

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

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SHIRLEY L. FOSTER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 01-2854 V
	)	
OVERNITE TRANSPORTATION CO.,	)	
	)	
Defendant.	)	

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ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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Shirley L. Foster, the plaintiff in this Title VII discrimination and breach of contract lawsuit, alleges that her employer, the defendant Overnite Transportation Co., failed to promote her because of her sex. The parties have consented to trial before the United States Magistrate Judge, pursuant to 28 U.S.C. § 636(c). Now before the court is a motion for summary judgment filed by Overnite.<sup>1</sup>

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<sup>1</sup> To support its motion, Overnite relies on the following: (1) an affidavit from Joseph Reding, Overnite's former Service Center Manager and current Hub Manager; (2) an affidavit from Robert Cecil, Overnite's former Hub Manager and current Service Center Manager; (3) an affidavit from Cynthia Anderson, Overnite's former Office Manager and current Training Specialist; (4) a September 26, 2000 deposition of Overnite employee Dana Hall; and (5) a June 24, 2002 deposition of the plaintiff, Shirley Foster.

Foster also relies on the Foster and Hall depositions. In addition, Foster relies on: (1) her personnel file; (2) a September 26, 2002 deposition of Overnite employee Brian Midkiff; (3) Brian Midkiff's Overnite personnel file; (4) Foster's EEOC

For the reasons that follow, Overnite's motion for summary judgment is granted.

#### UNDISPUTED FACTS

This suit arises from Foster's allegation that Overnite failed to promote her to a full-time Operations Clerk position that became available in 1999 because she was female, instead promoting a male who was less qualified. She also alleges that Overnite failed to promote her to a Road Dispatcher position in October, 2001. For purposes of this summary judgment motion, the following facts are undisputed.

On July 27th, 1998, Overnite hired Foster as a part-time Billing Clerk. (Aff. of Cynthia Anderson at ¶ 5.) On September 1, 1998, Overnite reclassified Foster to a part-time Manifest Clerk position. (Anderson Aff. at ¶ 5.) As a Manifest Clerk, Foster was sometimes required to help perform some duties in the Operations department. (*Id.*) At the time of the alleged misconduct by Overnite, Foster was reporting to Richard Pair. (Dep. of Shirley Foster at 30-33, 96; Pair Dep. at 30.)

On July 19, 1999, Overnite promoted Brandon Midkiff, a male, to a full-time Operations Clerk position. Midkiff had worked for Overnite as a full-time Dockworker since April 15, 1999. On July

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case file; (5) Foster's affidavit dated December 20, 2002; (6) a report by Dr. David Strauser, Foster's proposed expert witness; (7) a September 26, 2002 deposition of Overnite employee Richard Pair; and (8) a September 26, 2002 deposition of Joseph Reding.

6, 1999, Overnite had reclassified Midkiff to a full-time clerical position because of an injury to his hand. As a full-time employee, Midkiff had seniority over Foster, who had worked at Overnite longer but only as a part-time employee. (Anderson Aff. at ¶ 7.) The job vacancy was not posted at Overnite, and Foster did not apply for the position. (Aff. of Shirley Foster at ¶ 8.)

On January 12, 2001, Foster filed a charge of discrimination with the Tennessee Human Rights Commission (THRC) and the EEOC simultaneously for sex discrimination. The one page EEOC charge, signed by Foster on January 12, 2001, alleges in full:

I was denied a promotion to the position of OSCK Clerk [Overages Shortage Clerk] in August of 2000. When I asked about why I did not receive the promotion, I was told that it was because the selected male "did not wear a skirt." I am more qualified and have more seniority than the selected male. I believe that I have been discriminated against because of my sex, female in violation of Title VII of the Civil Rights Act of 1964, as amended.

