

# UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## Pena v. Potter

326 F. App'x 33 (2d Cir. 2009) · Decided May 7, 2009

### SUMMARY

The United States Court of Appeals for the Second Circuit affirmed the dismissal on the pleadings of Vivian Pena's employment discrimination claims against the federal government. The court held that claims under Title VII and the Rehabilitation Act were barred by Pena's failure to timely contact an Equal Employment Opportunity Commission counselor, and it deemed her other claims abandoned or meritless.

### CASE DETAILS

|                    |                                                                                                                                                                                                             |
|--------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT              | United States Court of Appeals for the Second Circuit                                                                                                                                                       |
| JURISDICTION       | Federal                                                                                                                                                                                                     |
| DECIDED            | May 7, 2009                                                                                                                                                                                                 |
| DISPOSITION        | affirmed                                                                                                                                                                                                    |
| PROCEDURAL POSTURE | Vivian Pena appealed from a judgment of the United States District Court for the Southern District of New York dismissing her employment discrimination claims under Federal Rule of Civil Procedure 12(c). |
| STANDARD OF REVIEW | De novo review of a judgment on the pleadings under Federal Rule of Civil Procedure 12(c).                                                                                                                  |
| PRECEDENTIAL VALUE | Nonprecedential summary order                                                                                                                                                                               |
| PARTIES            | Vivian Pena v. Potter                                                                                                                                                                                       |

### TOPICS

employment discrimination title vii ada / disability federal employment law appellate procedure

### PRACTICE AREAS

employment law federal employment law civil rights appellate procedure

### QUESTIONS PRESENTED

1. Whether Pena abandoned her claims under the Whistleblower Protection Act, 42 U.S.C. § 1981, and the New York State Human Rights Law by failing to address them in her appellate brief.

2. Whether the district court properly dismissed Pena's Title VII and Rehabilitation Act claims for failure to comply with the 45-day Equal Employment Opportunity Commission counseling requirement.
3. Whether equitable tolling excused Pena's failure to contact an Equal Employment Opportunity Commission counselor within 45 days.

## HOLDINGS

1. Pena abandoned her claims under the Whistleblower Protection Act, 42 U.S.C. § 1981, and the New York State Human Rights Law by failing to discuss them in her appellate submission.
2. A federal employee alleging discrimination under Title VII or the Rehabilitation Act must contact an Equal Employment Opportunity Commission counselor within 45 days of the alleged discriminatory act or the effective date of the personnel action.
3. Equitable tolling was not warranted because Pena failed to show extraordinary circumstances that prevented her from timely contacting an Equal Employment Opportunity Commission counselor.

## KEY QUOTATIONS

*“We review a judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c) de novo.”*

*“We therefore agree with the district court that equitable tolling is not warranted in this case.”*

## FACTUAL BACKGROUND

Pena alleged employment discrimination arising from her termination. Her amended complaint stated that she was notified of her termination approximately ten months before she first contacted an Equal Employment Opportunity Commission counselor in December 2002. She did not demonstrate extraordinary circumstances that prevented timely contact with the counselor or impaired her ability to pursue her rights.

## PROCEDURAL HISTORY

The district court, Hellerstein, J., dismissed Pena's claims on the pleadings. On appeal, the Second Circuit held that Pena abandoned several claims by failing to address them in her appellate brief and affirmed dismissal of her Title VII and Rehabilitation Act claims because she failed to timely contact an Equal Employment Opportunity Commission counselor and did not establish grounds for equitable tolling.

## DISPOSITION

affirmed

## CASES CITED

- Hardy v. N.Y. City Health & Hosps. Corp., 164 F.3d 789, 792 (2d Cir. 1999)
- LoSacco v. City of Middletown, 71 F.3d 88, 92-93 (2d Cir. 1995)
- Shah v. N.Y. State Dep't of Civil Serv., 168 F.3d 610, 614 (2d Cir. 1999)
- Boos v. Runyon, 201 F.3d 178, 184-85 (2d Cir. 2000)

- *Zerilli-Edelglass v. N.Y. City Transit Auth.*, 333 F.3d 74, 80-81 (2d Cir. 2003)

## OPINION

### PER CURIAM.

SUMMARY ORDER Plaintiff-Appellant Vivian Pena, pro se, appeals from the judgment of the United States District Court for the Southern District of New York (Hellerstein, /.), dismissing Pena's employment discrimination claims pursuant to Federal Rule of Civil Procedure 12(c).

We assume the parties' familiarity with the facts and procedural history of the case. We review a judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c) de novo. See *Hardy v. N.Y. City Health & Hosps. Corp.*, 164 F.3d 789, 792 (2d Cir.1999).

Because Pena's submission on appeal contains no discussion of the district court's dismissal of her claims under the Whistle-blower Protection Act, 5 U.S.C. § 2302(b), Section 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981, or the New York State Human Rights Law, N.Y. Exec. Law § 296, we deem those claims abandoned. See *LoSacco v. City of Middletown*, 71 F.3d 88, 92-93 (2d Cir.1995) (concluding that pro se appellant abandoned claim by failing to raise it in his appellate brief).

Furthermore, the district court correctly dismissed Pena's claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Rehabilitation Act, 29 U.S.C. § 791 et seq.. Federal regulations governing claims under Title VII and the Rehabilitation Act provide that aggrieved persons who believe they have been discriminated against must consult a Counselor from the Equal Employment Opportunity Commission prior to filing a complaint "in order to try to informally resolve the matter." 29 C.F.R. § 1614.105(a).

Exhaustion before the EEOC is "an essential element of Title VII's statutory scheme and is designed to give the administrative agency the opportunity to investigate, mediate, and take remedial action." *Shah v. N.Y. State Dep't of Civil Serv.*, 168 F.3d 610, 614 (2d Cir.1999) (internal quotation marks and citation omitted). Contact with the EEOC Counselor must take place within 45 days of (1) the date of the alleged discriminatory act; or (2) the effective date of the personnel action.

29 C.F.R. § 1614.105(a)(1). The 45-day requirement is subject to equitable tolling, see *Boos v. Runyon*, 201 F.3d 178, 184 (2d Cir.2000), but only in "rare and exceptional circumstances] in which a party is prevented in some extraordinary way from exercising his rights." *Zerilli-Edelglass v. N.Y. City \*35Transit Auth.*, 333 F.3d 74, 80 (2d Cir.2003) (internal quotation marks and citation omitted).

Courts are to consider whether the person seeking the application of equitable tolling "(1) has acted with reasonable diligence during the time period she seeks to have tolled, and (2) has proved

that the circumstances are so extraordinary that the doctrine should apply.” Id. at 80-81. Pena’s Amended Complaint states that her first contact with the EEOC was in December 2002, approximately ten months after she was notified of her termination.

She has failed to demonstrate that she faced extraordinary circumstances during that ten-month period that “adversely affected her capacity to function generally or in relationship to the pursuit of her rights.” Boos, 201 F.3d at 185 (equitable tolling not available where plaintiff alleged she suffered from paranoia, panic attacks, and depression, but did not provide “a particularized description” of how her condition impaired her ability to contact an EEOC Counselor within the 45-day period).

We therefore agree with the district court that equitable tolling is not warranted in this case. We have reviewed Pena’s remaining contentions and find them to be without merit. For the reasons stated above, the judgment of the district court is **AFFIRMED**.