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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ARTHUR G. ROSE,

v.

RAYMOND E. MABUS, Secretary,
Department of the Navy,

Plaintiff,

Defendant.

Case No. 08cv1471 BTM(BLM)
**ORDER REAFFIRMING DENIAL OF
PLAINTIFF’S MOTION IN LIMINE**

On the morning of November 29, 2010, the Court filed an Order Denying Plaintiff’s Motion in Limine. Shortly after the Order was filed, Plaintiff submitted to the Court a new document bearing upon the issue – a 1995 EEOC decision. The Court has reconsidered Plaintiff’s motion in light of the document and reaffirms its denial of the motion.

A. The 1995 EEOC Decision

According to the 1995 EEOC decision, on May 2, 1994, the Navy issued a Final Agency Decision (“FAD”) defining the Complaint as alleging that: (1) Plaintiff was harassed by management’s delay in timely processing Plaintiff’s promotion action to Fuel Distribution System Worker Supervisor; (2) Plaintiff was harassed when someone moved Plaintiff’s soda cans from one shelf to another shelf in the office refrigerator; and (3) Plaintiff was harassed when his scheduled leave request for April 1993 was initially granted and then denied two

1 days before his scheduled absence from work. The Navy accepted allegation 1, dismissed
2 allegation 2 for failure to state a claim, and dismissed allegation 3 on the ground that Plaintiff
3 had failed to timely raise the issue with an EEO counselor.

4 On appeal to the EEOC, Plaintiff listed various incidents of alleged harassment and
5 discrimination dating from March 1992 until December 1993 and argued that allegation 2 was
6 an example of this pattern of harassment. The Navy responded that Plaintiff had failed to
7 articulate the issues with respect to these other various incidents of harassment and had not
8 identified them clearly enough to be understood during the counseling process. The Navy
9 also indicated that it did not have all the information it needed to adequately address whether
10 Plaintiff's issues should be accepted or dismissed based on the continuing violation theory,
11 and requested a decision by the EEOC on the matter.

12 Upon review of the record, the EEOC concluded that it could not determine "with the
13 necessary precision" what appellant is alleging. It was unclear to the EEOC what allegations
14 constituted background information and what constituted "live allegations."

15 Because the Plaintiff's issues were not clearly defined, the EEOC reversed the Navy's
16 dismissal of allegations 2 and 3 and remanded with instructions that the Navy schedule a
17 meeting between Plaintiff and an EEO counselor to define the complaint. The EEOC
18 decision provided: "The agency shall notify appellant in writing of all allegations, if any, it is
19 accepting for investigation. If the agency wishes to dismiss any allegations, then it must
20 issue a FAD doing so. Such a FAD must list all allegations being dismissed and provide the
21 grounds for dismissal."

22 Counsel for Defendant concedes that upon remand, the allegation regarding the
23 denial of leave was accepted for investigation. Based on the 2003 EEOC decision attached
24 to Plaintiff's motion, it appears that upon remand, Plaintiff's complaint was defined as
25 including claims that Plaintiff was subjected to retaliation for his prior EEO activity when: (1)
26 for the period from February 1993 through January 1994, the Agency delayed the processing
27 of Plaintiff's promotion; (2) for the period from January 1993 through May 1993, the Agency
28 placed Plaintiff on night and Saturday work shifts; (3) in March 1993, the Agency counseled

1 Plaintiff; (4) for the period from March 1993 through June 1993, Plaintiff was supervised by
2 James Smith, a person identified as a discriminating official in Plaintiff's prior EEO complaint;
3 (5) for the period from March 1993 through June 1993, the Agency directed Plaintiff to work
4 as a dispatcher; (6) and in November 1993, the Agency moved Plaintiff's soda cans from the
5 office refrigerator. It appears that the complaint was also defined to include a claim for
6 hostile work environment on the basis of race or color for the period from March 1993
7 through May 1993, when the Agency disapproved Plaintiff's requests for leave.

8 9 **B. Analysis**

10 Plaintiff argues that the 1995 EEOC decision establishes that the Navy knowingly
11 waived the 45-day time requirement set forth in 29 C.F.R. § 1614.105(a) with respect to
12 Plaintiff's claim for retaliation based on the denial of his leave requests. The Court
13 disagrees.

14 Unlike Girard v. Rubin, 62 F.3d 1244, 1247 (9th Cir. 1995), in this case there was no
15 final decision by the EEOC regarding timeliness. In 1995, the EEOC remanded for
16 clarification of the complaint but made no findings regarding whether Plaintiff had complied
17 with the 45-day time requirement. Furthermore, the EEOC did not instruct the agency to
18 dismiss any untimely claims on remand. The EEOC merely instructed, "If the Agency wishes
19 to dismiss any allegations, then it must issue a FAD doing so."

20 As discussed in the Court's prior order, "The mere receipt and investigation of a
21 complaint does not waive objection to a complainant's failure to comply with the original filing
22 time limit when the later investigation does not result in an administrative finding of
23 discrimination." Boyd v. United States Postal Service, 752 F.2d 410, 413 (9th Cir. 1985).
24 "An agency waives a timeliness objection by making *an express finding that the complaint*
25 *was timely or failing to appeal an EEOC determination of timeliness.*" Bruce v. United States
26 Dept. of Justice, 314 F.3d 71, 74 (2d Cir. 2002) (emphasis added). Equating the acceptance
27 and investigation of a complaint with the waiver of any argument that the case is time-barred
28 would "vitate any incentive for [government] agencies to investigate and voluntarily remedy

1 instances of discrimination, lest the agencies risk forfeiting a valid defense to a potential suit.”
2 Belgrave v. Pena, 254 F.3d 384, 387 (2d Cir. 2001) (internal quotation marks omitted).

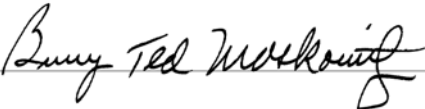
3 Based on the record before the Court (which is minimal with respect to the
4 administrative proceedings), the Court cannot say that the Navy waived the 45-day
5 requirement. Although the Navy had raised the 45-day requirement initially, the Navy may
6 have chosen to refrain from dismissing the claim on remand because of issues relating to the
7 continuing violation theory. The Court notes that the allegation of retaliation based on the
8 processing of Plaintiff’s promotion is for the time period from February 1993 through January
9 1994. There is no evidence regarding the Navy’s reasoning for not dismissing the claim, nor
10 is there any evidence establishing that the Navy intended to forego any defense of untimely
11 exhaustion. The Court declines to infer waiver from the mere fact of the Navy’s acceptance
12 and investigation of the claim.

13
14 **C. Conclusion**

15 For the reasons discussed above, the Court rejects Plaintiff’s argument that the Navy
16 waived the time requirements of 29 C.F.R. § 1614.105(a), and reaffirms the denial of
17 Plaintiff’s motion in limine.

18 **IT IS SO ORDERED.**

19 DATED: December 13, 2010

20 
21 Honorable Barry Ted Moskowitz
22 United States District Judge

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