

No. 10-35531

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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U.S. District Court Western District of Washington, No. 2:09-cv-01008-RAJ,
- Civil Action pursuant to Title VII of the Civil Rights Act of 1964, - 42
U.S.C. section 1983 and section 2000e. The Age Discrimination in
Employment Act of 1967, - 29 U.S.C. section 621, and 633a, and The
Whistleblower Protection Act of 1989, - 31 U.S.C. section 3730(h).

FILED _____
DOCKETED _____
DATE _____ INITIA _____

Lance P. McDermott,
vs.
John P. Potter, Postmaster General, United States Postal Service, *Et Al*,

APPELLANT'S INFORMAL BRIEF

Appeal from the United States District Court
for the Western District of Washington at Seattle
The Honorable Richard A. Jones
United States District Judge

Lance McDermott, Pro Se
1819 So 104 ST
Seattle, WA 98168
206 763-6268

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Lance P. McDermott,
Plaintiff - Appellant,

9th Cir. Case No. 10-35531
District Court Case No. 2:09-cv-01008RAJ

vs.

John P. Potter, Postmaster General,
United States Postal Service, Et Al,
Defendants - Appellees.

APPELLANT'S INFORMAL BRIEF

1. Jurisdiction:

a. District Court – Civil Rights Act of 1964, 42 U.S.C. section 1983 and section 2000e (29 C.F.R. section 1610.1). - The Age Discrimination in Employment Act of 1967, 29 U.S.C. section 621 and 663a. - The Whistleblower Protection Act of 1989, 31 U.S.C. section 3730(h).

b. Appeals Court - Double Jeopardy, - Procedural Due Process, - Federal Question(s) and other possible Mistakes by the District Court.

c. Timeliness of Appeal:

(1) Court Order Granting Motion to Dismiss: 11 May 2010.

(2) Date Notice of Appeal filed: 8 June 2010.

d. Excerpts of Record exhibits:

(1) Notice of Appeal, 9 June 2010.

(2) The District Court Docket Sheet.

(3) C09-1008-RAJ, Court Order Granting Motion to Dismiss, (second) Complaint

11 September 2009.

(4) C08-1846-JCC, Court Order Granting Motion for Dismissal of (first) Complaint, 18 June 2009.

2. The Facts of What Happened:

I suffered several incidents of Discrimination (29 C.F.R. 1614.103(a)) and Retaliation (29 C.F.R. 1614.101(b)) at my workplace. (1) I filed an age discrimination complaint on 23 December 2005 for a Maintenance Grinch Award given to me before Christmas (Complaint page 14, exhibit 1). See Dumaguit v. Potter, Case No. C-06-2042 JSW. (2) I filed a Sex Discrimination complaint on 5 April 2006 for Management's failure to inform me of a Promotion Opportunity (Complaint page 17, exhibit 2). These (1&2) were combined by the United States Postal Service (USPS) into one formal Equal Employment and Opportunity (EEO) Complaint #1E-981-0018-06 (Complaint page 4). (3) I filed an Age Discrimination and Retaliation Complaint on 3 May 2007 for the intimidation I suffered from a fellow Employee cussing at me during a meeting and the loss of a training opportunity that could lead to promotion (Complaint page 17, exhibit 3). (4) I filed a second complaint 9 April 2008 about Management's failure to notify me of a promotion opportunity and retaliation (Complaint page 18, exhibit 4). These (3&4) were combined by the Postal Service into the second formal EEO Complaint #1E-981-0044-08 (Complaint page 10, exhibit 29).

USPS took over 180 days (29 C.F.R. 1614.106(e)(2)) to conducted a formal investigation and completed a 500+ page investigation (29 C.F.R. 1614.108) for the first EEO Complaint #1E0981-0018-06 Report laced with errors (29 C.F.R. 1614.102(a)(2)) issued on 13 July 2006 (Complaint page 5). The completed investigation for the first EEO Complaint mixed up several important facts about the complaint and left out other facts. I still asked for an Administrative Hearing in hopes of clearing up the facts through discovery.

An Administrative Judge Steven R. Gaffin was assigned to the case 13 November 2006

(Complaint page 5, exhibit 7). I received a letter dated 17 November 2006 from USPS Law Department Attorney Richard C. Mosher and Notice of Deposition for 4 December 2006 (less than 20 day notice) (Complaint page 6, exhibit 8). I filed a Motion for Protection on 24 November 2006 (Complaint page 6, exhibit 9) with the Administrative Judge and the USPS Attorney. I also requested discovery documents from the Attorney 24 November 2006 and a settlement discussion (exhibit 57). Law Department letter, 17 November 2006, (exhibit 8), - "AJ Gaffin's Acknowledgement Order directs us to contact each other within thirty (30) days to define claims, develop stipulations and discuss settlement." Administrative Judges' Order, 1 December 2006, (exhibit 11), - "I find that complainant failed to certify that he conferred with the opposing party to attempt to resolve the discovery dispute." The Agency did not have a settlement discussion meeting with me before the start of discovery, again violating my right for possible settlement or to define the claims. (Complaint page 10)

The USPS Attorney left a message on my home phone (he had my work number) 30 November 2006 that "he was already in town" (exhibit 10). I also received a message on my home phone from Administrative Judge Gaffin that the deposition was "pretty routine" (exhibit 10). As requested I called Judge Gaffin on 1 December 2006 and complained about the *ex parte* communications (exhibit 11, page 2). He orally denied my Motion for Protection saying that I was late (29 C.F.R. 1614.604) in getting it to him when I was not (Complaint page 6) and sent me a written Order dated 1 December 2006, (exhibit 11). The AJ did not rule on the *ex parte* communications.

I mailed my Motion for Protection on 24 November 2006 to the Judge and the Attorney. The mail should have taken 3-4 days to be delivered to Salt Lake City. The Administrative Judge sent his letter to Salt Lake City dated 13 November 2006 and the Attorney sent his letter from Salt Lake City dated 17 November 2006 (4 day turn-around). Still the Attorney said that my Motion for Protection sent 24 November 2006 was received by his office after he left for Seattle 30 November 2006. Assigning an Attorney

to an Administrative Hearing violates the Alternative Dispute Resolution Rules that require the used of non-attorneys in the administrative process to save money and not to muddle the facts (legal) for the Civil Process. It is not my fault that the Postal Service assigned someone who did not live in Seattle to the case. 29 C.F.R. 1614.109(e) – “Attendance at hearings will be limited to persons determined by the administrative judge to have direct knowledge related to the complaint.” The USPS Attorney from Salt Lake City stated that he had not read the Complaint or the EEO Investigation Report before the Deposition.

I also asked for discovery documents 24 November 2006 (exhibit 57) and was denied the documents (exhibit 13) by the USPS Attorney 22 December 2006 (28 days later) because “The Agency objects to producing documents for job vacancies that Complainant never applied for ...” (Complaint page 7, exhibit 13) in violation of 29 C.F.R. 1614.109(d) and my discovery rights. 29 C.F.R. 1614.109(d), - “Both parties are entitled to reasonable development of evidence on matters relevant to the issues raised in the complaint...”

I gave deposition 4 December 2006 under protest and after a timely filed Motion for Protection (Complaint page 7, Deposition exhibit 13). The USPS Attorney violated several of my due process rights (Complaint pages 19 – 87) - 20-day notice, - normal work day (29 CFR 1614.605(b)), and - representative of choice (29 CFR 1614.605(a) before the deposition started. USPS EEO Dispute Resolution letter, 27 December 2005, (Exhibit 81, page 1), - “In fact, during all phases of the administrative EEO process, including mediation under the REDRESS program, you are entitled to have a representative of your choice...” During the deposition the USPS Attorney violated more of my protected rights (29 C.F.R. 1614.605) and threatened me with paying for his airfare, food and hotel if I quit (Complaint page 60, Deposition exhibit 12, page 19). AJ’s Order, 1 December 2006, (exhibit 11), - “The administrative judge may impose sanctions for failure to comply with an order, including: - Draw an adverse inference ... – Consider the matters to which – Exclude other evidence ...” FRCP 11(2) – “... reasonable attorneys’

fees and other expenses incurred as direct result of the violation.” Making the threats lies told by the USPS Attorney so he could continue to violate my rights.

The Administrative Judge listening-in and ruling in a speaker conference call during the deposition allowed repetitious questions like my birth date, where I was born, where I went to high school, military service, and questions already answered by me in the formal Investigation Report to go on for over 3 hours. This information is also in my USPS personal file. Deposition, document 13-2, page 58, THE COURT: - “... and some of it may be repetitive, but it’s under a different set of circumstances... Mr. McDermott, those are perfectly acceptable questions to ask. They can repeat.” 29 C.F.R. 1614.109(d), - “It shall be grounds for objection to producing evidence that the information sought by either party is irrelevant, overburdensome, repetitious, or privileged.” 29 C.F.R. 1614.109(e) –

“.., but the administrative judge shall exclude irrelevant or repetitious evidence.”

The Attorney also denied me the right to review the documents like the Investigation Report before answering the deposition questions (Federal Rule of Evidence 612). It became also apparent at the deposition that the USPS Attorney (Deposition page 25, line 5 – “...and he invited me to call if we had a dispute during this deposition.”) and the Administrative Judge (Deposition page 51, line 15, - “...I’m allowing it to go on the day off because the deposition was scheduled several weeks ago, ...”) had been in *ex parte* communications on more than one occasion.

Deposition page 60, THE COURT: - “Right now everyone’s there, the deposition is going on, so there’s no cost to anyone. I’d agree with you, Mr. McDermott, you’re out some money, difference between overtime and regular time.” (Note: A copy of the deposition cost me over \$500, travel downtown costs, and plus overtime pay loss of \$200.) 29 C.F.R. 1614.109(h), - “...If the agency submits a document that is accepted, it shall furnish a copy of the document to the complaintant.” Deposition (exhibit 12) page 121, line 14, - “But you are not entitled to a copy of the deposition unless you pay for that ...” The Agency never submitted a copy of the Deposition to the Administrative Judge.

The Agency did submit a copy of the deposition with their response to the District Court after I had paid for it and submitted it as Exhibit 12.

Deposition page 62, THE COURT: - "...You might consider still looking for legal help in your case, Mr. McDermott..." Why would I need "legal help" in an Administrative Process?

Deposition (exhibit 12), page 25, line 5, - "...and he invited me to call if we had a dispute during this deposition." Page 38, line 2, - "Judge Gaffin indicated he'd be available today if we had any discovery disputes so we could deal with them on the spot rather than for me to have to go back to Salt Lake and make a motion for sanctions , so I called him for today, and he's apparently not there." Page 48, line 11, - "... and if you leave the deposition at this point without us continuing, I'll file an appropriate motion to continue this at your expense. I have no choice. I'm not going to have the court reporter sit there for three or four hours and continue taking down testimony." (Complaint page 56) If I leave why would the Attorney have the Reporter there for several more hours except to run up the costs? Page 58, line 17, - "THE COURT: ...One is an investigator, one is now the legal representative...." Page 63, line 21, - "THE COURT: I'm willing to stay on the line a little bit. I do have other cases I'm, getting ready for, ..." Page 64, line 5, - "THE COURT: I guess I'm anticipating that I do, so -." Page 95, line 22, - "THE COURT: I'm here, I didn't hear the answer that was given. MR: MOSHER: I asked about six times, six different ways he why he couldn't have ..." 29 CFR 1614.102(a)(2), - "Provide for the prompt, fair and impartial processing of complaints in accordance with this part..."