(Mem. in Resp. to Def.'s Mot. for Summary Judgment, Ex. 7, EEOC File, January 12, 2001 Charge of Discrimination.) The EEOC charge lists the earliest and latest violation date as August 20, 2000. (Id.) The box on the form for ongoing violation is not checked; thus there is no allegation on the form which would indicate the charged misconduct was a continuing violation. (Id.) The accompanying four-page Charge Information Form, signed by Foster on the same date, gives the date of first occurrence as August 20,

2000, and the "date of most recent occurrence" as January 8, 2001. (Mem. in Resp. to Def.'s Mot. for Summary Judgment, Ex. 7, EEOC File, January 12, 2001 Charge Information Form.) The Charge Information Form describes the alleged discrimination as follows:

A job in my classification came up and it was not posted. The job was automatically given to a male with less seniority [sic] than I. When management was ask [sic] why, the management said because he got the position because he didn't wear a skirt. I went to terminal mgr. and he ask [sic] me to give a written statement and apologized.

01-08-01 - The same guy who got 1st promotion gets another promotion. Again this job was not even posted, which handbook states. And I still have more seniority. [sic]

(*Id.*)

The parties agree that no OSCK Clerk position was vacant during August, 2000. Discovery has revealed, and for the sake of this summary judgment motion both parties accept, that the "OSCK Clerk" position named in Foster's charge actually referred to the 1999 Operations Clerk position filled by Brian Midkiff. (Def.'s Mot. for Summary Judgment with Supporting Mem. of Law at 7-8; Mem. in Resp. to Def.'s Mot. for Summary Judgment at 6.)

The second position referred to in the Charge Information Form was that of Road Dispatcher. Due to company cutbacks, the position remained vacant until October, 2001. Mike Abston, a male, received it at that time. That promotion decision was made by Service Center Manager Joseph Reding. (Aff. of Joseph Reding at ¶ 4.)

Foster alleges that she did not suspect a sex-based motive for Overnite's failure to promote her into the Operations Clerk position until she heard, in August, 2000, a remark by Richard Pair to the effect that some jobs at Overnite were "for skirts" and others were not. (Mem. in Resp. to Def.'s Mot. for Summary Judgment at 6.) She further alleges that her January 12, 2001 charge was prompted by a "last straw" request that she train Midkiff for a second promotion to the Road Dispatcher position. (See *id.* at 5-6.)

Finally, Foster's pleadings and memoranda allege that Overnite often failed to post job vacancies as provided in its employee handbook. This failure to post job openings is mentioned in the January 2001 Charge Information Sheet, but not in the actual Discrimination Charge.<sup>2</sup>

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<sup>2</sup> The parties disagree on several facts surrounding the Operations Clerk promotion. None of these disputed facts, however, are material to the statute of limitations issue.

They clash over whether Foster ever told Pair, her supervisor, that she was interested in the position. (*Compare* Aff. of Shirley Foster at ¶ 8 with Pair Dep. at 36.)

They also dispute the identity of the decisionmaker. Overnite claims Robert L. Cecil was the final decisionmaker, with input from Cynthia Anderson, who was then Overnite's office manager. (Aff. of Robert L. Cecil at ¶¶ 4-5.) Foster claims that Richard Pair's recommendations were always accepted, and that Anderson had no input on the Operations Clerk promotion. (Mem. in Resp. to Def.'s Mot. for Summary Judgment at 4-5; see also Pair Dep. at 31-33.)

Further, they disagree about Overnite's motive for promoting Midkiff. Overnite proffers three business reasons: seniority, qualification, and performance. First, Overnite claims that as a full-time employee, Midkiff had seniority over Foster. She had

## ANALYSIS

In support of its motion for summary judgment, Overnite argues four primary grounds: (1) that Foster's discrimination claim is time-barred; (2) that Foster's claims regarding the Operations Clerk and Road Dispatcher positions are outside the scope of Foster's discrimination charge; (3) that Foster cannot establish a prima facie Title VII case because she cannot show that Overnite's actions were pretextual, that she was qualified for the open positions, or that equally or less qualified male employees were

