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Shiban v. Intel Corp.
 D.Ariz.,2002.

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United States District Court,D. Arizona.

Samir **SHIBAN**, Plaintiff,

v.

INTEL CORPORATION, et. al, Defendant.

No. CV 00-401-PHX-PGR.

March 28, 2002.

ORDER

ROSENBLATT, J.

*1 This is an action involving in part a disparate impact claim under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. 623 *et seq.* Pending before this Court is defendant Intel Corporation's Motion for Summary Judgment (Doc. 126) on Plaintiff's Disparate Impact Claim. Having reviewed the parties' memoranda in light of the record as a whole, the Court finds that there are no genuine issues of material fact and that the defendant is entitled to entry of judgment in its favor as a matter of law pursuant to Fed.R.Civ.P. 56 on the plaintiff's disparate impact claim.

PROCEDURAL HISTORY

Mr. Shiban ("Shiban"), the plaintiff, filed his administrative charge of discrimination on March 11, 1999 with the Equal Employment Opportunity Commission ("EEOC"). The EEOC issued Shiban a notice of the right to sue letter on June 29, 1999. Shiban filed the current action in the United States District Court for the District of Oregon on September 20, 1999. The case was transferred to United States District Court for the District of Arizona in early 2000. On July 23, 2001, defendant Intel Corporation ("Intel") filed this Motion for Summary Judgment on the plaintiff's disparate impact claim, claiming Shiban failed to timely

exhaust his administrative remedies within 300 days after his last performance evaluation.

BACKGROUND

Shiban worked for Intel from April 1984 until January 3, 1999, as a senior facilities engineer. Shiban was terminated on January 3, 1999. He was 53 years old at the time of his termination. During Shiban's employment with Intel he received annual performance reviews.

One of the criteria in the performance reviews was performance trend. This trend measured an individual's improvement in his job performance in comparison to other employees within the group. One could trend faster, the same, or slower than other individuals. Two consecutive slower ratings resulted in that individual being barred from participating in Intel's redeployment program. The redeployment program operated to allow employees, whose jobs had been eliminated, to find other employment within Intel.

Shiban received slower performance ratings on his April 1, 1996, April 3, 1997, and April 6, 1998 job reviews. On September 16, 1998, Shiban received written notice that his position was being eliminated. Shiban alleges this is the first time he became aware of Intel's policy regarding two consecutive slower ratings barring him from the redeployment program. Shiban alleges that he inquired of Intel management in 1997 what consequences a slower rating would have and the manager answered it would not be a problem.

Shiban maintains that the combination of Intel's performance trend ratings coupled with the redeployment program unfairly discriminate against older workers. Shiban contends that it is easier for younger, inexperienced workers to improve faster than older workers because the older workers have already attained a high level of experience so it

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would be harder for them to improve at the same rate as an inexperienced worker. This policy would tend to give a greater number of slower ratings to older employees assuming they have reached a plateau in experience. When this policy is enforced through barring the slower workers from the redeployment program it is alleged that it violates ADEA.

DISCUSSION

A. Standard of Review

*2 In analyzing a Motion for Summary Judgment the motion shall be granted if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The party moving for summary judgment bears the initial burden of production to demonstrate that the required standards of Rule 56(c) have been met. *DeHorney v. Bank of America Nat. Trust and Sav.*, 879 F.2d 459 (9th Cir.1989). If the moving party fails to meet the burden, summary judgment cannot be granted. *Celotex*, 477 U.S. at 322.

B. ADEA Requires Filing Within 300 Days of the Alleged Discriminatory Act.

ADEA requires that charges alleging unlawful discrimination be filed within 300 days after the alleged unlawful practice occurred. 29 U.S.C. § 626(d)(2). The court must first identify precisely the unlawful employment practice which the plaintiff claims was discriminatory. *Deleware State College v. Ricks*, 449 U.S. 250, 257 (1980).^{FN1} In *Ricks*, the plaintiff filed a Title VII discrimination claim after he was denied tenure and ultimately terminated from his teaching position at the college. *Id.* at 252. The claim was dismissed as untimely because it was not filed within 180 days of the alleged discriminatory act.^{FN2}

FN1. *Ricks* is a Title VII case; however, the filing requirements for claims are analogous to the ADEA.

FN2. In dual filing states, such as Arizona, where the state has a statute prohibiting discrimination based on age the statute of limitations is 300 days not 180.

In this case, Shibana filed the charge of discrimination on March 11, 1999. Accordingly, to timely exhaust his administrative remedies within 300 days of the discriminatory act, the unlawful practice must not have occurred earlier than May 16, 1998. The Court concludes as a matter of law that the last discriminatory act occurred on April 6, 1998, the day of the last performance review. This is more than 300 days, so the charge is time barred.

C. Continuing Violations

“Under the continuing violation doctrine, ‘a systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period.’” *Sosa v. Hiraoka*, 920 F.2d 1451, 1455 (9th Cir.1990) (citations omitted). The doctrine is applied because the continuing discrimination violates the employee's rights up to the time that falls within the applicable statute of limitations. *E.E.O.C. v. Local 350, Plumbers and Pipefitters*, 998 F.2d 641, 644 (9th Cir.1992).

Intel attempts to limit Shibana's claim of discrimination to one claim. Intel maintains that Shibana only states the performance evaluation was discriminatory. Intel seeks to exclude any later acts which might not be time barred, such as notice of the allegedly discriminatory redeployment program. Similarly in *Ricks*, the Supreme Court barred the plaintiff's claims of continuing violations.

In *Ricks*, the plaintiff tried to allege in oral argument that the termination was discriminatory in an attempt to extend the commencement of the limitations. However, the Complaint never alleged this fact; it only said the denial of tenure was discriminatory. The Supreme Court noted the

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termination was a consequence of the denial of tenure. *Ricks*, 449 U.S. at 258. Therefore, the termination would not be a continuing violation. The commencement of running the limitations would begin with the denial of tenure not the termination that occurred later.

*3 In this action, Shibban alleges the performance reviews were discriminatory. Barring Shibban from participating in the redeployment program is not a separate discriminatory act for the purpose of the disparate impact claim; it is only a consequence of his trending slower performance review. Therefore the running of the statute of limitations began on April 6, 1998, the date of the last performance review.

D. Standard of Notice

In ADEA discrimination suits, determining when the statute of limitations begins to run centers on the date when the employee has notice of the unlawful act. *Aronsen v. Crown Zellerbach*, 662 F.2d 584, 593 (9th Cir.1981). The last discriminatory act was communicated to Shibban on April 6, 1998. The running of the statute of limitations would commence on this date. ADEA's filing period does not begin to run until the employee knows, or as a reasonable person should know, that the employer has made an unlawful discriminatory practice. See *Id.*

In *Ricks*, the Supreme Court noted that the statute of limitations commenced to run when the discriminatory act, the denial of tenure, was made and communicated to the plaintiff. *Ricks*, 449 U.S. at 258. The notice constituted the official letter to the plaintiff notifying him that his tenure was denied.^{FN3} The termination was just a consequence of the denial of tenure and was not itself alleged to be discriminatory. The limitations would not commence at termination even if it was later because it was not a discriminatory act. *Id.*

FN3. The court in *Ricks*, makes some note of the fact that the plaintiff received an official letter and that several committees

had made it their *final* decision to deny tenure. The court seems to indicate that if the denial of tenure was tentative, the commencement of the running of limitations would have tolled until it was final. *Knox v. Davis*, 260 F.3d 1009, 1013 (9th Cir.2001) (holding notice of wrongful act commences the running). In the present action, Shibban received a final, not a tentative review of his trending slower performance on April 6, 1998.

In the present action, Shibban received notice of the discriminatory act at his April 6, 1998 performance review.^{FN4} At this review, Shibban is told he has received his third trending slower rating. The fact that Shibban maintains he did not become aware of the discriminatory effect of the performance reviews until he was notified he was unavailable for redeployment only goes to the issue of his termination. The termination is only a consequence of the performance review; therefore, it is not a separate discriminatory act. The last discriminatory act was the performance review of April 6, 1998, which was communicated to the plaintiff on that date.

FN4. Intel alleges that Shibban's affidavit claiming lack of knowledge of the discriminatory nature of the reviews until the Summer of 2000 is in direct conflict with his earlier testimony and prior depositions. Further, Intel cites *Burrell v. Star Nursery, Inc.*, 170 F.3d 941, 954 (9th Cir.1999), stating the court cannot consider the affidavit because it conflicts with earlier testimony. However, *Burrell* is distinguishable from this action because it is unclear whether the earlier testimony is in clear conflict with the affidavit.

E. Tolling of Statute of Limitations

The plaintiff asserts that the statute of limitations should be tolled until September 16, 1998, if this Court finds the statute of limitations to have commenced at an earlier date. Equitable tolling focuses on the plaintiff's excusable ignorance. *Funk*

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v. *Sperry Corp.*, 842 F.2d 1129, 1134 (9th Cir.1988)
. Factors to consider in granting equitable tolling may include lack of actual or constructive notice. *Abbott v. Moore Business Forms, Inc.*, 439 F.Supp. 643, 646 (D.N.H.1977) [cited by *Naton v. Bank of California*, 649 F.2d 691, 696 (9th Cir.1981)]. In this case, Shiban received actual notice of the discriminatory act at the time of the performance review, dated April 6, 1998. There is no lack of notice so the statute of limitations cannot be tolled to a later date. Therefore,

*4 IT IS ORDERED that defendant Intel's Motion for Summary Judgment on Plaintiff's Disparate Impact Claim (Doc. 126) is GRANTED.

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