Exhibit 12, page 49, line 18, - "THE COURT: Well, it's an administrative process, so the EEOC rules are first, ..." Page 60, line 17, - "...but as long as you have asked the EEOC to hear your case, you've got to go by the rules." Page 107, line 15, - "Q. What if there's no exception in the rule? Should management, in your opinion, have the right to ignore the rule in the best interests of the Postal Service?" Page 116, line 24, - "Q. Wasn't

there, in fact, mail flying all over the place as a result of the work you did on the TMS system? A. That's not true." (Complaint page 95-99 and 114)

The first USPS Attorney filed the first Motion for Dismissal shortly after the deposition. The Attorney did not file a Statement of Genuine Facts required by 29 C.F.R. 1614.109(g) with the Motion for Dismissal. (Complaint page 64)

Since I could not get a fair Administrative Hearing (29 C.F.R. 1614.102(b)(5)) without an Attorney and it was over 360 days (29 C.F.R. 1614.107(3)/.1614.108(f)) since filing my complaint I gave notice on 8 January 2007 to the Equal Employment Opportunity Commission (EEOC) and Administrative Judge that I was going to file a Civil Complaint to stop the EEO administrative process (29 C.F.R. 1601.28). (Complaint page 7)

On 11 June 2008 the second USPS Attorney Michael R. Tita assigned to the closed Administrative Hearing Motioned for Dismissal of the first EEO Complaint #1E-981-0018-06 (exhibit 16). Shortly after the Administrative Judge issued the Order for Dismissal dated 1 July 2008 (exhibit 52) 20 months after the Administrative Judge was assigned to the case, 13 November 2006. (29 C.F.R. section 1614.102(b)(5) – action is taken in a timely manner...)

I waited for the second discrimination and retaliation complaint's formal investigation to be completed. In coordination I received a Dismissal (exhibit 55) of the second Formal EEO Complaint #1E-981-0022-08, filed April and May of 2006, dated 18 June 2008 (25 months) from the USPS EEO Investigator. (Complaint page 10)

I filed an appeal (exhibit 56) of the Administrative Judge's Decision 23 July 2008 (Complaint page 12) EEO Complaints and the closed EEO Investigation Report to the Equal Employment Opportunity Commission (EEOC) (exhibit 18) (Complaint page 67).

Agency Brief in Opposition to the first EEOC Appeal, 14 July 2008, (exhibit 36), page 4, - "As discussed herein, the Complainant only demonstrates a complete lack of knowledge and understanding of the regulations regarding processing of administrative complaints." (Complaint page 11) However, the Notification and Federal Employee

Antidiscrimination and Retaliation Act of 2002, Public Law 107-174, section 202(c), -
“Employee Training – Each Federal Agency shall provide to the employees of such
agency training regarding the rights and remedies applicable to such employee under the
laws cited in section 201(c).” The Agency by law is responsible to train me!

The Postal Service’s Response (exhibit 68), 4 August 2008, page 13, – “...There are no
material facts in dispute and, accordingly, the Commission should uphold the decision
without a hearing finding no discrimination.” (Complaint page 12)

My two EEOC Appeals were combined into one (exhibit 63), September 2008.
(Complaint page 12)

2 October 2008, (exhibit 19), - “Complainant has not presented any material facts in
dispute...” (Complaint pages 12 and 69)

Case Number C09-1008-RAJ, Document 11, 26 October 2009, page 1-2, - “... And
even if the Court decides that Plaintiff can maintain his claims in this Court, there are
numerous issues of material fact that remain at issue, and which preclude a finding of
summary judgment in Plaintiff’s favor.” Page 3, line 7, - “Contrary to plaintiff’s
allegations, there are material facts that remain contested and preclude a finding of
summary judgment in Plaintiff’s favor.” Page 4, line 20, - “Here, there are clear genuine
issues of material fact pertaining to Plaintiff’s claims of unlawful employment practices,
and Plaintiff is not entitled to summary judgment.”

Court Order, 10 May 2010, (Document 29), page 3, line 8, - “All factual allegations are
considered true and viewed in the light most favorable to the nonmoving party.”

I won the Appeal with the EEOC, 10 November 2008, - “The Commission finds that
the agency has mischaracterized complainant’s claim” (Complaint pages 12-13, exhibit 80
page 2). The EEOC ordered the Postal Service to redo my EEO Complaints and did not
address my Retaliation or Due Process allegations.

The Postal Service after losing the Appeal failed to give me my day in court (a
Hearing). Instead of giving me my-day in front of a non-*ex parte* (complaint page 44)

Administrative Judge the Agency restarted the unfair and inaccurate formal EEO investigation process (Complaint page 13, line 4). I objected and filed notice that I would rather file a Civil Complaint *Pro Se* and have a day in front of a non-bias (Complaint page 24) Federal Judge than have more of my procedural Due Process Rights violated in the USPS Attorney controlled Administrative Process (Complaint page 51, 29 C.F.R. 1614.310).

- "... the fact remains that they were deprived of their right to procedural due process. 'It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing...'" *Fuentes v. Shevin*, 407 U.S., at 87, 92 S.Ct., (1997).

I filed and served the first Civil Complaint using the same procedures that I thought proper and have used in filing other Civil Complaints (C05-860-RSL, Notice of Appearance, doc 15-1/Plaintiff's Reply to Defendant's Motion to Stay, 11 April 2010, exhibit 1) against the Postal Service for unlawful acts (Federal Rules of Evidence 406 – Routine Practice). I sent Summons to the Individuals in their Official Capacity and copies of the Summons as the FRCP states to the Attorney General, District Attorney and the Postmaster General alerting them that federal employees need legal representation and their employees are being sued, respectively. (Civil Procedure, A Modern Approach, 2d. 1995, page 815, MANNER OF SERVING PROCESS – "... The primary purpose of service provisions, however is to guarantee that the defendant gets notice of the suit... Where default is involved, however, they are more likely to entertain arguments about whether the manner of service gave defendant notice of the suit.") I did give notice and the Agency did respond.

After several motions including a Motion for Summary Judgment, 2 May 2009, the U.S. District Judge John C. Coughenour Dismissed the Complaint for Lack of Service but noted on Reconsideration that – "Because this matter has been dismissed without prejudice, Plaintiff may re-file the action and follow the proper rules for service and

establishing personal jurisdiction.” (C08-1846-JCC, Court Order, 18 June 2009) I did re-file the complaint as Judge Coughenour noted and served all parties establishing personal jurisdiction with “directed” Summons. U.S. District Judge Richard A. Jones Dismissed the second Complaint as Time-Barred. This forms the bases of my Appeal - Double Jeopardy, - Procedural Due Process, - Federal Question(s), and other possible Mistakes of the Court.

3. I asked the Court for a *De Nova* review (Complaint page 130) of my original EEO complaints (Complaint exhibits 1, 2, 3, and 4) CR 39.1(d)(15). I asked the Court for a *De Nova* review of the 500 page Formal EEO Investigation Report and the exhibits. I asked the Court for a *De Nova* review of the Administrative Judge’s Decision without a Hearing.

Administrative Dispute Resolution Act of 1996, Public Law 104-320, Section 12, (b)(4), - “In any action under this subsection, the courts shall review the agency’s decision pursuant to the standards set forth in section 706 of title 5.” 29 C.F.R. 1614.310, - “An individual who has a complaint processed pursuant to 5 CFR part 1201, subpart E or this subpart is authorized by 5 U.S.C. 7702 to file a civil action. Agency Response, 4 August 2008, (exhibit 68, page 3), Standard of Review, - “Review of a case where a decision without a hearing has been issued is *de novo*.” I asked the Court after review to uphold the EEOC Final Agency Decision on Appeal that “The Commission finds that the agency has mischaracterized complaint’s claim” (Complaint exhibit 80) and the Undisputed Administrative Facts. I did Motion the Court in the first complaint for Summary Judgment of my claims, 2 March 2009, with a Statement of Facts.

a. Terry L. Whitman v. Department of Transportation, No. 04-1131, 5 June 2006, (Cite as: 547 U.S. ___ 2006) the Supreme Court in its decision found that - “even if [47 U. S. C.] §252(e)(6) does not confer jurisdiction, it at least does not divest the district courts of their authority under 28 U. S. C. §1331 to review the Commission’s order for compliance with federal law, or otherwise precludes employees from pursuing remedies

beyond those set out in the CSRA, cf. *United States v. Fausto*, 484 U. S. 439, 443–444 (1988).” – (“The question is phrased in terms of ‘prohibition’ rather than ‘authorization’ because ... judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress”).”

b. *Richard Jackson vs. USPS*, EEOC No. 01923399, 12 Nov 92, in the Analysis and Findings - ““The Commission’s federal sector case precedent has long defined an “aggrieved employee” as one who suffers a present harm of loss with respect to a term, condition, or privilege of employment for which there is a remedy. *Diaz v. Department of the Air Force*, EEOC Request No. 05931049 (April 21, 1994).”

c. *Arnett v. Kennedy*, 416 U.S. 134 (1974) - “The property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of the interest ... property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.”

d. *Smith v. Wade*, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d. 632 (1983) - “... When the defendant’s conduct is motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.”

I did ask the Court to review the Administrative Judge’s Decision and the EEOC’s Order on Appeal. I was harmed by the missed opportunity for promotion and the retaliation. I believe that the Agency’s EEO Investigator, Agency’s Legal Representative and the EEOC Administrative Judge did deprive me of my Due Process Rights in the Administrative Process. The EEOC’s Decision on Appeal found that the Postal Service lied about my EEO Claims. I believe that the Postal Service had an evil motive for doing so and was callously indifferent to my protected rights during the Administrative Process which has muddled the Civil Process.

4. The claims I raised (Complaint pages 130-132) with the District Court:

- a. Age – (Complaint exhibit 1) Was being given a 2005 Maintenance Grinch Award during a staff meeting and 18 cents 23 December 2004 two days before Christmas discrimination?
- b. Sex – (Complaint exhibit 2) Was Management's failure to post on the official bulletin board in the Processing and Distribution Center (P&DC) facility the Supervisor Job Vacancy Announcement the required 15 days (39 CFR 243.2(a), handbook EL 312.223 & 321.2, Handbook EL-350.3, and ELM 612.231 & 334.33) and denied me the opportunity to apply for a vacant maintenance supervisor position discrimination?
- c. Age – (Complaint exhibit 3) Was it discrimination when a fellow employee directed foul, abusive and threatening language with gestures at me. Was it discrimination for the Supervisor to do nothing? Was it discrimination for the other employee to go to a training class the next week that was cancel for me?
- d. Sex – (Complaint exhibit 4) Did management discriminate against me by not posting on the employee bulletin boards in the Priority Mail Annex (PMA) and all facilities in the recruitment area the required 15 days the job vacancy announcement for a Supervisor position?
- e. Sex – (Complaint exhibit 4) I mailed my 991 before the closing of the Job Vacancy position. The undated letter I received stated that the 991 was not received before the posting was closed. Did the Postal Service discrimination against me?
- f. Sex – (Complaint exhibit 4) Did discrimination occur Karen Black was given assistance and preferential treatment by management before being selected for the Supervisor position?
- g. Retaliation – (Complaint exhibits 3, 4) Did Management retaliate against me for EEO activities and other protected activity?
- h. Retaliation – Was there retaliation for other protected activities?

- i. Process Discrimination/Retaliation – (1) Did the USPS Attorney Richard C. Mosher violate my Due Process Rights during the Administrative Process? - (2) Did USPS Attorney Michael R. Tita violate my Due Process Rights in the Administrative Process? - (3) Did the Administrative Judge Steven R. Gaffin violate my Due Process Rights during the Administrative Process?

5. The issues I am raising on appeal:

a. Double Jeopardy:

The Court's Order, 10 May 2010, page 4 line 12, - "That his previous lawsuit (CV08-1846-JCC) was timely filed and dismissed without prejudice is irrelevant, because that lawsuit was dismissed due to Mr. McDermott's failure to effectuate service despite warnings."

(1) Another Federal Judge's decision is not "irrelevant" to me.

(2) I did not receive a "warning" from the Court. Agency Document 7, page 7, line 13, - "Despite this clear warning from the Postal Service, Plaintiff chose not to correct his service mistakes and instead continued to litigate his case. Thus, Plaintiff was not induced or tricked by the Postal Service into allowing the filing deadline to pass. Rather, the Postal Service gave Plaintiff a clear warning identifying the deficiencies in his service and Plaintiff simply failed to heed the Postal Service warning." I received a warning from the USPS Legal Representative who had lied to me in the Administrative Process. The Agency's Legal Representative issued Notices of Representative in both Administrative and Civil Processes but frustrated this in the first EEO Civil Complaint. Michael Tita was the Agency's substitute Legal Representative (Notice of Appearance) in the EEOC No. 1E-981-0018-06. Tita filed the Motion for Dismissal for the Administrative Process, Statement of Undisputed Facts for the EEOC Appeal and filed Responses for the Civil Complaint(s).

The Declaration of Michael R. Tita (Document 12, page 2, line 25), 26 October 2009, -

“n. I have reviewed the processing of this case by the Administrative Judge, the EEO Investigator, former Agency counsel, and the Equal Employment Opportunity Commission (EEOC). I have found no evidence that would support any legal, procedural, or ethical improprieties.” Agency Response EEOC No. 551-2006-0018-06, 4 August 2008, (Exhibit 68, page 4) - “To the uninformed reader, the Complainant’s filings are replete with examples of the process violations. However, to the informed reader, one who is knowledgeable in the EEO administrative process, the Complainant’s allegations are mere ramblings.” - Michael Tita, Agency Representative. Federal Rules of Evidence 602 – Lack of Personal Knowledge, - “A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” Webster Dictionary, Pretext, - “A purpose or motive alleged or an appearance assumed in order to cloak the real intention of state of affairs.” (Complaint page 80) FRCP 56(g) - Affidavits Made in Bad Faith. Obviously this uninformed Legal Representative did not review the EEOC Decision that found the Agency “mischaracterized” my claim (Complaint exhibit 80) and did not have any personal knowledge of the claims.

I believe that the USPS Legal Representative(s) lying to me and violated my procedural rights in the Administrative Process has also affected the Civil Process. (Complaint page 127) Having more been told a lie(s) I tend not to believe the source after that. Therefore, I did not believe that I failed to serve the copies of the Summons properly. I tried to clarify the matter with a Special Motion and get the Court’s Opinion.

(3) The second Court Order, 10 May 2010, page 4, did not consider the lies in the Administrative Process and did it consider the all of the first Civil Complaint evidence of record.

(4) FindLaw: U.S. Constitution: Fifth Amendment: Annotations page 2, Double Jeopardy, - “ The constitutional prohibition against ‘double jeopardy’ was designed to protect an individual from being subject to the hazards of trial and possible conviction

more than once for an alleged offense... ..Madison’s version of the guarantee as introduced in the House of Representatives read: “No person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offense.”

Footnote 42 - 1 Annuals of Congress 434 (June 8, 1789).

One Judge decided that I could re-file my case and the other decided that I cannot is Double Jeopardy for the same offense – failure to serve properly. Why would one Federal Judge call another Federal Judge’s decision “irrelevant”?

b. Procedural Due Process:

The Court’s Order, 10 May 2010, page 2 line 23, - “Mr. McDermott did not appeal that dismissal, but instead filed the same complaint to institute this action on July 16, 2009.”

(1) *Fuentes v. Shevin*, 407 U.S., at 87, 92 S.Ct., (1997), - “... the fact remains that they were deprived of their right to procedural due process. ‘It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing...’”

(2) *Arnett v. Kennedy*, 416 U.S. 134 (1974), - “... the property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of the interest ... property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.”

(3) – “In public-sector employment, a public employee who has the requisite property interest in his or her job, see *Roth v. Board of Regents*, 408 U.S. 564 (1972)... This protection reaches beyond formal civil services systems and may provide more meaningful protections because the Constitution determines the level of procedural protection required. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985)... the employee must be able to point to some basis beyond her own unilateral hopes – a statutory right or an employment contract – before the due process clause applies.....”

(4) *Gomez-Perez v. Potter* (USPS), 27 May 2008, codified at 29 U.S.C. Section 633a. Justice Alito delivered the opinion of the Court, - “The question before us is whether a federal employee who is a victim of retaliation due to the filing of a complaint of age discrimination may assert a claim under the federal-sector provision of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. section 633a. We hold that such a claim is authorized.” - “In so concluding, the Court follows the reasoning of two prior decisions ruling that retaliation is covered by similar language in other antidiscrimination statutes. First, in *Sullivan v. Littlerock Hunting Park, Inc.*, 396 U.S. 229, the Court held that a retaliation claim could be brought under 42 U.S.C. Section 1983, which provides that ‘all citizens ... shall have the same right ... as enjoyed by white citizens.’”

(5) *Itel Containers Intern. Corp. v. Puerto Rico Marine Mgmt., Inc.*, 108 F.R.D. 96 (D.N.J.1985), the court found that defense counsel had knowingly concealed the absence of diversity from plaintiff of diversity from plaintiff and the court in hopes that the statute of limitations would run before the truth was discovered. *Civil Procedure, A Modern Approach, Second Edition*, page 9, - “Established procedures lie at the heart of due process and are as important to the attainment of ultimate justice as the factual merits of a cause.”

(6) *Garland’s Digest on employment discrimination law*, 6.454.20 Standard for availability of equitable tolling, - “...Equitable tolling is generally considered appropriate ‘where the plaintiff actively pursued judicial remedies but filed a defective pleading during the specified time period’ *Brown v. Parkchester South Condominiums*, 287 F.3d 58, 60 (2d Cir. 2002); where plaintiff was unaware of his or her cause of action due to misleading conduct of the defendant, see *Miller v. Int’l Tel. & Tel. corp.*, 755 F.2d 20, 24 (2d Cir. 1985).”

(7) *Cornell University Law School CRS Annotated Constitution*, - “The requirements of procedural due process apply only to the deprivation of interests encompassed by the

Fourteenth Amendment's protection of liberty and property. ... – protections against erroneous governmental deprivation of something it might within its discretion have bestowed.... Justice Powell wrote, 'That right is conferred not by legislative grace but by the constitutional guarantee.' ...”

Judge Jones seems to indicate that I should have filed an Appeal when Judge Coughenour's Decision said that I could re-file the Complaint. I believe that I did followed the proper procedures in re-filing and serving the second Complaint. The Defendant's Legal Representative accepted service of the copies of the Summons in previous cases that I thought was established procedure. In the Defendant's (Proposed) Order, Document 7-2, the Attorney wanted the case “Dismissed with Prejudice” so as to prevent re-filing. FRCP 41(a)(2), - “...unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.” The Defendant's Attorney misled, threaten and lied to me in the Administrative Process. The Defendant's Attorney told a half-truth in the first Civil Complaint about the service of the copies of the Summons but because of the lies in the past I did not believe them. I did properly service the five Individual Defendants, but filed (according to the Court) failed to serve the Postmaster and the District Attorney (some debate for the Attorney General). I served 6 out of 8 parties to the complaint correctly. The Defendant's Attorney told a half-truth in the second civil case that I did not file a complaint within 90 days, when I did, to obtain the second dismissal.

The EEOC Decision on Appeal (Complaint exhibit 80) and the District Court Decision did not address the violations of Due Process during the EEOC Administrative Hearing of my EEO Complaints: - Notice of Intent to Sue, pages 7, 38 and 62; - Evidence, page 40; - Ex parte Communications, page 44; - Discovery, pages 48; - Administrative Judge, page 51 and 56; - Deposition, page 52; - Representative of Choice, page 57; - Right to Cross-Exam, page 59; - Threats, page 60; - Statement of Genuine Facts, page 64; - Right to Dispute the Facts, page 70; and - Prima Facie, page 72. I believe that these should survive even if the others fail.

c. Federal Question(s):

Cornell University Law School CRS Annotated Constitution, Federal Questions Resulting from Special Jurisdictional Grants. – “In the Labor-Management Relations Act of 1947, Congress authorized federal courts to entertain suits for violations of collective bargaining agreements without respect to the amount in controversy or the citizenship of parties... the Court construed the grant of jurisdiction to be more than procedural and to empower federal courts to apply substantive federal law, divined and fashioned from the policy of national labor laws (footnote 691, 28 U.S.C. 1343 - ...deprives any person of any rights, privileges, or immunities ...”).

29 C.F.R. section 1614.103(a), - “Individual and class complaints of employment discrimination and retaliation prohibited by title VII... Complaints alleging retaliation prohibited by these statutes are considered to be complaints of discrimination for purposes of this part.... (3) the United States Postal Service...”

The Federal Questions that I did ask for in the Administrative/Civil processes and have not received a decision for - Were my Due Process Rights violated in the EEOC Title 29 ADR Administrative Hearing Process? - Was the denial of my Due Process Rights retaliation?

d. Possible Mistakes of the Court, FRCP 60(b):

(1) Failure to state a claim:

The Court’s Order, 10 May 2010, A. Legal Standards, page 3, line 6, - “To withstand a motion to dismiss for failure to state a claim ... the court may dismiss the action for failure to state a claim.”

(a) Richard Jackson vs. USPS, EEOC No. 01923399, 12 Nov 92, in the Analysis and Findings - ““The Commission’s federal sector case precedent has long defined an “aggrieved employee” as one who suffers a present harm of loss with respect to a term,

condition, or privilege of employment for which there is a remedy. *Diaz v. Department of the Air Force*, EEOC Request No. 05931049 (April 21, 1994).”

(b) The Court’s Order, 10 May 2010, page 3 line 1, - “...United States Attorney for this judicial district – have moved to dismiss this action as time-barred.”

(c) EEOC Decision, 10 November 2008, (Exhibit 80, page 1), - “The agency defined the issue raised by complainant submitting applications that were late. Based on this definition, the agency issued its final decision dismissing complainant’s complaint, pursuant to 29 C.F.R. section 1614.107(a)(1), for failure to state a claim. The instant appeal followed.... The Commission’s federal sector case precedent has long defined an ‘aggrieved employee’ as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. *Diaz v. Department of the Air Force*, EEOC Request No. 05931049 (April 21, 1994).” Page 2, - “The Commission finds that the agency has mischaracterized complainant’s claim.”

The Defendant’s Administrative EEOC appeal defense was that I failed to State a Claim and this was found to be a lie by the EEOC. The Defendant in the Civil Action did not Motion to Dismiss for failure to State a Claim and the Court improperly relied on a defense that was not raised by the Defendant. The Court (Order 26 May 2010) also did not allow me to amend my complaint to better state my claim.

(2) Failure to file on time:

The Court’s Order, 10 May 2010, page 3 line 17, - “An employee must file a title VII employment discrimination claim in district court within ninety days of receiving a right-to-sue letter from the EEOC.”

(a) The Court’s Order, 10 May 2010, page 2 line 9, - “Mr. McDermott filed a lawsuit in this judicial district on December 29, 2008, to redress the injuries described in his EEO complaints.”

(b) The Court’s Order, 10 May 2010, page 4 line 12, - “That his previous lawsuit

(CV08-1846-JCC) was timely filed...”

(c) 29 C.F.R. 1614.604 Filing and computation of time, (b) - “A document shall be deemed timely if it is received or postmarked before the expiration to the applicable filing period...” (c) – “The time limits in this part are subject of waiver, estoppel and equitable tolling.”

(d) In *Terry L. Whitman v. Department of Transportation*, No. 04-1131, 5 June 2006, (Cite as: 547 U.S. _____2006) – (“The question is phrased in terms of ‘prohibition’ rather than ‘authorization’ because ... judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress”).

(e) The EEOC Decision, 10 November 2008, (exhibit 80, page 3) Right to file a Civil Action states – “In the alternative, you may file a civil action after one hundred and eighty (180) calendar days of the date to filed you complaint with the agency, or filed your appeal with the Commission.” Page 4, - “Both the request and the civil action must be filed within the time limits as stated in the paragraph above (“Right to File a Civil Action”).”

(f) Defendant’s Motion to Strike Complainant’s Supporting Statement dated September 2, 2008, (exhibit 62). The Defendant stated that my Supporting Statement for the EEOC Appeal was “untimely filed” on September 2, 2008. However, the Supporting Statement with Certificate of Service (exhibit 64) was dated 23 July 2008.

I did file a timely claim within the lawful ninety-day limit of the EEOC Decision. I also filed civil complaint 180 days after filing a complaint with the agency. I therefore do not believe that I am limited by law in filing “this” Complaint. Nor would I be limited in amending the Complaint or filing other Complaints if more unlawful acts were found to have occurred through the discovery that I was denied. I also have the right to ask the Court for judicial review of the Administrative Judge’s Decision to Dismiss without a Hearing that took over 180 days and the Equal Employment Opportunity Commission’s

Decision on Appeal that found the Postal Service “mischaracterized” my EEO Complaints.

(3) Time-Barred:

The Court’s Order, 10 May 2010, page 3 line 19, - “... If the employee misses this deadline, a court action is time-barred.” Page 5 line 8, - “...Bur Mr. McDermott’s ADEA claims are also subject to a ninety-day filing requirements, see 29 U.S.C. section 626(e), so they are time-barred for the same reasons described in the previous section.”

(a) The Sixth Circuit Court in Opinion for Case N. 00-07427, Decided 3 October 2002, - “We have, on occasion, deviated from the general rule for exceptional cases or particular circumstances, or when the rule would produce a miscarriage of justice. Foster v. Barilow, 6 F.3d 405, 407, (6th Cir. 1993). ... In order for the charge to be timely, the employee need only to file a charge within the time period of any act that is part of the hostile work environment.” Also see Jamie L. McFarland v. USPS, Sixth Circuit Court, No. 00-07427, 3 October 2002.

(b) Title 42 U.S.C. Section 1983, derived from Section 1 of the Civil Rights Act of 1871, provides: - “Every person who, ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,....”

(c) Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982) Held: - “1. Filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling. The structure of Title VII, the congressional policy underlying it, and the reasoning of this court’s prior cases all lead to this conclusion. Pp. 392-398.”

(d) Goodman v. McDonnell Douglas Corp., 606 F.2d 800, 804-805 (8th Cir. 1979), - “... Other courts have completely disregarded statues of limitation in considering a defense of laches or treated them as merely one element in the congeries of factors to be

considered in determining whether the length of delay was unreasonable and whether the potential for prejudice was great. We find that the last approach accords most favorably with the purpose of the doctrine of laches and congressional intent regarding the doctrine's application to claims..."

(e) *Powell v. Zuckert*, District of Columbia, 366 F.2d 634, (1966), - "...The defense of laches stems from the principle that 'equity aids the vigilant, not those who slumber on their rights,' and is designed to promote diligence and prevent enforcement of stale claims. To establish the defense the evidence must show both that the delay was unreasonable and that it prejudiced the defendant."

(d) *Carpenter, et al v. MSPB & USPS*, 95-3643, -3668, -3692, -3693, -3761, April 8, 1997, - "... We hold that one of the employees – James H. Miller, Jr. – offered sufficient evidence to require further consideration of whether he showed good cause for his untimely appeal... See 5 C.F.R. section 1201.22(b) (1992). The petitioners' appeals were therefore all substantially out-of-time. In light of the untimeliness of the appeals, the administrative judge issued a show-cause order requiring the petitioners to show good cause for their filings delays.... sufficient to put the Postal Service on notice... The administrative judge appears to have overlooked that evidence; the judge did not advert to that evidence in analyzing Miller's good cause showing.... Miller's affirmation statement is sufficient to constitute a prima facie showing that he informed his agency..."

I did file a Complaint within the time limit (prima facie) and did not miss the deadline. I did not unreasonably delay in filing the second Complaint or sleep on my rights. The Defendant did not demonstrate prejudice caused by the second Complaint. The first Judge and the second Judge did not issue a show-cause order for the mis-service. I did put the Postal Service on "notice" in time by sending copies of the Summons and the Complaint. I also believe that "this" Complaint is not time-barred since the time for filing was also extended by the first Judge in his Order on the Motion for Reconsideration.

(4) Equitable Tolling:

The Court's Order, 10 May 2010, page 4 line 6, - "But where a claimant's untimeliness is based on his or her own lack of diligence, a court should not apply equitable tolling, even if the claimant is proceeding pro se..." Line 18, - "... there is no equitable reason to toll that statute of limitations." Page 5 line 11, - "... ADEA claims because there is no equitable reason to do so." Page 2 line 16, - "The court denied Mr. McDermott's motion ... but specifically noted that a dismissal without prejudice would allow him to 're-file the action and follow the proper rules for service and establishing personal jurisdiction.'"

(a) - "... we construe Smith's complaint liberally to assert both an official-capacity and individual-capacity claim against the Attorney General of the United States. See Reynoldson v. Shillinger, 907 F.2d 124, 125 (10th Cir. 1990) (applying the principle that '*pro se* prisoner complaints must be construed liberally')."

(b) FRAP Rule 26 (b) Extending Time, - "For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit and act to be done after that time expires."

(c) FRCP 6(b) Extending Time, - "When an act may or must be done within a specified time, the court may with good cause, extend time: ..."

In the first complaint timely filed the Judge found that I did show good cause to re-file the case and in doing so *de facto* extend the time. The second Judge found that I did not show good cause is clearly double jeopardy. Proceeding also as *pro se* I believe that Judge Jones should apply the principle that *pro se* complaints must be construed liberally and cut me some slack considering the Postal Service, the EEO Investigators and the Attorneys have muddled the facts in the Administrative Process and Civil Process over several years.

(5) Whistleblower Protection Act:

The Court's Order, 10 May 2010, page 5 line 18, - "... retaliation claims under the

WPA, but that to whatever extent he is attempting to raise such claims, they fail as a matter of law because USPS employees cannot bring independent action under the WPA.” Most of the citations used by the Agency in the Defendant’s Reply (Document 15) were prior to the 2006 Postal Accountability and Enhancement Act. The one 2008 *Madden v. Runyon* (Marvin Runyon Postmaster General 1992-1998 resigned amid conflict of interest kickback scandal) started before 2006 so that none apply to this case filed after 2006.

(a) Federal Register Notice, volume 71, No 139, July 20, 2006, pages 41095-41099, OPM, page 41095 -“...Congress noted that it is essential that the rights of employees, former employees and applicants for Federal employment under Federal antidiscrimination and whistleblower protection laws be steadfastly protected.”

(b) – “...most decisions in the last two decades have concluded that employer policies may constitute enforceable promises when they give rise to reasonable expectations on the part of employees. See, e.g. *O’Brien v. New England Telephone & Telegraph Co.*, 664 N.E. 2d. 843 (Mass. 1996).”

(c) No FEAR Act:

(1) Federal Register, 2 August 2006, Volume 71, number 148, pages 43643-43652, Equal Employment Opportunity Commission, 29 CFR Part 1614. Summary: - “The EEO Commission is issuing a final rule implementing the posting requirements set forth in Title III of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act)... Section 1614.702 definitions. (a) The term Federal agency or agency means an Executive agency (as defined in 5 U.S.C. 105), the United States Postal Service, and the Postal Rate Commission... Section 724.102 – Antidiscrimination Laws refers to 5 U.S.C. 2302(b) ... Whistleblower Protection Law refers to 5 U.S.C. 2302(b)... A Federal agency cannot retaliate against an employee or applicant because that individual exercises his or her rights under any of the Federal antidiscrimination or whistleblower protection laws listed above.”

(2) USPS No Fear Act Notice, (Plaintiff’s Reply to Defendant’s Motion to

Stay, 12 November 2009, exhibit 1) (Complaint page 86) - "On May 15, 2002, Congress enacted the 'Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002,' which is known as the No Fear Act. One purpose of the Act is to 'require that Federal agencies be accountable for violations of antidiscrimination and whistleblower protection laws.' Public Law 107-174, Summary. In support of this purpose, Congress found that 'agencies cannot be run effectively if those practice or tolerate discrimination.' Public Law 107-174, Title I, General Provisions, section 101(1)... Pursuant to section 205 of the No FEAR Act, neither the Act nor this notice creates, expands or reduces any rights otherwise available to any employee, former employee or applicant under the laws of the United States."

(3) USPS No FEAR Act Information & Data

(www.usps.com/nofearact/welcome) – "Retaliation against an employee or applicant for making a whistleblower disclosure is prohibited by ELM 666.18..." (ELM - Employee and Labor Relations Manual)

(4) Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, Public Law 107-174, 107th Congress, - "To require that Federal agencies be accountable for violations of antidiscrimination and whistleblower protection laws; ... Congress finds that – (1) Federal agencies cannot be run effectively if those agencies practice or tolerate discrimination; ... For purposes of this Act -- ... (3) the term 'Federal agency' means an Executive agency (as defined in section 105 of title 5, United States Code), the United States Postal Service, or the Postal rate Commission..."

(d) The Supreme Court's decision in *Gomez v. Potter*, codified at 29 U.S.C. Section 633a the High Court held that a federal employee who is a victim of retaliation due to the filing of an age discrimination complaint may asset a claim for retaliation under the federal-sector provisions of the ADEA. - "(a) in so concluding, the Court follows the reasoning of two prior decisions that retaliation is covered by similar language in other antidiscrimination statutes. First, in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229,

the court held that retaliation claim could be brought under 42 U.S.C. section 1982...”

“Lane v. PeA,, a, 518 U.S. 187, is satisfied here by section 663a(c), which unequivocally waives sovereign immunity for claim brought by ‘any person aggrieved’ by a section 633a violation.”

(e) 29 C.F.R. 1614 No FEAR Act notice, Whistleblower Protection Laws, -
“...Retaliation against an employee or applicant for making a protected disclosure is prohibited by 5 U.S.C. 2302(b)(8)... A Federal agency cannot retaliate against an employee or applicant because that individual exercises his or her rights under any of the Federal antidiscrimination or whistleblower protection laws listed above...”

(f) Federal Tort Claims Act: An Overview by Michael E. Quinton, - “Before an ~~action may be filed under the Federal Tort Claims Act, and administrative claim must be~~ presented to the federal agency employing the person whose act or omission caused the injury... After an administrative claim is presented to the appropriate agency, the agency has six months to either admit or deny the claim.... Johns-Manville Sales Corp. v. United States, 690 F.2d 7211 (9th Cir. 1982), - The requirement that a claimant must present an administrative claim and receive a denial or wait for six months to pass before filing suit only applies when suit is filed against the United States.... Unless the administrative claim is denied, the six-month statute of limitation does not begin to run and a claimant has an indefinite time within which to file suit. 28 U.S.C. 2675(a); Douglas v. United States, 658 F.2d 445, 449-450 (6th Cir. 1981).”

(g) 29 CFR section 1614.101(b), - “No person shall be subject to retaliation for opposing any practice made unlawful by title VII...”

Whistleblower protection, Antidiscrimination and Retaliation laws do apply to the USPS and its employees. I complained about retaliation in my original EEO Claims. The USPS Form to fill-out for the EEO Complaints has a check-box for “Retaliation” (Complaint exhibits 1, 2, 3, & 4). I complained to the Administrative Judge about the *ex parte* communications and retaliation from the USPS Attorney violating my Due Process

Rights in the Administrative Process. I complained to the EEOC about the retaliation in the Administrative Process in my EEOC Appeal. I Complained about the retaliation for Protected Activity in the Civil Complaint (page 105 and 115). The EEOC found the Postal Service “mischaracterized” my EEO Claims in the Administrative Process. The Postal Service, EEO Administrative Judge and the EEO Commission did not make a decision on my Retaliation or failure to follow Due Process claims. Failure to issue a decision within 6 months under 28 U.S.C. 2675 is considered a denial of the claim. USPS Handbook PO-702.422, - “The Federal Tort Claims Act, 28 U.S.C. 1346(B) and 2671-2680 is made applicable to the Postal Service by the Postal Reorganization Act, 39 U.S.C. 409(c).” Under 28 U.S.C. 2675 I have and “indefinite time” to file a civil action for the undecided Retaliation and violation Due Process claims. I believe that my Retaliation claims for protected activity and failure to follow the Administrative Due Process Procedures of Title 29 claims do survive indefinitely even if all my EEO claims have been dismissed by the Court.

(6) Due Diligence:

Defendant’s Motion to Stay, 30 March 2010, (Document 26), page 2, line 22, - “Plaintiff’s ninety-day window to file a civil action should not be equitably tolled given the facts of this case. First, Plaintiff did not file a defective pleading during the statutory period. Second, he did not purse his claims with due diligence to justify equitable tolling. Third, there is no evidence of wrongdoing on the part of the Postal Service that contributed to Plaintiff’s failure to timely file this action.”

The Court’s Order, 10 May 2010, page 3, line 20, - “Court apply equitable tolling to this statute of limitations ‘sparingly,’ not typically in situations where a missed deadline is “due to claimant’s failure ‘to exercise due diligence in preserving his legal rights.’”

EEOC Decision, 10 November 2008, (Exhibit 80, page 2), - “Whether or not complainant was not selected because his application was submitted late, and where and

how vacancy announcements are made to employees goes to the merits of his claim, which cannot be resolved without an investigation. Accordingly, the agency's dismissal is REVERSED, and the complaint is REMANDED to the agency for further processing..."

I did "exercise due diligence" to preserve my rights in the EEOC administrative process and the EEOC Appeal. I tried to preserve my rights in the first civil complaint by filing Motions like the Special Pleading to the Court determine if I served the Summons properly. Document 7, page 6, line 27, - "...continued to litigate the issues in the underlying claim, including filing a frivolous motion..." Judge Coughenour's Order in Reconsideration - "... The Court does not offer legal advice to litigants on how to comply with the law, it renders decisions." Judge Coughenour found that I had file "at least one frivolous motion." Since Judge Coughenour found that I had filed so many motions that some were "frivolous" and the USPS Attorney stated that I continued to litigate the issues how can Judge Jones in the second claim find that I did not "exercise due diligence" in the first claim when the first judge found that I over-exercised it?

6. Additional Considerations for the Court of Appeals not asked in District Court:

a. I asked the District Court to consider if my right to representative of choice was violated for the administrative deposition. What I did not ask is if my Representative of Choice, my wife Darlene M. McDermott, right to represent me was also violated. The USPS Attorney held the Deposition in the District Headquarters Office. I met him in the Lobby with my wife before the Deposition. When I would not shake his hand he turned to my wife and said she could not come in. The Lobby has no chairs so she sat in the car on a cold December morning for several hours and caught a cold. Agency Brief in Opposition to EEOC Appeal, 14 July 2007, (exhibit 36), page 2, - "Response: The Complainant's wife was never his representative and, as such, had no right to attend the deposition." Administrative Dispute Resolution Act of 1996, Public Law 104-320, Section 9, (b) Representation and Assistance by Nonattorneys. - "A person who is not an

attorney may provide representation or assistance to any individual in a claim or dispute with an agency.” 29 CFR section 1614.605(b), - “At any stage in the processing of a complaint, including the counseling stage - 1614.105, the complainant shall have the right to be accompanied, represented, and advised by a representative of complainant’s choice.” Therefore, I ask the Court of Appeals if my Representative of Choice right to represent me was violated and if so she can seek relief?

b. Since I believe that the Appeals Court will find in my favor for the Second Court Ruling based on Double Jeopardy the Appeals Court may want to review the first Court Order for mistakes. U.S. District Judge John C. Coughenour dismissed the first complaint for Lack of Service but noted on Reconsideration that – “Because this matter has been dismissed without prejudice, Plaintiff may re-file the action and follow the proper rules for service and establishing personal jurisdiction.” (C08-1846-JCC, Court Order, 18 June 2009) FRCP 59 (d), - “...When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.”

Because of the Agency Legal Representative’s lies in the EEOC Administrative Process I did not believe their “warning” that I had improperly served copies of the Summons in the Civil Process. I made the service the same way as in other civil actions that I have made against the Postal Service, - CV5-00860RSL and - CV06-1335-MJP (Footnoted on Document 7, page 1). In CV05-00860 the Judge issued a Show Case Order for failure to serve the Summons. At the time I thought that I needed the court’s permission to serve summons on Federal Employees. I then served the Summons in that case the same as I served them in CV08-1846-JCC. The copies of the Individual Summons for CV-5-00860 were accepted by the Defendant’s Legal Representative who issued a Notice of Appearance. However, in CV08-1846 the Agency’s legal representative did not accept copies of the Summons the same as before and Motion for Dismissal based on Lack of Service. Document 7, page 6, line 7, - “Similarly, the Ninth Circuit has found that estoppel requires some proof of wrongdoing on the part of the defendant, which

contributed to the plaintiff's failure to timely file. O'Donnell, 465, F.3d at 1067." FRCP 61, - "...The court at every stage of the proceedings must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." I did serve notice on all parties and did not violate any of their "substantial rights." Judge Coughenour could have responded to my Special Pleading, 16 February 2009, and told/warned me that I had not served a Court Clerk issued and notarized Summons ("directed at Potter", Court Order, 29 May 2009, page 3, line 9) to the Agency and its Legal representative and not just copies of the Individual Summons. FRCP 17(a) - "... or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest." Did the District Attorney responded for the real party in interest - the Postal Service?

The Court's Order, 29 May 2009, page 3, line 8, - "See FED. R. CIV. P. 4(i)(2). This requires Plaintiff to (1) deliver a copy of the summons (directed at Potter) and the complaint to Jeffery Sullivan (the United States Attorney for the Western District of Washington), and (2) send a copy of the summons and complaint to the United States Attorney General." FRCP 83(a)(2), - "A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement." (b), - "...No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement." I did send a copy of the Summons and the Complaint in accordance to FRCP 4(i)(1)(A), - "by delivering a copy of the summons and of the complaint to the United States attorney..." (2)(B), - "... - is effected by serving the United States in the manner prescribed by Rule 4(i)(1) ..."

I asked the Agency's Legal Representative in the EEOC Administrative Process Deposition (exhibit 12) for a copy of the rule(s) that they said that I was violating only to be told that Page 7, line 15, - "Q. I don't have to show you the rule. The judge will be

happy to explain the rule to you and order you to contact me in the future.” Deposition (exhibit 12, page 19, line 17), - “You, frankly, don’t know what you’re reading and how it applies to an EEOC administrative case. This is not a state or federal court lawsuit. I’m entitled to do what I’m doing today...” I asked the Agency’s Legal Representative in the civil process what rule of service did I violate only to be told FRCP 4 that says to send a “copy.” Judge Coughenour was not “happy” to explain this rule and did not specify in his Order what specific rule other than FRCP 4 that required me to send a copy of the summons “directed” to the Postmaster and the District Attorney. In fact Judge Coughenour said the rule specified that I needed to send “direct” summons Postmaster and District Attorney and not to the Attorney General. To my limited legal knowledge at the time it seemed odd that I would have to issue Summons to someone and one “directed” to their Boss the Postmaster General and “directed” to the District Attorney their Legal Representative.

I did send copies of the summons and the complaint to everyone. GR 2 (h), - “An attorney eligible to appear may enter an appearance in a civil case by signing any pleading...” Was the Attorney “eligible”? FRCP 19(a), “... If the person has not been so joined, the court shall order that the person be made a party.” FRCP 21, - “Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative of the action.” The District Attorney did receive notice and appeared and defend Agency in the civil action. The Court did not add the other parties. So why was it my responsibility to “add” a directed summons to the District Attorney and the Postmaster?

Some of my unintended legal knowledge has grown to include some of the details of the EEOC Administrative Process and the technical processes of the District Court. This includes knowing that a Federal Judge can extend any time limit except Appeals. That being the case the time to appeal Judge Coughenour’s Decision has passed. However, I asked the Court of Appeals to consider that if Judge Coughenour had allowed/warned me

to serve the Summons properly (directed at Potter and the District Attorney) all of this could have been avoided. Judge Jones issued me a Show Cause Order (Document #4). Judge Coughenour could have done the same. Therefore, I asked the Court of Appeals if this Appeal is remanded back to the District Court that if possible it be remanded back to Judge Coughenour for a De Nova review of all claims.

c. I did complain to the Court that the USPS Attorney(s) “concealed the offenses and shifted the responsibility for the offenses away from the individuals who committed the unlawful acts on to me.” (Complaint page 127) I ask the Appeals Court to consider if the use of an Attorney in the Administrative Process is a violation of the Administrative Dispute Resolution Act of 1996, Public Law 104-320, Section 9, Use of Nonattorneys, (a), - ~~“Representation of Parties. – Each agency, in developing a policy on the use of~~ alternative means of dispute resolution under this Act, shall develop a policy with regard to the representation by persons other than attorneys of parties in alternative dispute resolution proceedings ...” (i.e. violates the reason to have a non-legal administrative process to save money and/or not to muddle the administrative process with a legal expert).

29 C.F.R.1614.107(a)(9), - “... A clear pattern of misuse of the EEO process requires: ... - (iii) Evidence of circumventing the administrative processes.”

Deposition (exhibit 12) page 9, line 4, - “Q. I’ve done this for 33 years. If you want to object to something, that’s your right, but in terms of asking questions, I ask, you answer.” Page 13, line 20, - “I’m entitled ...” Page 14, line 18 – “I’m entitled to ask you the questions over again.” Page 19, line 23, - “I don’t have to give you 20 days notice of this kind of deposition.” Page 24, line 2, - “I’m entitled to ask you again.” Page 28, line 14, - “I have an independent right today to ask you the same questions that the EEO investigator asked you ...” Page 33, line 10, - “I’m entitled to any document that pertain to this claim that you filed with the EEO in whatever form. I don’t have to specify a pocket notebook that you’ve kept for 20 years. Are we agreed on that? A. No.” Page 43, line

13, - “A. What are you trying to discover? Q. I’m not trying to discover anything.”

