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### Briefs and Other Related Documents

Gloeckl v. Giant Eagle, Inc.C.A.3 (Pa.),2006.This case was not selected for publication in the Federal Reporter.NOT PRECEDENTIAL Please use FIND to look at the applicable circuit court rule before citing this opinion. Third Circuit Local Appellate Rule 28.3(a) and Internal Operating Procedure 5.3. (FIND CTA3 Rule 28.0 and CTA3 IOP APP I 5.3.)

United States Court of Appeals,Third Circuit.

Laurie GLOECKL, Appellant

v.

GIANT EAGLE, INC.

No. 05-1758.

Submitted Under Third Circuit LAR 34.1(a) April  
20, 2006.

Decided April 20, 2006.

**Background:** Former employee sued employer, alleging employer failed to provide reasonable accommodation in violation of the Americans with Disabilities Act (ADA). The United States District Court for the Western District of Pennsylvania, Terrance F. McVerry, J., entered summary judgment in favor of employer. Employee appealed.

**Holdings:** The Court of Appeals, Ambro, Circuit Judge, held that:

(1) 300-day period in which former employee was required to file her charge of discrimination ran from date employer denied employee's request to be transferred to a part-time position, and

(2) Court of Appeals would not invoke its equitable powers to toll the statutory time limitation.

Affirmed.

West Headnotes

[1] Civil Rights 78 ⇨1505(3)

## 78 Civil Rights

78IV Remedies Under Federal Employment  
Discrimination Statutes

78k1503 Administrative Agencies and  
Proceedings

78k1505 Time for Proceedings;  
Limitations

78k1505(3) k. Operation; Accrual and  
Computation. Most Cited Cases

The 300-day period in which former employee was required to file her charge of discrimination under the Americans with Disabilities Act (ADA) ran from date employer denied employee's request to be transferred to a part-time position, which action was, in effect, equivalent to a termination of her employment. Civil Rights Act of 1964, § 706(e)(1), 42 U.S.C.A. § 2000e-5(e)(1).

## [2] Civil Rights 78 ⇨1505(6)

## 78 Civil Rights

78IV Remedies Under Federal Employment  
Discrimination Statutes

78k1503 Administrative Agencies and  
Proceedings

78k1505 Time for Proceedings;  
Limitations

78k1505(6) k. Tolling. Most Cited  
Cases

Absent evidence that employer knew, when employee requested a transfer to a part-time position, that a suitable, part-time position was available or was going to be available in the near future or that employer's failure to notify employee about a part-time position actively misled her, Court of Appeals would not invoke its equitable powers to toll the 300-day statutory time limitation on employee's Americans with Disabilities Act (ADA) failure to accommodate claim. Civil Rights Act of 1964, § 706(e)(1), 42 U.S.C.A. § 2000e-5(e)(1).

\*324 Appeal from the United States District Court for the Western District of Pennsylvania. (D.C.

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Civil Action No. 03-cv-00550). District Judge:  
Honorable Terrance F. McVerry.

Gregory G. Paul, Peirce, Raimond & Coulter,  
Pittsburgh, PA, for Laurie Gloeckl.  
Susan G. Flynn, Elly M. Heller-Toig, Raeann  
Traficante, Marcus & Shapira, Pittsburgh, PA, for  
Giant Eagle, Inc.

Before SLOVITER and AMBRO, Circuit Judges,  
and DUBOIS,<sup>FN\*</sup> District Judge.

FN\* Honorable Jan E. DuBois, Senior  
District Judge for the Eastern District of  
Pennsylvania, sitting by designation.