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worked at Overnite longer, but only as a part-time employee. (Anderson Aff. at ¶ 7.) Second, Overnite claims that Midkiff had experience working with dockworkers, experience working in "hectic situations," and ability to pay attention to detail, all of which qualified him for the position. (Def.'s Mot. for Summary Judgment with Supporting Mem. of Law at 12-13.) Foster disputes this, claiming that Midkiff lacked the necessary office experience, that she trained him for the position, and that she was equally qualified. (Dep. of Shirley Foster at 73-74; Report of David Strauser at 2.) Third, Overnite claims that Midkiff was a superior performer with no attendance problems, and that he got along well with other employees. (Anderson Aff. at 3.) Overnite claims that Foster did not quickly learn tasks, made many errors, "often complained when she had to perform some of the Operations Clerk duties [and] did not perform those duties well when she did assist." (Def.'s Mot. for Summary Judgment with Supporting Mem. of Law at 12; Anderson Aff. at 3.) Overnite also alleges that Foster "was not qualified because of her numerous absences and failure to call in when she was going to be late to work." (Def.'s Mot. for Summary Judgment with Supporting Mem. of Law at 13; Anderson Aff. at 3.) Foster denies that Overnite ever counseled her for attendance problems. (Aff. of Shirley Foster at ¶ 4.)

The parties, of course, also disagree over whether Midkiff's promotion was sex-based. Foster claims that all Overnite's considerations are pretextual, and that actually she did not receive the Operations Clerk position because of her sex.

promoted into the positions; and (4) that Foster has no meritorious breach of contract claim arising from Overnite's alleged failure to post open positions in accordance with the procedure outlined by the Overnite Employee Handbook.

For the following reasons, the court finds that Foster's claim is time-barred; that the Road Dispatcher position is outside the scope of Foster's discrimination charge; and that, with the federal claims dismissed, Foster's breach of contract claim is properly dismissed without prejudice. Because these issues are dispositive, the court need not reach an analysis of the merits.

A. Summary Judgment Standard

Summary judgment is to be rendered if the pleadings, discovery materials, and affidavits on file "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The court's function is not to weigh the evidence, judge credibility, or in any way determine the truth of the matter, but only to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party . . . [i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50

(internal citations omitted). The evidence of the nonmovant is to be believed, and all justifiable inferences drawn in the nonmovant's favor. *Id.* at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)).

B. Statute of Limitations

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating "against any individual with respect to . . . compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . ." 42 U.S.C. § 2000e-2(a)(1). In a sex discrimination case,

a plaintiff bears the burden of establishing by a preponderance of the evidence a prima facie case . . . by demonstrating: (1) membership in the protected class; (2) that she suffered an adverse action; (3) that she was qualified for the position; and (4) that she was replaced by someone outside the protected class or was treated differently from similarly situated members of the unprotected class.

*Warfield v. Lebanon Correctional Inst.*, 181 F.3d 723, 728-29 (6th Cir. 1999) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

Relief under Title VII may be had only if a plaintiff files an employment discrimination charge with the Equal Employment Opportunity Commission within 180 days of the alleged misconduct, or files such a charge with a state or local agency within 300 days of the alleged misconduct. 42 U.S.C. § 2000e-5(e)(1); *National R.R. Passenger Corp. [AMTRAK] v. Morgan*, 536 U.S. 101, 116-117

(2002). Earlier this year, the Supreme Court clarified the inquiry governing these time limits:

[T]he critical sentence of the charge filing provision is: "A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred." The operative terms are "shall," "after . . . occurred," and "unlawful employment practice." "Shall" makes the act of filing a charge within the specified time period mandatory. "Occurred" means that the practice took place or happened in the past. The requirement, therefore, is that the charge be filed "after" the practice "occurred" tells us that a litigant has up to 180 or 300 days after the unlawful practice happened to file a charge with the EEOC.

The critical questions, then, are: What constitutes an "unlawful employment practice" and when has that practice "occurred"? . . . The answer varies with the [employment] practice.

*Morgan*, 536 U.S. at 119-120 (emphasis in original) (internal citations omitted). In addition, "this time period for filing a charge is subject to equitable doctrines such as tolling or estoppel." *Id.* at 120 (2002) (citing *Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982)).

It is undisputed for purposes of this motion that the "OSCK Clerk" position identified in Foster's EEOC charge refers to the Operations Clerk position filled by Midkiff on July 19, 1999. It is clear that Foster neither filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) within 180 days of the July 19, 1999 promotion decision, nor filed a charge of discrimination with a state agency within 300 days of the July 19,

1999 promotion decision.

Foster counters that her claim is not time-barred, first because Overnite's repeated pattern of failures to promote falls under the "continuing violation" doctrine, and, secondly because her claim should benefit from the "date of discovery" doctrine. (Mem. in Resp. to Def.'s Mot. for Summary Judgment at 6-7.) The "continuing violation" doctrine allows the time limitations to run from the date of the most recent misconduct in certain limited circumstances. The "date of discovery" doctrine, one of equitable tolling, allows the time limitations to run from the date the plaintiff discovers the injury, provided that the plaintiff reasonably could not have discovered the injury at an earlier date.

1. The Continuing Violation Doctrine

The Sixth Circuit recognizes two categories of continuing violations: (1) the "serial" violation, which involves repeated discriminatory acts, such as where an employer continues to impose disparate work assignment between similarly situated employees, and (2) the "long-standing and demonstrable policy" violation, which involves intentional discrimination against a protected class, such as an established and repeated pattern of paying men more than women. See, e.g., *EEOC v. Penton Industrial Pub. Co., Inc.*, 851 F.2d 835, 837-39 (6th Cir. 1988) (recognizing two categories of continuing violation); *Alexander v. Local 496*, 177 F.3d 394, 408-

409 (6th Cir. 1999) (recognizing two categories of continuing violation). A "long standing and demonstrable policy" is often created or evinced by the employer's repeated discriminatory acts. See, e.g., *Alexander*, 177 F.3d at 408-409 (finding both types of continuing violation when a union consistently failed to inform black members of continued work eligibility guidelines but consistently informed white members of those guidelines). However, the categories are distinguishable, because a "serial" violation affects only one person, while a "policy" violation reveals disparate treatment of the protected class as a whole. See, e.g., *Penton Industrial*, 851 F.2d at 838-39 (rejecting, in a sex discrimination case, a "policy" violation theory for a single incident of disparate pay); *Tenenbaum v. Caldera*, 2002 U.S. App. LEXIS 18155 (6th Cir. 2002) (rejecting, in a Title VII case, a "policy" violation theory for lack of facts supporting "similar discrimination against other American Jews" or "class-wide discrimination"); *Janikoski v. Bendix Corp.*, 823 F.2d 945 (6th Cir. 1986) (rejecting, in an ADEA case, a "policy" violation theory when plaintiff failed to allege an "over-arching policy" of age discrimination).

The first category, "serial violations," recently was re-defined by the Supreme Court's holding in *National R.R. Passenger Corp. [AMTRAK] v. Morgan*, 536 U.S. 101 (2002). See *Morgan*, 536

U.S. at 125 (affirming the application of the serial violations doctrine to hostile work environment cases); *Tenenbaum*, 2002 U.S. App. LEXIS 18155 at \*\*7-8 (discussing *Morgan's* effect on previous Sixth Circuit holdings for this type of violation). Under previous Sixth Circuit case law, a plaintiff could recover for all violative acts under the "serial violation" theory if at least one act in a series occurred within the filing time. See, e.g., *Janikoski*, 823 F.2d 945 (applying the rule to an ADEA violation). Under the new *Morgan* standard, "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify . . . [and each] constitutes a separate actionable 'unlawful employment practice,'" and they are not actionable if time-barred, even when they are related to acts alleged in timely filed charges. *Morgan*, 536 U.S. at 120. See also *Tenenbaum*, 2002 U.S. App. LEXIS 18155 at \*\*7-8.

By the plain language of this Supreme Court decision, Overnite's failure to promote Foster to Operations Clerk is a "discrete act." The time limitation begins to run at the time Overnite promoted Midkiff to the Operations Clerk position instead of Foster. At the latest, this occurred on July 19, 1999, the day of Midkiff's promotion. Foster's 180-day window of opportunity to file charges with the EEOC closed on January 15, 2000. Foster's 300-day window of opportunity to file charges with a state or local

agency closed on May 14, 2000. Foster filed nothing before January 21, 2001. Accordingly, a "serial" violation claim alleging a failure to promote is time-barred under 42 U.S.C. § 2000e-5(e) (1).

Foster's claim regarding the Road Dispatcher position does not change this analysis. A series of discrete, unconnected discriminatory acts do not constitute a serial violation for purposes of the statute of limitations; each act constitutes a separate unlawful employment practice. *Sherman v. Chrysler Corporation*, 2002 U.S. App. LEXIS 19186 AT \*10 (6th Cir. Sept. 16, 2002) (holding that allegations regarding three promotions were discrete acts which did not constitute a continuing violation). An EEOC charge must be filed within the 180 or 300 day time period after each discriminatory act occurs. *Morgan*, 536 U.S. at 122.

The second category, the "long-standing and demonstrable policy" violation, remains unaffected by *Morgan*. *Tenenbaum*, 2002 U.S. App. LEXIS 18155 at n3. The plaintiff in this category must establish, by a preponderance of the evidence, "that some form of intentional discrimination against the class of which plaintiff was a member was the company's standard operating procedure." *Penton Industrial*, 851 F.2d at 838 (citing *Jewett v. ITT Corp.*, 653 F.2d 89, 91-92 (3d Cir. 1981). See also *Tenenbaum*, 2002 U.S. App. LEXIS 18155 (applying the rule in a Title VII suit); *Alexander*, 177 F.3d at 408-409 (applying the rule in a Title VII suit); *Janikoski*, 823

F.2d 945 (applying the rule in an ADEA suit). In this case, Overnite presents unrefuted evidence that its promotion system is based on seniority and performance. (Anderson Aff. at Ex. A, Overnite Employee Handbook). Foster has alleged only that Overnite has a general propensity to fail to post job vacancies in accordance with its employee handbook. She has not alleged that Overnite's failure to do so has ever resulted in a general failure to promote females as a class, nor has she alleged any facts to support such an inference. (See Mem. in Resp. to Def.'s Mot. for Summary Judgment at EEOC File, Charge of Discrimination and Charge Information Sheet.) Without such facts, no reasonable jury could find that a "policy" violation exists.

Accordingly, the failures to promote Foster do not constitute a continuing violation, and Foster's claim regarding the Operations Clerk position remains time-barred by 42 U.S.C. § 2000e-5(e)(1) unless tolled by an equitable doctrine.

## 2. The "Date of Discovery" Doctrine

Since at least 1979, the Sixth Circuit has approved equitable tolling for Title VII cases, "even in the absence of any misleading conduct by the employer." *Fox v. The Eaton Corp.*, 615 F.2d 716, 719 (6th Cir. 1979). Five factors help determine whether equitable tolling is appropriate in a given case:

- (1) [W]hether the plaintiff lacked actual notice of the filing requirements;
- (2) whether the plaintiff lacked

constructive notice, i.e., his attorney should have known; (3) the diligence with which the plaintiff pursued his rights; (4) whether there would be prejudice to the defendant if the statute were tolled; and (5) the reasonableness of the plaintiff remaining ignorant of his rights.

*Andrews v. Orr*, 851 F.2d 146, 151 (6th Cir. 1988). *Accord Rose v. Secretary of Labor*, 945 F.2d 1331, 1335 (6th Cir. 1991) (applying the test in an ERA case); *Graham-Humphreys v. Memphis Brooks Museum of Art*, 209 F.3d 552, 561 (6th Cir. 2000) (applying the test in a Title VII sex discrimination case).

