Davis thus argues that, since Congress amended § 1981 in The Civil Rights Act of 1991, § 1658 should apply here.

While there is a circuit split as to which of these statutes of limitations should apply, the Third Circuit has definitively answered this question for this circuit by holding that § 1658 does not apply to any type of

§ 1981 claim. *See Madhat Zubi v. AT&T Corp.*, 219 F.3d 220, 226 (3d Cir. 2000). Therefore, the governing statute of limitations for the § 1981 claim at issue here is Delaware's two-year personal injury statute of limitations. *See* DEL. CODE ANN. tit. 10, § 8119 (1999); *Joyner v. News Journal*, 1999 WL 33220037, at *3, fn 1 (D.Del. Aug. 18, 1999). The statute of limitations begins to run from the date of the last alleged injury. *See* DEL. CODE ANN. tit.10, § 8119 (1999).

The last allegedly discriminatory act which Davis complains of occurred around September 25, 1997. Davis did not file this § 1981 suit until March 7, 2001, approximately three and a half years after the last act of discrimination. Accordingly, Davis' § 1981 suit is time-barred, and the defendant's motion for summary judgment on that claim is granted.

B. Limitations Period for the Title VII Claim

Title VII explicitly requires a complainant to file a timely discrimination charge with the EEOC as a prerequisite to filing a lawsuit in federal court. *See EEOC v. Commercial Office Prods.*, 486 U.S. 107, 110 (1988). To be considered timely under Title VII, a charge of employment discrimination must be filed with the EEOC within 180 days of the last alleged act of discrimination.[1] *See id*. Although a formal EEOC charge must also be verified, charges that fail to meet this technical requirement may be amended to comply

[1]In states that have a local deferral agency, such as Pennsylvania, a claimant who initially files a charge with the local agency may also file a charge with the EEOC until 300 days after the alleged discriminatory act. *See DuBose v. District 1199C*, 105 F. Supp. 2d 403, 410 (E.D. Pa 2000). On the present facts, the 300 day time period is inapplicable because Davis initially filed his charge with the EEOC, not the local agency.

with EEOC regulations.[2] *See* 29 C.F.R. 1601.12(b) (2001).[3]

In this case, the defendant argues that Davis' claim must be dismissed because the formal charge of discrimination was not filed with the EEOC until January 27, 2000, well past the 180 day time limitation set by Title VII. In effect, the defendant is arguing that the "Charge Information Questionnaire" filed by the plaintiff on March 18, 1998 alone is insufficient to constitute a valid charge within the meaning of Title VII.

As an initial matter, SmithKline Beecham argues that, because Davis' questionnaires were not verified, they automatically fail one of Title VII's requirements for a valid charge. The court finds this argument unpersuasive. The EEOC's own regulations explicitly allow such "technical defects" to be retroactively cured. 29 C.F.R. 1601.12(b). Thus, because this "defect" can be cured, the court declines to find that this alone bars Davis from having timely filed a charge.

Moreover, during its consideration of the adequacy of the appellants efforts at triggering the charging mechanism prescribed by section 626(d) of the Age Discrimination in Employment Act, the Third Circuit in the case of *Bihler v. Singer* held that a communication to the EEOC, other than a formal charge, may constitute a valid charge if it is "of a kind that would convince a reasonable person that the grievant

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[2]The court is mindful of the fact that a case questioning the validity of 29 C.F.R. 1601.12(b) is currently pending before the United States Supreme Court.

[3]This regulation reads in full: "Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received." 29 C.F.R. 1601.12(b).

has manifested an intent to activate the Act's machinery."[4] 710 F.2d 96, 99 (3d Cir. 1983). To determine whether such communication equals a valid charge, courts consider "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." *Gulezian v. Drexel University*, 1999 WL 153720, at *3 (E.D. Pa. March 19, 1999) (citing *Diez v. Minnesota Mining and Mfg. Co.*, 88 F.3d 672, 676 (8th Cir. 1996)). Courts also consider whether the EEOC issued a right to sue letter without indicating that the claim was time-barred and whether the grievant checked a box on the questionnaire marked, "I want to file a charge of discrimination." *See DuBose v. District 1199C*, 105 F. Supp. 2d 403, fn 7 (E.D. Pa. 2000) (considering the issuance of a right to sue letter to be a relevant criterion); *see also Deily v. Waste Mgmt. of Allentown*, 118 F.Supp. 2d 539, 543 (E.D. Pa. 2000). Conversely, questionnaires do not constitute a validly filed charge where the EEOC requests further information from the grievant or where the grievant is asked to contact the EEOC again to complete the charge. *See Gulezian*, 1999 WL 153720, at * 3.

On the present facts, it is clear that the Charge Questionnaire that Davis filed on March 18, 1998, well within the 180 day time period required by Title VII, suffices as a valid charge for purposes of Title VII. Davis, who did not have the benefit of counsel during this process, clearly checked the box stating "I want to file a charge" on the Charge Questionnaire. When the EEOC received Davis' completed questionnaire, the Charge Receipt Supervisor sent him a letter dated March 30, 1998 ("the letter") stating

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[4]Although the court in *Bihler* was interpreting the more lenient charge requirements under the ADEA, courts have also applied the *Bihler* analysis to Title VII charges. *See Getz v. Pennsylvania Blindness and Visual Servs.*, 1999 WL 768303, at *5 (E.D. Pa. Sept. 28, 1999) (applying the *Bihler* factors to a Title VII charge.); *see also Vilcheck v. Atlas Powder Co.*, 1993 WL 473272, at *3 (E.D. Pa. Nov. 15, 1993) (discussing the *Bihler* factors in conjunction with claims under both the ADEA and Title VII.)

that his case would now be assigned to an EEOC representative to determine whether a charge would be filed. The letter informed Davis that the EEOC would contact him if it determined that he had a viable charge, and that a delay in contacting him was possible. Notably, the EEOC did not ask for additional information from Davis, nor did it request him to contact them for any reason. Rather, the letter left the distinct impression that Davis should do nothing more than wait for the EEOC to contact him in due course. Following that directive, Davis was forced to wait until January 2000 for the EEOC to contact him.

Finally, and perhaps most persuasively, the EEOC itself considered the Charge Questionnaire sufficient as a valid charge. Upon notification of the formal charge filed against it, SmithKline Beecham questioned the timeliness of the charge in a letter dated March 29, 2000. The EEOC replied by letter on April 11, 2000. In that letter, the EEOC stated that it had received the Charge Questionnaire on March 18, 1998 and that, as such, Davis' complaint was timely filed and would not be dismissed. Thus, the EEOC's own actions with regard to the Charge Questionnaire strongly indicate that it should be considered a valid charge substitute for purposes of constituting a timely filing.

Thus, the court finds that Davis' Title VII claim was timely filed.

V. CONCLUSION

For these reasons, IT IS HEREBY ORDERED that:

1. The Motion for Summary Judgment (D.I. 20) filed by SmithKline Beecham, Corp. is GRANTED as to Davis' § 1981 claim and DENIED as to Davis' Title VII claim.

Date: November 28, 2001

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE