

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

| | | |
|--------------------------------|---|---------------------|
| HERBERT L. BROWN, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | No. 12-3086-STA/tmp |
| |) | |
| PATRICK R. DONAHOE, Postmaster |) | |
| General, United States Postal |) | |
| Service, |) | |
| |) | |
| Defendant. |) | |

REPORT AND RECOMMENDATION

Before the court by order of reference is defendant Postmaster General Patrick R. Donahoe's ("USPS") Motion to Dismiss or Alternatively for Summary Judgment ("Motion to Dismiss"), filed on August 21, 2013. (ECF No. 14.) Plaintiff Herbert L. Brown, who is proceeding *pro se*, responded by filing a document styled, "Motion to Grant Damages in Plaintiff Case," which the court construes as Brown's response in opposition to the Motion to Dismiss.¹ (ECF No.

¹Brown's "Motion to Grant Damages in Plaintiff Case" is two paragraphs long and does not address the USPS's arguments raised in the Motion to Dismiss. The first paragraph describes the types and amounts of damages Brown is seeking to recover in this lawsuit. In the second paragraph, Brown apparently attempts to explain why he was absent from work (which was one of the reasons for his termination) by stating that "I was under heavy medication from my doctor during the period in which I was fired. I have copies of my prescriptions." Attached to his "Motion" is (1) a letter dated July 24, 2002, from the U.S. Department of Labor acknowledging receipt of written authorization from Brown to have his attorney,

15.) For the reasons below, it is recommended that the Motion to Dismiss be granted.

I. PROPOSED FINDINGS OF FACT

In and before 2002, Brown was employed by the USPS as a Customer Services Manager in Memphis, Tennessee. On February 6, 2002, the USPS issued to Brown a Notice of Proposed Removal, which informed him that the USPS was proposing to terminate his employment because he was absent from work without leave ("AWOL") and failed to follow instructions.² (Exs. 1 & 2.) On February 28, 2002, the USPS issued a Letter of Decision notifying Brown that he was being terminated from his employment effective March 10, 2002. (Def.'s Relevant Facts ¶ 1; Ex. 1.) Brown subsequently filed an appeal with the Merit Systems Protection Board ("MSPB") on March 27, 2002, challenging the termination decision outlined in the

C.B. Weiser, represent him before the Office of Workers' Compensation Programs; (2) an October 15, 1991 memorandum from Richard D. Lake, General Manager of Employee Development and Education Division of the USPS, regarding a "Management Intern Program"; and (3) a list of management associates and interns as of September 6, 1991. Because Brown's filing was styled as a "Motion" and did not address any of the substantive arguments raised in the Motion to Dismiss, on September 26, 2013, the court entered an Order to Show Cause directing Brown to file a response within twenty days. On October 19, 2013, Brown filed a response to the show cause order, stating that his previously filed "Motion to Grant Damages in Plaintiff Case" was intended to be his response to the Motion to Dismiss.

²According to the February 6 Notice, Brown sustained an on-the-job injury in 1998. He returned to work in a limited duty job, but on June 15, 2011, he called in stating he was sick and did not return to work after that date. (Ex. 1.)

February 28 Letter of Decision. (Id.) Brown, who was represented by an attorney, C.B. Weiser, raised race (black), sex (male), mental disability, and reprisal (prior protected activity) as affirmative defenses in the MSPB appeal. (Def.'s Relevant Facts ¶ 2; Ex. 2.) On April 24, 2002, Brown filed a formal complaint with the USPS's Equal Employment Opportunity ("EEO") office, Case No. 4H-370-0218-02. On May 8, 2002, the USPS dismissed this EEO complaint based on Brown's previously filed appeal with the MSPB on March 27.³ (Def.'s Mot. to Dismiss at 9 n.2.)

On June 13, 2002, Brown and the USPS entered into a written settlement agreement ("Settlement Agreement") in which the USPS agreed to rescind the original removal and to reissue it based on Brown's inability to perform the requirements of the position. (Def.'s Relevant Facts ¶ 3; Ex. 3.) Pursuant to the terms of the Settlement Agreement, Brown agreed to apply for disability retirement, accept the new removal, and withdraw the MSPB appeal and any other claims of any nature in any forum, including the Equal Employment Opportunity Commission ("EEOC"), arising out of the subject matter of the appeal. (Def.'s Relevant Facts ¶ 4; Ex. 3.) Specifically, the Settlement Agreement provided in relevant part as follows:

SETTLEMENT AGREEMENT AND RELEASE

³See 29 C.F.R. § 1614.107(a)(4).

The parties to this appeal have agreed to fully and finally settle claims by Appellant of any nature against the United States Postal Service (Agency), its agents, and its employees, arising out of the subject matter of this appeal, whether or not these claims are all known to the parties and whether or not these claims have all yet matured. This appeal includes claims arising under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act. The terms and conditions of this settlement agreement are as follows:

1. By signing this Agreement, the Agency rescinds the Letter of Decision issued to Appellant dated February 28, 2002. The Agency also agrees to change any period of time between October 9, 2001 to March 10, 2002, from an official designation of AWOL to an official designation of Leave Without Pay (LWOP), and to officially designate the time period from March 11, 2002, to the date of this Agreement as LWOP. . . .

2. The parties specifically agree that the Agency will issue to Appellant a Notice of Proposed Removal (new proposed removal) for Inability to Perform the Requirements of Your Position and a Letter of Decision (new letter of decision) removing Appellant from postal employment for Inability to Perform the Requirements of Your Position. . . . The parties specifically agree that Appellant accepts the new proposed removal and new decision letter, that he will be removed from postal employment pursuant to these new letters, and that he will not appeal this new removal action to any forum.
. . . .

4. The Postal Service agrees to allow Appellant's attorney, C.B. Weiser, to review, and make suggestions regarding, any paperwork submitted by the Agency to the Office of Personnel Management (OPM) regarding a claim of disability retirement made by Appellant in the future, prior to its submission to OPM.

5. By signing this Agreement, Appellant voluntarily and irrevocably withdraws the above-referenced MSPB appeal and any other claims of any nature in any forum, arising out of the subject matter of this appeal, that Appellant has against the Postal Service, its agents, and employees acting in their official capacities, including EEO Case No. 4H-370-0218-02.

6. The parties specifically agree that, in this Agreement, Appellant is not waiving his right to pursue, and will not be barred from pursuing, any claim or appeal pending before the Department of Labor's Office of Workers Compensation Programs (OWCP).

. . . .

8. Should a dispute arise regarding the implementation of this settlement, it is expressly agreed that the Appellant is restricted to seeking specific enforcement of this Agreement in the MSPB and that he cannot seek to rescind this Agreement on account of that dispute. . . . Should new disputes arise between the parties involving other than the fulfillment of the terms of this Agreement, those disputes are independent matters which must be presented to the appropriate administrative or judicial forum, and neither party may seek to rescind this Agreement on account of those disputes.

9. The Appellant confirms that he has read this Settlement Agreement and Release and that he fully understands its terms and conditions. The Appellant further confirms that he has been advised to seek legal counsel prior to signing this Settlement Agreement and Release and that he has in fact utilized the services of personal legal counsel in reviewing and entering into this Settlement Agreement and Release. Finally, the Appellant confirms that he has been afforded a reasonable period of time in which to consider the terms of this Settlement Agreement and Release, and that he voluntarily accepts the Agreement for the purpose of fully and finally settling and release the Agency (Postal Service), and its agents and employees from all claims arising out of or connected to the subject matter of the above-referenced MSPB appeal and EEO Case No. 4H-370-0218-02.

. . . .

12. This Agreement will be entered into the record for the [MSPB] to retain jurisdiction over the enforcement of this Settlement Agreement and Release.

(Ex. 3.) Based on the settlement, on June 14, 2002, the MSPB issued an Initial Decision dismissing the appeal, which became final on July 19, 2002. (Def.'s Relevant Facts ¶ 5; Ex. 4.) The

Initial Decision, signed by Administrative Judge Joseph E. Clancy, provided:

The parties engaged in settlement discussions pursuant to my direction and they subsequently reached a settlement agreement wherein they resolved their dispute and the scheduled hearing was cancelled. . . . The agreement is lawful, was understood by the parties, was freely and voluntarily entered into by the parties, and will be enforceable by the Board. Accordingly, the hearing in this case is cancelled, and I find it appropriate that the appeal be DISMISSED.

(Ex. 4 at 1) (internal citation omitted). In accordance with the terms of the Settlement Agreement, Brown was removed from his position on December 6, 2002. (ECF No. 1, Nov. 30, 2012 EEOC Reconsideration Decision at 2.)

Nearly nine years later, on August 8, 2011, Brown filed a formal EEO complaint, Case No. 4C-370-0016-11, alleging that the USPS "forced me into disability retirement in 2002." (Def.'s Relevant Facts ¶ 6; Ex. 5.) Brown also alleged that the USPS "refused to deal with the law" by discriminating against him when they removed him in February 2002, failed to make reasonable accommodations for him in 2002, and retaliated against him by referencing the limited duty job in the February 6 Notice of Proposed Removal. On August 24, 2011, the USPS's EEO office dismissed Brown's formal complaint based on untimely EEO contact, in accordance with 29 C.F.R. § 1614.107(a)(2), and previous adjudication of the issues, in accordance with 29 C.F.R. § 1614.107(a)(1). (Def.'s Relevant Facts ¶ 7; Ex. 6.) The August 24

notice of dismissal explained that pursuant to 29 C.F.R. § 1614.105(a)(1), an aggrieved person must initiate contact with an EEO counselor within 45 days of the date of the matter alleged to be discriminatory, and because the discriminatory acts occurred in 2002 and Brown did not initiate counselor contact until April 29, 2011, the counselor contact was untimely. The notice referenced Brown's position as a manager and his EEO complaints filed in 1999 (which were both settled in 2001) and 2002, as facts demonstrating Brown's awareness of the 45-day EEO counselor contact requirement. The notice further stated that the discriminatory acts contained in the complaint were identical to those adjudicated by the EEOC in 2002 (Case No. 4H-370-0218-02) and which had been dismissed as a result of Brown's decision to pursue his appeal with the MSPB.

Brown appealed the final agency decision to the EEOC, and by decision dated February 29, 2012, the EEOC affirmed the final agency decision dismissing the complaint. (Def.'s Relevant Facts ¶ 8; Ex. 7.) The EEOC found that Brown did not timely contact the EEO counselor. The EEOC also determined that 29 C.F.R. § 1614.107(a)(4) provides for the dismissal of an EEO complaint where the complainant has elected, pursuant to 29 C.F.R. § 1614.302(b), to first file an appeal before the MSPB on the same matter. The EEOC's decision concluded that "[t]he record in this case establishes that Complainant has already raised his constructive discharge claim with the MSPB and the matter was settled therein.

He could have pursued his discrimination claims before the [MSPB] had he so desired. Because the matter was settled before the [MSPB], Complainant cannot now pursue the matter in an EEO complaint." On November 30, 2012, the EEOC denied Brown's request for reconsideration. (Def.'s Relevant Facts ¶ 10; Ex. 8.)

Brown filed his *pro se* complaint in this district court on December 19, 2012. (Def.'s Relevant Facts ¶ 11; ECF No. 1.) He alleges that the USPS discriminated against him in violation of Title VII of the Civil Rights Act of 1964 and the Rehabilitation Act of 1973, when it terminated him in February 2002 based on his race, color, sex, religion, and disability. In its Motion to Dismiss, the USPS argues that the complaint should be dismissed because Brown (1) previously elected to appeal the removal decision through the MSPB and settled that appeal, thus foreclosing his right to litigate those same claims in the instant action; and (2) failed to exhaust his administrative remedies in that he did not make initial EEO contact until April 29, 2011, well beyond the 45-day period required by 29 C.F.R. § 1614.105(a)(1).

II. PROPOSED CONCLUSIONS OF LAW

A. Standard of Review

Federal Rule Civil Procedure 12(b)(6) allows for the dismissal of a case where the complaint fails to state a claim upon which relief can be granted. When reviewing a motion to dismiss under Rule 12(b)(6), a court must "construe the complaint in the light

most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." DirectTV, Inc. v. Treesh, 487 F.3d 471, 476 (6th Cir. 2007). But the court "need not accept as true legal conclusions or unwarranted factual inferences." Id. (quoting Gregory v. Shelby Cnty., 220 F.3d 433, 446 (6th Cir. 2000)). "[L]egal conclusions masquerading as factual allegations will not suffice." Eidson v. State of Tenn. Dep't of Children's Servs., 510 F.3d 631, 634 (6th Cir. 2007).

"When a court is presented with a Rule 12(b)(6) motion, it may consider the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to the defendant's motion to dismiss, so long as they are referred to in the Complaint and are central to the claims contained therein." Bassett v. Nat'l Collegiate Athletic Ass'n, 528 F.3d 426, 430 (6th Cir. 2008). Although Rule 12(d) of the Federal Rules of Civil Procedure requires a court to treat a Rule 12(b)(6) motion as one for summary judgment "[i]f . . . matters outside the pleadings are presented to and not excluded by the court[,] " the court finds that the EEOC documents and the Settlement Agreement attached to the Motion to Dismiss are central to the claims and are public records. Kovac v. Superior Dairy, Inc., 930 F. Supp. 2d 857, 862-63 (N.D. Ohio 2013) (stating that "EEOC charges and related documents, including right to sue letters, are public records of which the Court may take judicial

notice in ruling on a motion to dismiss without having to convert the motion into one for summary judgment"). Therefore, the court will not convert the Motion to Dismiss into a motion for summary judgment.