Although the test provides guidance, equitable tolling decisions ultimately are made on a case-by-case basis. *Amini v. Oberlin College*, 259 F.3d 493, 500 (6th Cir. 2001); *Graham-Humphreys*, 209 F.3d at 561. In many cases, including those cited by the parties, the key inquiry is whether the plaintiff's delay in asserting her rights was reasonable. In all cases, however, equitable tolling should be granted only when "compelling equitable considerations" so demand. *Graham-Humphreys*, 209 F.3d at 561. *Accord Amini*, 259 F.3d at 500.

In this case, Foster does not allege any lack of actual or constructive notice of her rights. Accordingly, the inquiries are whether Foster's actions were reasonable; whether Foster diligently pursued her rights; and whether equitable tolling would prejudice the defendant Overnite.

Generally, a civil rights statute of limitations begins to run

when a reasonable plaintiff knew or should have known of the injury. See, e.g., *Shaw v. Nashville Gas Co.*, 2000 U.S. App. LEXIS 33383 (6th Cir. 2000) (applying the rule in a Title VII claim); *McLaughlin v. Excel Wire and Cable*, 1986 U.S. App. LEXIS 19444 (6th Cir. 1986) (applying the rule in an ADEA claim); *Hughes v. Vanderbilt Univ.*, 215 F.3d 543, 547-48 (6th Cir. 2000) (applying the rule in a 42 U.S.C. § 1983 claim).

To support the reasonableness of her delay in filing an EEOC charge, Foster relies on *Brown v. Packaging Corp. of Amer.*, 846 F. Supp. 592 (M.D. Tenn. 1993). In *Brown*, the female plaintiff learned, after the fact, that her supervisor had failed to submit her name for a promotion. The supervisor had previously remarked that the plaintiff was not suitable for the job because of her sex. The *Brown* court held that the statute of limitations began to run when the plaintiff learned that the supervisor failed to submit her name for the promotion. *Brown*, 846 F. Supp. at 598.

Foster argues that, according to *Brown*, the statute of limitations begins to run when a plaintiff discovers a discriminatory motive for an adverse employment action. Overnite argues, and this court agrees, that this interpretation is inaccurate. *Brown* merely stands for the widely-accepted proposition that the statute of limitations begins to run when a plaintiff becomes aware of an adverse employment action, i.e., when

an employer "makes and communicates a final decision to an employee" or when "the employee is aware or reasonably should be aware of the employer's decision." *EEOC v. United Parcel Service*, 249 F.3d 557, 561-62 (6th Cir. 2001) (citing *Delaware State College v. Ricks*, 449 U.S. 250 (1980)). See also *Black v. Columbus Public Schools*, 211 F. Supp. 2d 975 (S.D. Ohio 2002) (holding that, when plaintiff teacher was notified of a transfer to another school in spring of 1992 and actually transferred in fall of 1992, the statute began to run on the date of the transfer notification, not the date the transfer took effect).

"The proper focus for purposes of determining the 300-day limitations period is on the discriminatory act itself and when that act was communicated to the plaintiff." *Amini*, 259 F.3d at 500. In *Brown*, the supervisor's failure to submit Brown's name for promotion was the discriminatory act. In Foster's case, Overnite's failure to promote Foster is the allegedly discriminatory act. Under *Brown*, Foster's statute of limitations would begin to run when Foster became aware that she had not been promoted. Foster does not claim she was unaware of Midkiff's promotion in July, 1999. She claims, instead, that she was unaware of Overnite's motive for the promotion until August, 2000, and that the statute should start to run on this date.