Agency Brief in Opposition to EEOC Appeal, 14 July 2007, (exhibit 36), page 2, - “(a) pursuant to MD-110 ADR Core Principles, the deposition was not voluntary; Response: Alternative Dispute Resolution (ADR) Principles have no applicability to a deposition.” Page 3, - “The above allegations clearly demonstrate the Complainant’s complete ignorance and understanding of the EEOC administrative process. The Complainant fails to identify any legitimate failings of the administrative process, the Administrative Judge, or of the Agency counsel. His incoherent ramblings are just that, incoherent.”

FRCP 56(g), - “Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, ...”

The Court’s Minute Order, 2 November 2009, page 2, line 11, - “Unless all parties agree that there should be no ADR, a statement of when mediation or another ADR proceeding under Local Rule CR 39.1 should take place.” Page 4, line 20, - “When civil cases are settled early – before becoming costly and time consuming – all parties and the court benefit. The Federal Bar Association Alternate Dispute Resolution Task Force Report for this district stated:Frequently, under existing ADR system, case resolution occurs far to late, after parties have completed discovery and incurred substantial expenditure of fees and costs. The judges of this district have adopted a resolution ‘approving the Task Force’s recommendation that court – connected ADR services be provided as early, effectively, and economically as possible in every suitable case.’ The steps required by this Order are meant to help achieve that goal while preserving the rights of all parties.”

It seems strange that a Federal Judge would order me to undergo ADR process that I have already gone through. However, at least in the Court’s un-bias ADR process my rights would not be violated and it could save a lot of time and money for both parties and the court. This should have happened back with my complaints in the EEOC ADR

Process and therefore, I would not have filed a Civil Action.

Court Order, 30 March 2010, (Document 26, page 2, line 7), - “(3) requiring discovery to be completed while the dispositive motion is pending would impose an unjust burden and expense upon the Defendants.”

Considering extra cost (airfare, meal and hotel) that one expensive Attorney added with no vested interest in fixing the discrimination problems and the mischaracterization he has inflicted in the EEO Administrative Hearing Process over 33 years the legal affects and costs are enormous. These repugnant practices must be adding millions of Federal Public Trust dollars spent and muddling the Administrative/Civil EEO Complaints nationwide. The USPS adds these extra costs to the labor costs and then justifies contracting out work ~~which further directly injures my federal retirement because the contract employees are~~ not paying into the federal retirement fund or ADR costs. I find it odious that the Postal Service created extra costs in the Administrative Process and then the USPS Attorney threatened me with paying for the extra costs if I did not play by his bastardized rules. In fact, my 134 page Civil Complaint would be less than 40 pages without the Complaints about the USPS Attorney and his violation of my Rights. (Complaint page 77)

7. Law supporting these issues:

a. 5 U.S.C. Section 702 – “A person suffering wrong because of agency action ... is entitled to judicial review thereof” and 5 U.S.C. sections 105, 2302(b).

b. 28 U.S.C. Sections 1331, 1343, 2401 and 2671-2680.

c. Title 29 Section 401 Congressional Declaration of Findings, Purposes and Policy – “... (b) protection of rights of employees and the public; “The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures of observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary

protection of the rights and interests of employees and the public...”

d. Title 29 Section 411 Bill of Rights (4) Protection of the Right to Sue, Section 412 – “Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court...”
Section 413 – “Nothing contained in this subchapter shall limit the rights and remedies of any member ...”

e. Title 29 Section 1854 Private Right of Action – “Any person aggrieved by a violation of this chapter or any regulation under this chapter by a ... or other person may file suit in any district court... and without regard to exhaustion of any alternative administrative remedies provided herein.” 29 C.F.R. 1601-1614 and 29 U.S.C. section 633a.

f. Title 39 Section 409 (a)(B) – “shall not be immune under any other doctrine of sovereign immunity from suit in Federal Court by any person for any violation of any of those provisions of law by an officer of employee of the Postal Service...” 39 CFR 243.2.

g. Title 42 Section 1983 - “... or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law...”

h. Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, Public Law 107-174, May 15, 2002 (No FEAR Act).

i. Administrative Dispute Resolution Act of 1996, Public Law 104-320.

j. Federal Arbitration Act, 9 U.S.C. section 1 et seq., RCW 7.04.010.

k. 29 C.F.R. section 1610, - 5 U.S.C. 552

8. I have filed another Appeal File Number: 09-35999, U.S. District Court for Western Washington, Seattle, No. 2:09-cv-0776-RSL, brief filed: 16 December 2009.

Summary – The Postal Service lied in the administrative process that I “did not apply for” (Complaint page 7 line 12, exhibit 13) the supervisor position to deny me discovery and a hearing. The truth is that I did not have the opportunity to apply for a position (Complaint page 4 line 12) because the Postal Service failed to Post the Job Promotion as required. The other truth is that I did apply for another supervisor position (Complaint page 9 line 15) and was told I was untimely when I was not. Making this untrue statement presented as evidence to the Administrative Judge and used for the Dismissal without a Hearing one-quarter of the truth.

The EEOC on Appeal found that the Postal Service mischaracterized my complaints. (EEOC Decision exhibit 80) Answers.com Mischaracterize – “To give a false or misleading character to: *mischaracterized the findings of the study.*”

The Postal Service in the first civil action used a half-truth that I did not serve the District Attorney and the Postmaster summons. The truth is I did serve copies of the summons and the complaint on both.

The Postal Service in the second civil action used a half-truth that I did not file “this complaint” on time when the truth is that I did file the first complaint on time.

Therefore, again I ask the Court for a *De Nova* review of my Complaints.

Dated this 14th day of September, 2010,



Lance McDermott, *Pro Se*,
1819 So 104 St
Seattle, WA 98168
206 763-6268.

Form 8. Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit, Rule 32-1 for Case Number: 10-35531

I certify that:

1. Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached Informal Brief is. Proportionately spaced, has a typeface of 14 points or more and contains 12,160 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words), and complies with Fed. R. App. P. 32(a)(1)(5).



Lance McDermott, *Pro Se*

CERTIFICATE OF SERVICE

Case Name: Lance McDermott v. John P. Potter, *Et Al*
Case No.: 10-35531

I certify that two copies of the Informal Brief and excerpts of record exhibits were served, by certified First-Class Mail on 15 September 2010, to:

Kristin B. Johnson
Assistant U.S. Attorney
700 Stewart Street, Suite 5220
Seattle, WA 98101-1271



Lance McDermott
1819 So 104 ST
Seattle, WA 98168
206 763-6268

No. 10-35531

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U.S. District Court Western District of Washington, No. 2:09-cv-01008-RAJ,
- Civil Action pursuant to Title VII of the Civil Rights Act of 1964, - 42
U.S.C. section 1983 and section 2000e. The Age Discrimination in
Employment Act of 1967, - 29 U.S.C. section 621, and 633a, and The
Whistleblower Protection Act of 1989, - 31 U.S.C. section 3730(h).

Lance P. McDermott,
vs.
John P. Potter, Postmaster General, United States Postal Service, *Et Al*,

Appendix A, Except of Record

Appeal from the United States District Court
for the Western District of Washington at Seattle
The Honorable Richard A. Jones
United States District Judge


Lance McDermott, Pro Se
1819 So 104 ST
Seattle, WA 98168
206 763-6268

Lance P. McDermott, vs. John P. Potter, Postmaster General, United States Postal Service,
Et Al,

Appendix A, Except of Record

Table of Contents

1. Notice of Appeal, 7 June 2010.
2. Civil Docket for Case #2:09-cv-01008-RAJ.
3. Order, Case No. 09-1008-RAJ10 May 2010.
4. Order, Case No. C08-1846-JCC.


Lance McDermott, Pro Se
1819 So 104 ST
Seattle, WA 98168
206 763-6268

United States District Court
Western District of Washington

FILED ENTERED
LODGED RECEIVED

File Number:

JUN 09 2010

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
DEPT

Lance P. McDermott,
Plaintiff, *Pro Se*

) Notice of Appeal of

vs.

) Case No. C09-1008RAJ

) Judge Richard A. Jones

John P. Potter, Postmaster General,
United States Postal Service, *Et Al*,

)

Defendants.

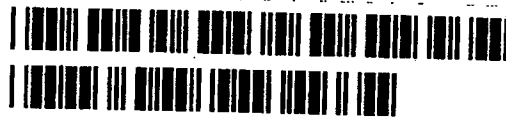
)

)

Notice is hereby given that Lance P. McDermott, Plaintiff, *Pro Se*, and

U.S. Postal Service (USPS) Postmaster General John E. Potter, U.S. Attorney
General Michael B. Makasey, U.S. District Attorney Jeffery C. Sullivan, Federal
Agency Defendants, and USPS P&DC Plant Manager Don Jacobus, USPS Senior
Maintenance Manager Robert DeBoard, USPS Maintenance Manager Jeff Carter,
USPS Engineering Technician Dave Hoff, USPS Labor Relations Specialist Susan
Houser, Individual Defendants in their official capacity, *Et Al*, in the above named
case. I hereby appeal to the United States Court of Appeals for the Ninth Circuit
the final judgment of the District Court granting Motion to Dismiss dated on the
10th Day of May 2010.

Dated this 7th day of June 2010,



09-CV-01008-APP

L. McDermott
Lance McDermott, *Pro Se*,
1819 So 104 St
Seattle, WA 98168
206 763-6268

SHA 34682

1

Representation Statement

I Lance McDermott as Appellant/Plaintiff am representing myself as *Pro Se*. The following Appellee/Defendants, *Et Al*, in Complaint C09-1008RAJ are represented by Kristin B. Johnson, Assistant U.S. Attorney, 700 Stewart St, Suite 5220, Seattle, WA 98101:

John E. Potter,
USPS Postmaster General,
475 L'Efant Plz SW
Washington, DC 20260-0001

Eric H. Holder Jr.
U.S. Attorney General
950 Pennsylvania Ave NW
Washington, DC 20530-0001

Jeffery C. Sullivan
U.S. District Attorney
700 Stewart St, Suite 5220
Seattle, WA 98101-1271

Don Jacobus
USPS Plant Manager
10700 27th Ave So
Seattle, WA 98168


Robert DeBoard
USPS Senior Maintenance Manager
10700 27th Ave So
Seattle, WA 98168

Jeff Carter
USPS Maintenance Manager
10700 27th Av So
Seattle, WA 98168

Dave Hoff
USPS Engineering Technician
10700 27th Ave So
Seattle, WA 98168

Susan Houser
USPS Labor Relations Specialist
415 1st Ave N
Seattle, WA 98109

Dated this 7th day of June, 2010


Lance P. McDermott, *Pro Se*
1819 So 104 St
Seattle, WA 98168
(206) 763-6268

APPEAL, CLOSED

**U.S. District Court
United States District Court for the Western District of Washington (Seattle)
CIVIL DOCKET FOR CASE #: 2:09-cv-01008-RAJ
Internal Use Only**

McDermott v. Potter et al
Assigned to: Judge Richard A Jones
Cause: 42:2000e Job Discrimination (Employment)

Date Filed: 07/16/2009
Date Terminated: 05/11/2010
Jury Demand: None
Nature of Suit: 442 Civil Rights: Jobs
Jurisdiction: U.S. Government Defendant

Plaintiff

Lance P McDermott

represented by **Lance P McDermott**
1819 SO 104 ST
SEATTLE, WA 98168
206-763-6268
PRO SE

V.