B. Analysis

"Federal employees asserting Title VII claims must exhaust their administrative remedies as a precondition to filing a federal court action." Bailey v. Henderson, No. 99-4082, 2000 WL 1434634, at *4 (6th Cir. Sept. 21, 2000); Ramey v. Ashcroft, No. 4:04 CV 01797, 2005 WL 1637868, at *2 (N.D. Ohio July 12, 2005) (citing Brown v. Gen. Servs. Admin., 425 U.S. 820, 832 (1976)); see also Woods-Calhoun v. Potter, No. 08-2783-STA, 2010 WL 105001, at *3 (W.D. Tenn. Mar. 22, 2010). "Also, a plaintiff's Title VII action must be timely filed." Bailey, 2000 WL 1434634, at *4. Rehabilitation Act claims are subject to the exhaustion requirements and filing procedures applicable to Title VII claims against federal employers. 29 U.S.C. § 794a(a)(1); 29 C.F.R. § 1614.103(a); Smith v. U.S. Postal Serv., 742 F.2d 257, 260-62 (6th Cir. 1984).

"When a case involves both a personnel action normally appealable to the MSPB and discrimination claims, it is considered to be a 'mixed case' and is governed by a comprehensive statutory and regulatory scheme." Bailey, 2000 WL 1434634, at *4; see also Ramey, 2005 WL 1637868, at *2 (citing Valentine-Johnson v. Roche,

386 F.3d 800, 805 (6th Cir. 2004)); Woods-Calhoun, 2010 WL 1051001, at *3 ("A mixed case may be administratively filed either as an EEO complaint with the agency, or as an appeal to the MSPB, but not both."). This comprehensive scheme has been described as follows:

An employee who intends to pursue a mixed case has several paths available to her. At the outset, the aggrieved party can choose between filing a "mixed case complaint" with her agency's EEO office and filing a "mixed case appeal" directly with the MSPB. By statute, the relevant agency EEO office and the MSPB can and must address both the discrimination claim and the appealable personnel action. Should she elect the agency EEO route, within thirty days of a final decision she can file an appeal with the MSPB or a civil discrimination action in federal district court. If 120 days pass without a final decision from the agency's EEO office, the same avenues of appeal again become available: the complainant can file either a mixed case appeal with the MSPB or a civil action in district court.

When a complainant appeals to the MSPB, either directly or after pursuing her claim with the agency EEO office, the matter is assigned to an Administrative Judge who takes evidence and eventually makes findings of fact and conclusions of law. The AJ's initial decision becomes a final decision if neither party, nor the MSPB on its own motion, seeks further review within thirty-five days. However, both the complainant and the agency can petition the full Board to review an initial decision. Should the Board deny the petition for review, the initial decision becomes final; if the Board grants the petition, its decision is final when issued. At this point, the complainant again has a choice: within thirty days of receiving a final decision from the MSPB, she can either appeal the discrimination claim to the EEOC, or appeal the entire claim (or any parts thereof) to the appropriate district court. Finally, if the MSPB fails to render a judicially reviewable decision within 120 days from the filing of a mixed case appeal, the aggrieved party can pursue her claim in federal district court.

Valentine-Johnson, 386 F.3d at 805-06 (quoting Butler v. West, 164

F.3d 634, 638-39 (D.C. Cir. 1999) (citations omitted)).

In Bailey, the plaintiff, Gordon Bailey, Jr., was employed as a clerk at the USPS's Cincinnati Distribution Center. Bailey, 2000 WL 1434634, at *1. Bailey was charged with being AWOL four times and was suspended from work three times, and finally was removed from employment on January 16, 1995. Id. at *2. In October 1994, he filed an EEO complaint alleging discrimination based upon religion and disability following his first suspension in September 1994. Id. Bailey subsequently appealed his removal to the MSPB, arguing that his removal was improper and discriminatory. Id. While the MSPB appeal was pending, the USPS continued to process his EEO complaint. Id. However, Bailey did not appear at meetings scheduled with the EEO investigator. Id. On May 26, 1995, the MSPB issued its initial decision affirming Bailey's removal and finding that the USPS had not discriminated against him on the basis of disability or religion. Id. at *3. The decision advised that it would become final on June 30, 1995, unless Bailey pursued a petition for review with the MSPB. Id. It also notified him that he could obtain further administrative review by filing a petition with the EEOC or obtain judicial review by filing an action in federal court within 30 days. Id. The MSPB's decision became final on June 30, 1995, but Bailey did not file a petition with the EEOC or commence a civil action within 30 days of that date. Id. The USPS subsequently issued its final agency decision