*Brown* does not stand for the proposition that a statute of

limitations is tolled until an employer's discriminatory motive comes to light. The Sixth Circuit considered and rejected this precise proposition in *Amini v. Oberlin College*, 259 F.3d 493 (6th Cir. 2001). In *Amini*, the plaintiff, an "Iranian born Muslim male," applied for a mathematics faculty position at Oberlin College. He was not interviewed for the position. On January 12, 1999, he received a letter informing him that the position had been filled. On September 16, 1999, he discovered that Oberlin had filled the position with a white male. Amini filed an EEOC charge on December 9, 1999, alleging that Oberlin had discriminated against him on basis of his race, religion, and national origin. In response to a statute of limitations argument, the court held that "the starting date for the 300-day limitations period is when the plaintiff learns of the employment decision itself, not when the plaintiff learns that the employment decision may have been discriminatorily motivated." *Amini*, 259 F.3d at 498-99 (citing *EEOC v. United Parcel Service*, 249 F.3d 557 (6th Cir. 2000)). See also *Taylor v. Ohio Dept. of Rehab. and Corr.*, 2001 U.S. Dist. LEXIS 24325 (2001) (holding that plaintiff employee was not entitled to equitable tolling when, three years after termination of her employment, her independent investigation revealed facts indicating that similarly situated males and females were treated differently by her former employer). Accordingly, Foster's delay

in pursuing her rights until she learned of a potential discriminatory motive is an unreasonable delay.

In addition, Foster did not diligently pursue her rights after Midkiff's 1999 promotion. "[A] court should not 'permit an aggrieved employee aware of his general rights to sit on those rights until he leisurely decided to take action.'" *Id.* at 1319 (internal citations omitted). The test is whether the plaintiff "despite all due diligence, [was] unable to obtain information bearing on the existence of [his] claim." *Allen v. Diebold, Inc.*, 807 F. Supp. 1308, 1316 (N.D. Ohio 1992) (quote unattributed).

The Sixth Circuit's position is illustrated by *Allen v. Diebold*, an ADEA claim. Several Diebold employees over age forty were notified in fall of 1989 of workforce reductions. Layoffs began in January, 1990. In November 1990, the laid-off employees learned that they had been replaced by younger, lower-paid employees. Nevertheless, none met with an EEOC representative until February 1991, and none filed an EEOC charge until June, 1991. *Allen*, 807 F. Supp. at 1310, 1318. The court declined to grant equitable tolling, holding that, "the plaintiffs, after acquiring the information purportedly necessary for them to lodge an EEOC complaint, displayed a remarkable degree of lethargy in pursuing claims which should, by the righteous indignation such claims oft-times evoke, cry out for immediate protest." *Id.* at

1319.

Foster's case suffers a similar weakness. The undisputed facts show that Foster was aware of Midkiff's promotion in July, 1999. Foster also knew at that time that Midkiff was male, knew Midkiff had been hired by Overnite more recently than she, and believed at the time that she was more qualified for the position because she recently had been instructing Midkiff in clerical duties. Foster does not allege that, at any time, she complained about Midkiff's promotion to any person at Overnite, sought Overnite's reasoning for promoting Midkiff, consulted with an attorney, or attempted to file any EEOC charge before January 12, 2001. In July 1999, Foster had sufficient information about Midkiff's promotion to warrant further inquiry, and she did not inquire.

Foster alleges that in August, 2000, Pair's remark gave her the first reason she had to believe that Overnite promoted Midkiff solely because of his sex. Even if this is accepted as fact, Foster undoubtedly had sufficient information to pursue an EEOC charge in August 2000. Again, she did not do so. She made no complaint at all until January 12, 2001, over four months later, when she learned that Midkiff was being considered for the Road Dispatcher position. This is not a diligent pursuit of rights. See *Rose*, 945 F.2d at 1336 (6th Cir. 1991) (declining to extend

equitable tolling when plaintiff suspected, but did not act on the suspicion, that his employer was retaliating for "whistleblowing" activity). See also *Hart v. J.T. Baker Chem. Co.*, 598 F.2d 829 (3d Cir. 1979) (declining to extend equitable tolling in Title VII case when female plaintiff was hired in January, 1973; discharged in July 1973; allegedly learned of the employer's discriminatory motive in December 1973; and failed to file an EEOC charge until September 1974).

Finally, Overnite would be prejudiced if equitable tolling is granted. The statute of limitations is designed, in part, to protect employers from vulnerability to ancient claims; tolling a statute until an employer's motive is discovered could subject employers to a flood of litigation based on past acts. *Amini*, 259 F.3d at 502 (citing *Hill v. United States Dep't of Labor*, 65 F.3d 1331, 1337 (6th Cir. 1995)). Accord *Taylor*, 2001 U.S. Dist. LEXIS 24325. In addition, permitting Foster to take advantage of equitable tolling would deprive Overnite of its fair opportunity to receive notice of a claim and defend while all evidence is still fresh. See *Fox*, 615 F.2d at 720, n8 (discussing policy goals behind statutes of limitations).