Defendant

John P Potter
*Postmaster General, United States Postal
Service*

represented by **Kristin Berger Johnson**
US ATTORNEY'S OFFICE (SEA)
700 STEWART ST
STE 5220
SEATTLE, WA 98101-1271
206-553-7970
Email: Kristin.B.Johnson@usdoj.gov
ATTORNEY TO BE NOTICED

Defendant

Eric H Holder, Jr
U.S. Attorney General

represented by **Kristin Berger Johnson**
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Jeffery C. Sullivan
U.S. District Attorney

represented by **Kristin Berger Johnson**
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Don Jacobus
USPS Plant Manager

represented by **Kristin Berger Johnson**
(See above for address)

2

*ATTORNEY TO BE NOTICED***Defendant**

Robert DeBoard
USPS Senior Maintenance Manager

represented by **Kristin Berger Johnson**
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Jeff Carter
USPS Maintenance Manager

represented by **Kristin Berger Johnson**
(See above for address)
ATTORNEY TO BE NOTICED

Defendant







Dave Hoff
USPS Engineering Technician

represented by **Kristin Berger Johnson**
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Susan Houser
USPS Labor Relations Specialist

represented by **Kristin Berger Johnson**
(See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
07/16/2009	 <u>1</u>	COMPLAINT against defendants (Summons(es) issued)(Receipt # SEA 27704), filed by Lance P McDermott. (Attachments: # <u>1</u> Civil Cover Sheet) Note: Exhibit Book 1 (Exhibits 1-88) and Exhibit Book 2 (Exhibits 89-173) are voluminous; sent to chambers directly without posting. (PM) (Entered: 07/17/2009)
08/06/2009	 <u>3</u>	CERTIFICATE OF SERVICE/mail(no mail receipts attached) OF SUMMONS and Complaint returned executed upon defendants: John P Potter on 8/4/2009; Eric H Holder, Jr on 8/4/2009; Jeffery C. Sullivan on 8/4/2009; Don Jacobus on 8/4/2009; Robert DeBoard on 8/4/2009; Jeff Carter on 8/4/2009; Dave Hoff on 8/4/2009; Susan Houser on 8/4/2009. (CL) (Entered: 08/07/2009)
09/17/2009	 <u>4</u>	ORDER by Judge Richard A Jones. It is ordered that the Plaintiff SHOW CAUSE why the case should not be unsealed, no later than September 28, 2009. (cc: pltf L. McDermott) (CL) (Entered: 09/17/2009)
09/25/2009	 <u>5</u>	MOTION to Unseal Case by Plaintiff Lance P McDermott. (Attachments: # <u>1</u> certificate of service) Noting Date 10/16/2009, (CL) (Entered: 09/28/2009)
09/29/2009	 <u>6</u>	ORDER by Judge Richard A Jones. The court orders the clerk to UNSEAL this case and to remove the Plaintiff's motion (Dkt. # <u>5</u>) from the record. (cc: pltf L. McDermott)(CL) (Entered: 09/29/2009)
10/02/2009	 <u>7</u>	MOTION to Dismiss Pursuant to Rule 12(b)(6) by Defendants John P Potter, Eric H Holder, Jr, Don Jacobus, Robert DeBoard, Jeff Carter, Dave Hoff, Susan Houser. (Attachments: # <u>1</u> Proposed Order) Noting Date 10/30/2009, (Johnson, Kristin) (Entered: 10/02/2009)

2

10/07/2009	<u>8</u>	RESPONSE, by Plaintiff Lance P McDermott, to <u>7</u> MOTION to Dismiss <i>Pursuant to Rule 12(b)(6)</i> . (Attachments: # <u>1</u> Exhibits, # <u>2</u> certificate of service)(CL) (Entered: 10/08/2009)
10/07/2009	<u>9</u>	MOTION for Summary Judgment FRCP 56 by Plaintiff Lance P McDermott. (Attachments: # <u>1</u> Exhibits 1-7, # <u>2</u> Exhibits 8-19, # <u>3</u> Certificate of service) Noting Date 10/30/2009. (CL) (Entered: 10/08/2009)
10/07/2009	<u>10</u>	PROPOSED Findings of Uncontroverted Fact FRCP 56 re <u>9</u> MOTION for Summary Judgment. (CL) (Entered: 10/08/2009)
10/26/2009	<u>11</u>	RESPONSE, by Defendants John P Potter, Eric H Holder, Jr, Jeffery C. Sullivan, Don Jacobus, Robert DeBoard, Jeff Carter, Dave Hoff, Susan Houser, to <u>9</u> MOTION for Summary Judgment. (Johnson, Kristin) (Entered: 10/26/2009)
10/26/2009	<u>12</u>	DECLARATION of Michael R. Tita re <u>11</u> Response to Motion by Defendants John P Potter, Eric H Holder, Jr, Jeffery C. Sullivan, Don Jacobus, Robert DeBoard, Jeff Carter, Dave Hoff, Susan Houser. (Attachments: # <u>1</u> Exhibit)(Johnson, Kristin) (Entered: 10/26/2009)
10/27/2009	<u>13</u>	PRAECIPE to attach document re <u>12</u> Declaration (non motion), <u>11</u> Response to Motion by Defendants John P Potter, Eric H Holder, Jr, Jeffery C. Sullivan, Don Jacobus, Robert DeBoard, Jeff Carter, Dave Hoff, Susan Houser. (Attachments: # <u>1</u> Exhibit)(Johnson, Kristin) (Entered: 10/27/2009)
10/27/2009	<u>14</u>	CERTIFICATE OF SERVICE by Defendants John P Potter, Eric H Holder, Jr, Jeffery C. Sullivan, Don Jacobus, Robert DeBoard, Jeff Carter, Dave Hoff, Susan Houser re <u>13</u> Praecipe to Attach Document, re <u>12</u> Declaration (non motion), <u>11</u> Response to Motion. (Johnson, Kristin) (Entered: 10/27/2009)
10/28/2009	<u>15</u>	REPLY, filed by Defendants John P Potter, Eric H Holder, Jr, Jeffery C. Sullivan, Don Jacobus, Robert DeBoard, Jeff Carter, Dave Hoff, Susan Houser, TO RESPONSE to <u>7</u> MOTION to Dismiss <i>Pursuant to Rule 12(b)(6)</i> (Johnson, Kristin) (Entered: 10/28/2009)
10/29/2009	<u>16</u>	REPLY, filed by Plaintiff Lance P McDermott, TO RESPONSE to <u>9</u> MOTION for Summary Judgment (CL) (Entered: 10/30/2009)
10/29/2009	<u>17</u>	MOTION for Default FRCP 55 by Plaintiff Lance P McDermott. (Attachments: # <u>1</u> Exhibits) Noting Date 11/13/2009. (Entered: 10/30/2009)
10/29/2009	<u>18</u>	CERTIFICATE OF SERVICE by Plaintiff Lance P McDermott re <u>16</u> Reply to Response to Motion, <u>17</u> MOTION for Default. (CL) (Entered: 10/30/2009)
11/02/2009	<u>19</u>	ORDER REGARDING INITIAL DISCLOSURES, JOINT STATUS REPORT AND EARLY SETTLEMENT. FRCP 26f Conference Deadline is 12/2/2009, Initial Disclosure Deadline is 12/9/2009, Joint Status Report due by 12/16/2009, by Judge Richard A. Jones. (cc: Plaintiff Lance McDermott) (VE) (Entered: 11/02/2009)
11/09/2009	<u>20</u>	RESPONSE, by Defendants John P Potter, Eric H Holder, Jr, Jeffery C. Sullivan, Don Jacobus, Robert DeBoard, Jeff Carter, Dave Hoff, Susan Houser, to <u>17</u> MOTION for Default. (Johnson, Kristin) (Entered: 11/09/2009)
11/12/2009	<u>21</u>	REPLY, filed by Plaintiff Lance P McDermott, TO RESPONSE to <u>17</u> MOTION for Default (Attachments: # <u>1</u> Exhibits, # <u>2</u> Certificate of service)(CL) (Entered: 11/12/2009)

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		11/13/2009)
12/07/2009	<u>22</u>	ORDER by Judge Richard A Jones. The Court DENIES <u>17</u> Plaintiff's Motion for Default. (cc: pltf L. McDermott)(CL) (Entered: 12/08/2009)
12/16/2009	<u>23</u>	STATEMENT for (draft) Discovery Plan by Plaintiff Lance P McDermott. (CL) (Entered: 12/17/2009)
12/18/2009	<u>24</u>	DISCOVERY PLAN Filed by Plaintiff Lance P McDermott.(CL) (Entered: 12/22/2009)
12/30/2009	<u>25</u>	MINUTE ORDER SETTING TRIAL DATE AND RELATED DATES. Length of Trial: *2 days*. <i>BENCH TRIAL</i> is set for 11/15/2010 at 9:00 AM in Courtroom 13106 before Judge Richard A. Jones. Joinder of Parties due by 1/8/2010, Amended Pleadings due by 5/19/2010, Expert Witness Disclosure/Reports under FRCP 26(a)(2) due by 5/19/2010, Discovery completed by 7/19/2010, Dispositive motions due by 8/17/2010, Settlement conference to be held by 9/16/2010, 39.1 mediation to be completed by 10/18/2010, Motions in Limine due by 10/18/2010, Pretrial Order due by 11/1/2010, Trial briefs, proposed Findings of Fact and Conclusions of Law, and trial exhibits to be submitted by 11/8/2010, by Judge Richard A. Jones. (cc: Pro se Plaintiff Lance McDermott) (VE) (Entered: 12/30/2009)
03/30/2010	<u>26</u>	MOTION to Stay <i>Discovery and Other Deadlines Pending Ruling on Motion to Dismiss</i> by Defendants John P Potter, Eric H Holder, Jr, Jeffery C. Sullivan, Don Jacobus, Robert DeBoard, Jeff Carter, Dave Hoff, Susan Houser. (Attachments: # <u>1</u> Proposed Order) Noting Date 4/16/2010, (Johnson, Kristin) (Entered: 03/30/2010)
03/30/2010	<u>27</u>	DECLARATION of Kristin B. Johnson filed by Defendants John P Potter, Eric H Holder, Jr, Jeffery C. Sullivan, Don Jacobus, Robert DeBoard, Jeff Carter, Dave Hoff, Susan Houser re <u>26</u> MOTION to Stay <i>Discovery and Other Deadlines Pending Ruling on Motion to Dismiss</i> (Johnson, Kristin) (Entered: 03/30/2010)
04/12/2010	<u>28</u>	RESPONSE, by Plaintiff Lance P McDermott, to <u>26</u> MOTION to Stay <i>Discovery and Other Deadlines Pending Ruling on Motion to Dismiss</i> . (Attachments: # <u>1</u> Exhibits)(CL) (Entered: 04/13/2010)
05/11/2010	<u>29</u>	ORDER by Judge Richard A Jones. The Court GRANTS <u>7</u> Dfts' Motion to Dismiss.(CL)(cc: pltf L. McDermott) (Entered: 05/11/2010)
05/11/2010	<u>30</u>	JUDGMENT IN A CIVIL CASE. THE COURT HAS ORDERED THAT; The Defendants' motion to dismiss is granted. (cc: pltf L. McDermott)(CL) (Entered: 05/11/2010)
05/13/2010	<u>31</u>	MOTION to Amend Complaint by Plaintiff Lance P McDermott. (Attachments: # <u>1</u> Exhibits, # <u>2</u> Certificate of service) Noting Date 5/28/2010. (CL) (Additional attachment(s) added on 5/14/2010: # <u>3</u> Praecipe to issue sms) (CL). (Entered: 05/14/2010)
05/13/2010	<u>32</u>	NOTICE of Adding Image/Document re <u>31</u> MOTION to Amend. (Service of additional image is attached). (CL) (Entered: 05/14/2010)
05/26/2010	<u>33</u>	ORDER Terminating Pltf's <u>31</u> Motion to Amend, by Judge Richard A Jones. (cc: pltf L. McDermott)(CL) (Entered: 05/26/2010)

2

06/08/2010	§ 34	NOTICE OF APPEAL as to <u>30</u> Judgment by Court, <u>29</u> Order on Motion to Dismiss by Plaintiff Lance P McDermott. filing fee: \$455.00, receipt #SEA34682 (SA) (Entered: 06/08/2010)
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THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LANCE MCDERMOTT,

Plaintiff,

v.