dismissing Bailey's EEO complaint for lack of prosecution. Id. Bailey appealed the lack of prosecution dismissal. Id. The EEOC affirmed the dismissal of the EEO complaint, but decided that the USPS should have dismissed the EEO complaint because Bailey had elected to pursue his mixed case appeal before the MSPB. Id. Bailey timely filed a complaint in district court, and the court subsequently granted summary judgment in favor of the USPS. Id. On appeal to the Sixth Circuit, the court ruled as follows:

Having proceeded with his MSPB appeal, plaintiff could have sought further review of the MSPB's decision either (1) by filing a petition for administrative review of the MSPB's final decision with the EEOC within 30 days, or (2) by filing a civil action in the appropriate district court within 30 days of the MSPB's final decision. If a petition for review of the MSPB's decision had been filed with the EEOC, then a civil action could have been commenced within 30 days of receipt of the EEOC's decision on the petition.

When the MSPB's decision became final on June 30, 1995, plaintiff neither petitioned the EEOC to review the MSPB's decision nor instituted a civil action within 30 days. Instead, on July 31, 1995, plaintiff appealed from the agency's dismissal of his EEO complaint for lack of prosecution. The dismissal was affirmed by the EEOC on August 9, 1996, and plaintiff commenced this action within 90 days of that decision. *The filing of this action in November 1996, however, cannot resurrect the claims which were abandoned after the MSPB's final decision in June 1995.* Plaintiff failed to bring this action within the 30-day time limit and, as a result, summary judgment was properly entered in favor of defendant. To hold otherwise would ignore the clear requirement that a federal employee elect between pursuing either a mixed case EEO complaint with the agency or a mixed case appeal to the MSPB.

Id. at *5 (internal citations omitted) (emphasis added); see also

Ramey, 2005 WL 1637868, at *5-6 ("Ramey, after choosing the MSPB forum, elected to settle his case, foregoing a final decision from the MSPB and also waiving his right to a hearing before the EEOC and district court review. Ramey waived his right to pursue his administrative remedies in the MSPB forum; therefore, the Court lacks subject matter jurisdiction over his claims.") (internal citations omitted).

In the present case, Brown elected to file his mixed case appeal with the MSPB, settled his MSPB appeal, and did not timely seek any further administrative or judicial review after the Initial Decision dismissing the appeal became final on July 19, 2002. Thus, Brown failed to exhaust his administrative remedies, and his complaint must be dismissed.

Alternatively, the court finds that because Brown voluntarily withdrew his MSPB appeal pursuant to the Settlement Agreement, and as a result the Administrative Judge dismissed the entire MSPB appeal *without reaching the merits*, Brown failed to exhaust his administrative remedies with respect to his discrimination claims. See Browder v. Potter, No. 2:07-CV-546-MEF, 2008 WL 822132, at *5 (M.D. Ala. Mar. 26, 2008) (adopting report and recommendation) (citing cases and holding that because the Administrative Judge dismissed the entire MSPB appeal as withdrawn in light of the settlement agreement without reaching the merits, plaintiff did not exhaust his administrative remedies and thus court lacked

jurisdiction over his discrimination claims); see also Hart v. Lew, No. ELH-12-0382, 2013 WL 5330581, at *12 (D. Md. Sept. 23, 2013) (“[I]f an employee files a formal complaint or appeal, but withdraws or settles it before a final decision is issued, the employee has not exhausted her remedies and thus may not file suit.”).