All factors indicate that Foster is not entitled to equitable tolling. She does not argue inadequate notice of her rights. The delay in filing her EEOC claim was unreasonable, and Foster failed

to diligently pursue her rights in the interim. Permitting equitable tolling under these circumstances would prejudice Overnite's defense and undermine the general policy considerations favoring application of equitable tolling in only the most compelling circumstances.

C. Scope of EEOC Charge

In Title VII litigation, a plaintiff's claims are "limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination." *Tipler v. E.I. DuPont DeNemours and Co.*, 443 F.3d 125, 131 (6th Cir. 1971). When an allegation is neither set forth in the EEOC charge nor within the scope of the EEOC's reasonable investigation arising from that charge, or when the EEOC charge is so general that the court cannot identify the nature of the plaintiff's allegations, the plaintiff's claim is barred. See *Martin v. Federal Express Corp.*, 1998 U.S. App. LEXIS 13155 (6th Cir. 1998) (disallowing such claims despite an acknowledgment of Title VII's liberal construction). Overnite argues that this rule should apply to Foster's case, and the court agrees. It is not clear that the Road Dispatcher position would reasonably fall within the EEOC's investigation of the Operations Clerk position. In the first place, Midkiff was never promoted to the Road Dispatcher position as suggested by Foster's EEOC Charge Information Form, and Foster did not challenge Mike Abston's

promotion to the position. In the second place, the decisionmaker who filled the Road Dispatcher position was not the same decisionmaker who filled the Operations Clerk position. Finally, and most compelling, the Road Dispatcher position still stood vacant when the EEOC investigation ended. Although Foster claims the EEOC investigated the Road Dispatcher position, nothing in the EEOC file substantiates this allegation. To the contrary, the EEOC file is marked for closure with a handwritten note dated July 26, 2001. The EEOC case log ends on July 30, 2001. The EEOC issued a Dismissal and Notice of Rights on July 30, 2001. The Road Dispatcher position was not filled until October, 2001. There is no reasonable way an October, 2001 employment action could be the subject of an investigation that ended in July, 2001. Title VII requires that an EEOC charge be filed "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). Accordingly, all claims associated with the Road Dispatcher position are dismissed because they are beyond the scope of the EEOC charge.

D. Breach of Contract Claim

Finally, Foster asserts a state law breach of contract arising from Overnite's alleged failure to post open positions in accordance with the Overnite Employee Handbook. With all federal claims now extinguished, the court exercises its discretion to dismiss without prejudice this state law claim. See 28 U.S.C. §

1331; *First National Bank of Pulaski v. Curry*, 301 F.3d 456, 467-68 (6th Cir. 2002) (dismissal of state claims, rather than remand, is the proper disposition when action was originally filed in federal court). *Accord Vandiver*, 925 F.2d at 935 ("The proper recourse where pendent jurisdiction is not exercised is dismissal of the state claims without prejudice.") (citing *Roberts v. City of Troy*, 773 F.2d 720, 726 (6th Cir. 1985)).

#### CONCLUSION

For the above reasons, this court finds that neither the continuing violations exception or date of discovery doctrine applies, and that Foster's claim for failure to promote her to Operations Clerk is time-barred by 42 U.S.C. § 2000e-5(e)(1). The Road Dispatcher promotion cannot be litigated in this action because it is beyond the scope of Foster's EEOC charge. Foster's Title VII claims are therefore dismissed with prejudice. In addition, Foster's breach of contract claim is dismissed without prejudice. Overnite's motion for summary judgment is granted.

IT IS SO ORDERED this 16th day of January, 2003.

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DIANE K. VESCOVO  
UNITED STATES MAGISTRATE JUDGE