JOHN P. POTTER, et al.,

Defendants.

NO. 09-1008RAJ

ORDER

I. INTRODUCTION

This matter comes before the court on the Defendants' motion to dismiss (Dkt. # 7). No party requested oral argument, and the court finds the motion suitable for disposition on the basis of the parties' briefing and supporting evidence. For the reasons explained below, the court GRANTS the Defendants' motion (Dkt. # 7).

II. BACKGROUND

Plaintiff Lance McDermott is employed by the United States Postal Service ("USPS"), and in this lawsuit seeks damages for alleged employment discrimination. In 2006, Mr. McDermott filed complaints with the Equal Employment Opportunity Commission ("EEOC") alleging age and sex discrimination, and those complaints were consolidated into one EEOC action. Mr. McDermott filed a notice of intent to

3

1 sue with regard to that EEOC action on January 8, 2007, and on October 2, 2008, Mr.
2 McDermott received a right-to-sue letter from the EEOC.

3
4 Mr. McDermott also filed an EEOC complaint on May 3, 2007, alleging age
5 discrimination and retaliation, which was consolidated with his March 28, 2008 EEOC
6 complaint alleging sex discrimination and retaliation. Mr. Dermott received a right-to-
7 sue letter from the EEOC with regard to that consolidated action on November 10,
8 2008.

9 Mr. McDermott filed a lawsuit in this judicial district on December 29, 2008, to
10 redress the injuries described in his EEOC complaints. *See McDermott v. Potter*, Case
11 No. CV08-1846-JCC (W.D. Wash.). On March 12, 2009, Mr. McDermott filed a
12 motion for default judgment. On March 23, 2009, USPS filed a motion to dismiss for
13 lack of service. Mr. McDermott filed a motion for sanctions against the USPS. On
14 May 29, 2009, the court granted the motion to dismiss without prejudice. Mr.
15 McDermott moved for reconsideration, requesting that the court permit him additional
16 time to effectuate service. The court denied Mr. McDermott's motion and specifically
17 denied his request for additional time to effectuate service, due to Mr. McDermott's
18 filing a frivolous sanctions motion, but specifically noted that a dismissal without
19 prejudice would allow him to "re-file the action and follow the proper rules for service
20 and establishing personal jurisdiction." Order (Case No. CV08-1846-JCC, Dkt. # 22)
21 at 2.
22

23 Mr. McDermott did not appeal that dismissal, but instead filed the same
24 complaint to institute this action on July 16, 2009. The Defendants — who include
25 USPS, USPS government officials, the United States Attorney General, and the United
26

1 States Attorney for this judicial district — have moved to dismiss this action as time-
2 barred.

3 4 III. ANALYSIS

5 A. Legal Standards.

6 To withstand a motion to dismiss for failure to state a claim, a complaint must
7 plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*
8 *Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). All factual allegations are considered
9 true and viewed in the light most favorable to the nonmoving party. *See Associated*
10 *Gen. Contractors v. Metro. Water Dist.*, 159 F.3d 1178, 1181 (9th Cir. 1998). If a
11 ~~plaintiff fails to allege a cognizable legal theory or sufficient facts to support a~~
12 ~~cognizable legal theory, the court may dismiss the action for failure to state a claim.~~
13 *See Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

14 B. Plaintiff has Failed to Allege a Cognizable Legal Theory as to Any of his 15 Claims.

16 1. Plaintiff’s Title VII Claims are Time-Barred.

17 An employee must file a Title VII employment discrimination claim in district
18 court within ninety days of receiving a right-to-sue letter from the EEOC. 42 U.S.C. §
19 2000e-16(c). If the employee misses this deadline, a court action is time-barred. *See*
20 *Nelmisda v. Shelly Eurocars, Inc.*, 112 F.3d 380, 383 (9th Cir. 1997). Courts apply
21 equitable tolling to this statute of limitations “sparingly,” not typically in situations
22 where a missed deadline is “due to claimant’s failure “to exercise due diligence in
23 preserving his legal rights.”” *Id.*, 112 F.3d at 384 (quoting *Scholar v. Pacific Bell*, 963
24 F.2d 264, 267 (9th Cir. 1992) (quoting *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89,
25 96 (1990)). Equitable tolling is appropriate where a claimant files a timely but
26

1 defective pleading, where a claimant has been induced or tricked into missing the
2 deadline, or where the defendant's wrongdoing contributes to the claimant's failure to
3 timely file. *See Irwin*, 498 U.S. at 457-58; *O'Donnell v. Vencor, Inc.*, 465 F.3d 1063,
4 1066 (9th Cir. 2006). But where a claimant's untimeliness is based on his or her own
5 lack of diligence, a court should not apply equitable tolling, even if the claimant is
6 proceeding *pro se*. *See Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151
7 (1984).
8

9 It is undisputed that Mr. McDermott did not file this lawsuit within ninety days
10 of receiving his right-to-sue letter from the EEOC. He filed this lawsuit on July 16,
11 2009, even though his statutory periods ran on December 21, 2008, and February 9,
12 2009, for his Title VII claims. That his previous lawsuit (CV08-1846-JCC) was timely
13 filed and dismissed without prejudice is irrelevant, because that lawsuit was dismissed
14 due to Mr. McDermott's failure to effectuate service despite warning. Mr. McDermott
15 had ample opportunity to correct defective service in the previous timely case, but did
16 not do so and instead filed this untimely lawsuit. Because Mr. McDermott's
17 untimeliness stems from his own lack of diligence, there is no equitable reason to toll
18 the statute of limitations. *See, e.g., Baldwin County Welcome Ctr.*, 466 U.S. at 151
19 ("One who fails to act diligently cannot invoke equitable principles to excuse that lack
20 of diligence.")
21

22 Furthermore, to whatever extent Mr. McDermott believes that this second
23 lawsuit "relates back" to the complaint he filed in the first lawsuit, he is mistaken.
24 This lawsuit constitutes an entirely separate action. *See Fed. R. Civ. P. 15(c)(2)*; *see*
25 *also O'Donnell*, 466 F.3d at 1111 ("[Plaintiff's] second complaint does not 'relate
26

1 back' to her first complaint because her second complaint was a separate filing.")
2 Thus, because Mr. McDermott's complaint in this lawsuit was filed after the ninety-
3 day period had passed, his Title VII claims fail as a matter of law.
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5 **2. Plaintiff's ADEA Claims are Time-Barred.**

6 Mr. McDermott requests that even if his EEOC claims are found to be time-
7 barred, the court permit his Age Discrimination and Employment Act ("ADEA")
8 claims to go forward. *See* Complaint at 132. But Mr. McDermott's ADEA claims are
9 also subject to a ninety-day filing requirement, see 29 U.S.C. § 626(e), so they are
10 time-barred for the same reasons described in the previous section. For the same
11 reasons as described in the previous section, the court will not toll the statute of
12 limitations on Mr. McDermott's ADEA claims because there is no equitable reason to
do so.

13 **3. Plaintiff's Whistleblower Protection Act Claims Fail as a Matter of**
14 **Law.**

15 In his Opposition, Mr. McDermott contends that the Defendants' motion to
16 dismiss fails to address his retaliation allegations under the Whistleblower Protection
17 Act ("WPA"), 5 U.S.C. § 1221. The Defendants' Reply argues that Mr. McDermott's
18 complaint did not clearly describe retaliation claims under the WPA, but that to
19 whatever extent he is attempting to raise such claims, they fail as a matter of law
20 because USPS employees cannot bring an independent action under the WPA. *See*
21 *Booker v. Merit Sys. Protection Bd.*, 982 F.2d 517, 519 (Fed. Cir. 1992); *Dumaguit v.*
22 *Potter*, 2008 WL 413733 *15 (N.D. Cal. Feb. 13, 2008). Because the WPA does not
23 apply, Mr. McDermott's WPA claims fail as a matter of law.
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IV. CONCLUSION

For the foregoing reasons, the court GRANTS Defendants' motion (Dkt. # 7).

DATED this 10th day of May, 2010.



The Honorable Richard A. Jones
United States District Judge

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LANCE P MCDERMOTT,
Plaintiff,

v.

JOHN P POTTER, *Postmaster General, United States Postal Service,*
Defendant.

CASE NO. C08-1846-JCC

ORDER

This matter comes before the Court on Plaintiff's Motion for Reconsideration (Dkt. No. 21). Plaintiff asks the Court to reconsider its dismissal of this action for failure to effect proper service because he "made a Pleading of Special Matter," which he claims the Court failed to consider. (Mot. 1 (Dkt. No. 21).) The Local Rules provide that:

Motions for reconsideration are disfavored. The court will ordinarily deny such motions in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence.

Local Rule W.D. Wash. CR 7(h). Plaintiff has shown neither manifest error nor new facts or legal authority that could not have been brought to the Court's attention earlier.


4

1 Contrary to Plaintiff's assertion, the Court was well-aware of his "Pleading of Special Matter," in
2 which he asked the Court to give him legal advice as to whether he had complied with the Federal Rules
3 of Civil Procedure in attempting to serve the defendants in this action. That pleading, however, was not
4 considered as a motion because it did not seek a proper form of relief. The Court does not offer legal
5 advice to litigants on how to comply with the law, it renders decisions.

6 Moreover, Plaintiff's "Pleading of Special Matter" did not establish "good cause" for his failure to
7 effect proper service. Ignorance of the law and inadvertence do not constitute "good cause" for a failure
8 to timely serve. *See* 1 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 4.82[4] (3d ed. 2008)
9 ("[A] pro se plaintiff's ignorance of the Federal Rules of Civil Procedure is inadequate to support a
10 finding of good cause.") Absent good cause, the Court has the discretion to dismiss without prejudice or
11 to extend the time period. *See In re Sheehan*, 253 F.3d 507, 512 (9th Cir. 2001); FED. R. CIV. P. 4(m). In
12 light of Plaintiff's filing of at least one frivolous motion,¹ the Court declines to extend the time period for
13 service and finds that dismissal without prejudice is warranted. Because this matter has been dismissed
14 without prejudice, Plaintiff may re-file the action and follow the proper rules for service and establishing
15 personal jurisdiction.

16 Accordingly, having carefully considered the motion papers and being fully advised, the Court
17 hereby DENIES Plaintiff's motion for reconsideration (Dkt. No. 21).

18 SO ORDERED this 18th day of June, 2009.

19
20 
21 John C. Coughenour
22 UNITED STATES DISTRICT JUDGE

23
24 ¹ Plaintiff filed a motion for sanctions against Defendant's counsel "for using the frivolous defense
25 of 'insufficient service of process' that is not warranted by existing law." (Mot. for Sanctions 2 (Dkt. No.
26 13).) Plaintiff's motion for sanctions has no basis whatsoever in law or fact. Plaintiff also filed a number
of other unfounded motions. (*See* Dkt. Nos. 9 & 11.)