Lastly, to the extent Brown’s complaint can be liberally construed as also alleging discrimination in connection with his “constructive discharge” in December 2002, that claim must be dismissed for an additional reason. As discussed above, before a federal employee may bring a Title VII discrimination lawsuit, he or she must first exhaust administrative remedies. Steiner v. Henderson, 354 F.3d 432, 435 (6th Cir. 2003). This requires the employee to initiate contact with 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); Taylor v. Donahoe, 452 F. App’x 614, 617 (6th Cir. 2011). If informal counseling proves unsuccessful, the employee has 15 days to file a formal complaint. 29 C.F.R. § 1614.105(d). Failure to follow these steps is grounds for dismissing the lawsuit. Steiner, 354 F.3d at 435; Maxwell v. Postmaster General, No. 13-10040, 2013 WL 6482536, at *2 (E.D. Mich. Dec. 10, 2013); Snow v. Napolitano, No. 10-02530, 2013 WL 3717732, at *1-2 (W.D. Tenn. July 11, 2013). Brown’s contact with

an EEO counselor on April 29, 2011, for discrimination that allegedly occurred in December 2002, was untimely.

The Sixth Circuit has held that a federal employee's obligation to consult with an EEO counselor within a set time period as a pre-condition to suit is subject to equitable tolling, waiver, and estoppel. Steiner, 354 F.3d at 435-36; see also Baldwin v. Wynne, No. 3:08-cv-1, 2009 WL 1032850, at *1 (S.D. Ohio Apr. 16, 2009) ("[T]he 45-day limit for contacting an EEO counselor is not jurisdictional and is subject to equitable tolling."). The doctrine of equitable tolling "permits courts to extend the statute of limitations on a case-by-case basis to prevent inequity." Baden-Winterwood v. Life Time Fitness, 484 F. Supp. 2d 822, 826 (S.D. Ohio 2007) (citing Truitt v. Cnty. of Wayne, 148 F.3d 644, 648 (6th Cir. 1998)).

A plaintiff bears the burden of demonstrating why he or she is entitled to equitably toll the statute of limitations in a particular case. Keenan v. Bagley, 400 F.3d 417, 420-22 (6th Cir. 2005); Allen v. Yukins, 366 F.3d 396, 401 (6th Cir. 2004); McClendon v. Sherman, 329 F.3d 490, 494 (6th Cir. 2003); Griffin v. Rogers, 308 F.3d 647, 653 (6th Cir. 2002); Baldwin, 2009 WL 1032850, at *3. Moreover, it is well-established that equitable tolling should be granted only sparingly. Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 90 (1990); Amini v. Oberlin Coll., 259 F.3d 493, 500 (6th Cir. 2001). Typically, "equitable tolling

applies only when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control." Graham-Humphreys v. Memphis Brooks Museum of Art, Inc., 209 F.3d 552, 561-62 (6th Cir. 2000) (citing Baldwin Cnty. Welcome Ctr. v. Brown, 466 U.S. 147, 151 (1984)). The Sixth Circuit has articulated five factors to guide courts in determining whether equitable tolling should apply in a particular case:

(1) the petitioner's lack of [actual] notice of the filing requirement; (2) the petitioner's lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the respondent; and (5) the petitioner's reasonableness in remaining ignorant of the legal requirement for filing his claim.

Cook v. Comm'r of Soc. Sec., 480 F.3d 432, 437 (6th Cir. 2007) (quoting Dunlap v. United States, 250 F.3d 1001, 1008 (6th Cir. 2001)). This list "is not necessarily comprehensive, and not all factors are relevant in all cases." Allen, 366 F.3d at 401 (quoting Vroman v. Brigano, 346 F.3d 598, 605 (6th Cir. 2003)).

Brown has not demonstrated that the eight-plus year delay in contacting the EEO counselor should be equitably tolled. Neither his complaint nor any of his other filings contain any explanations for the delay, nor do they address any of the equitable tolling factors. Brown's position as a manager and his prior EEO filings strongly suggest that, at a minimum, he had constructive knowledge of the 45-day EEO counselor contact requirement. The lengthy, unexplained delay in making contact with the EEO counselor

evidences a lack of diligence by Brown in pursuing his rights, supports a finding of substantial prejudice to the USPS, and highlights Brown's unreasonableness in failing to comply with the legal requirements.

III. RECOMMENDATION

For the reasons above, it is recommended that the Motion to Dismiss be granted and that the complaint be dismissed with prejudice.

Respectfully submitted,

s/ Tu M. Pham

TU M. PHAM
United States Magistrate Judge

January 30, 2014

Date

NOTICE

WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THIS REPORT AND RECOMMENDED DISPOSITION, ANY PARTY MAY SERVE AND FILE SPECIFIC WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATIONS. ANY PARTY MAY RESPOND TO ANOTHER PARTY'S OBJECTIONS WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b)(2); L.R. 72.1(g)(2). FAILURE TO FILE OBJECTIONS WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND FURTHER APPEAL.