

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

AMY HO,

Plaintiff,

v.

PATRICK R. DONAHUE,
Postmaster General, U.S. Postal Service,

Defendant.

MOSMAN, J.,

Ms. Ho, a United States Postal Service (“USPS”) employee, is suing USPS under Title VII for discrimination and retaliation. Defendant moves to dismiss for failure to state a claim. For the reasons stated below, I GRANT Defendant’s Motion to Dismiss for Failure to State a Claim [8].

I. Background

Plaintiff sustained an on-the-job injury in 2009 and was placed on limited duty until December 10, 2010. She returned to full duty from December 2010 until December 2011, when she went back to limited duty. Plaintiff was again returned to full duty in December of 2012, where she has been ever since. On August 14, 2013, Plaintiff first contacted an EEO counselor alleging her removal from limited duty was discriminatory. She filed a formal complaint with USPS in November 2013.

II. Argument

To pursue a discrimination claim, a federal employee must bring a discrimination claim to an EEO counselor “within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.” 29 C.F.R. § 1614.105(a)(1). Defendant argues Plaintiff’s claims are barred because she failed to talk with a counselor until August of 2013, even though the latest of Plaintiff’s alleged injuries occurred in December 2012. Plaintiff claims 1) she had no notice of discrimination until August 2013 and 2) the discrimination she is suffering is a continuing injury. Neither of Plaintiff’s arguments is persuasive.

First, the Ninth Circuit has held an injury accrues when “plaintiffs [know] they had been injured and by whom...even if...[they] did not know of the legal injury, i.e., that there was an allegedly discriminatory motive.” *Lukovsky v. City & Cnty. of San Francisco*, 535 F.3d 1044, 1051 (9th Cir. 2008). Under that test, Ms. Ho’s last injury occurred in December 2012, when she was returned to full duty for the final time. Since she did not contact a counselor within 45 days, her first argument fails.

Plaintiff’s second argument fares no better. The Supreme Court has held that “a discrete retaliatory or discriminatory act occurred on the day that it happened.” *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 (2002) (internal quotations omitted). In addition, the Ninth Circuit has noted that “a continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation.” *Garcia v. Brockway*, 526 F.3d 456, 462 (9th Cir. 2008) (citations omitted). Defendant’s unlawful acts, if any, were discreet and occurred at the time Plaintiff was removed from limited duty. Her continued status as a worker on regular duty is not an ongoing violation and cannot serve to overcome her failure to confer within the statute of limitations.

CONCLUSION

For the reasons given above, I GRANT plaintiffs' Motion to Dismiss [8].

DATED this 17th day of September, 2015.

/s/ Michael W. Mosman
MICHAEL W. MOSMAN
United States District Judge