### \*325 OPINION

AMBRO, Circuit Judge

\*\*1 Laurie Gloeckl filed a complaint against her employer, Giant Eagle, Inc. ("Giant Eagle"), in the United States District Court for the Western District of Pennsylvania. In it she alleged the failure to provide reasonable accommodation under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"). Because Gloeckl failed to file her charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") within 300 days of the challenged employment decision, the District Court granted summary judgment for Giant Eagle. Gloeckl timely filed a notice of appeal and, for the reasons provided below, we affirm.<sup>FN1</sup>

FN1. The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 1343. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

#### I.

As we write only for the parties, who are familiar with the underlying facts, we set out only those facts necessary to our analysis. Gloeckl was hired by Giant Eagle in 1990 as floral manager. Due to a shoulder and arm injury that occurred in 1991, she was moved, at her request, to the position of office manager. When this injury made it difficult for

Gloeckl to perform her duties in that capacity, she requested a transfer to the position of personnel manager, which was granted.

Gloeckl unfortunately continued to have problems with her left arm and shoulder. After two surgeries and extensive physical therapy, she was released to return to work twenty hours per week on June 15, 1998. Dale Giovengo, Giant Eagle's Director of Human Resources, permitted her to return to her former position with the understanding that over time she would be able to satisfy the full-time requirement. Gloeckl, however, suffered a relapse, was unable to return full-time to her position, and went on disability leave.

Following a thermal shrink procedure and additional physical therapy/rehabilitation, Gloeckl was released in 2001 to return to work twenty hours a week. As a result, she spoke with Giovengo and inquired whether she could return to her former position with the twenty-hour restriction. On August 16, 2001, Giovengo informed Gloeckl that she could not return to work as a personnel manager because it was a full-time position and she could only work part-time. He further stated that she was not physically able to perform the essential functions of any other position at Giant Eagle and, thus, could not return to work in any capacity.

In an attempt to persuade Giant Eagle to reconsider, Gloeckl inquired of Ray Huber, Vice President of Human Resources. Huber investigated the matter and, on September 15, 2001, called Gloeckl and told her that he concurred with Giovengo. Eleven months later (on August 16, 2002), Gloeckl filed a complaint for discrimination with the EEOC. A fact-finding conference was held before an EEOC investigator who, on January 24, 2003, dismissed Gloeckl's complaint as untimely filed. This appeal followed.

#### II.

[1] Under the ADA, prior to filing an employment discrimination action, an employee must file a timely charge of discrimination with the EEOC. 42 U.S.C. § 12117(a) (applying the administrative

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enforcement procedures of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, to ADA claims). For a charge to be timely, an employee normally must file it with the EEOC within 180 days of \*326 the alleged unlawful employment practice. 42 U.S.C. § 2000e-5(e)(1). However, in a deferral state such as Pennsylvania (that is, a state that has a state or local law prohibiting the practice alleged and has established or authorized the state or local authority to grant or seek relief from practices prohibited under the ADA), the employee has not 180 but 300 days from the date of the alleged unlawful employment practice in which to file her charge of discrimination. *Id.*; see *Cardenas v. Massey*, 269 F.3d 251, 255 n.2 (3d Cir.2001).

\*\*2 Giant Eagle argues that, because Gloeckl filed her EEOC charge more than 300 days after her adverse employment action, we have no jurisdiction to hear her ADA claim. We agree. As noted above, Gloeckl filed her charge of discrimination with the EEOC on August 16, 2002. Accordingly, in order for her claim to be timely, the alleged unlawful employment practice must have occurred and been communicated to her on or after October 20, 2001.

Giant Eagle takes the position that the alleged unlawful employment practice at issue occurred on August 16, 2001, when, as conceded by Gloeckl in her deposition testimony, Giovengo informed her that she could not return to work at Giant Eagle in any capacity. Gloeckl, on the other hand, contends that the unlawful employment action occurred when Giant Eagle failed to consider her requests for funded part-time work that became available and was advertised in November 2001. We are convinced that the alleged discriminatory practice took place when the company denied Gloeckl's request to be transferred to a part-time position on August 16, 2001. As aptly stated by the District Court, "such an action was, in effect, equivalent to a termination of her employment. Therefore, [Gloeckl's] subsequent requests for reconsideration of [Giant Eagle's] decision not to allow her to return to work in any capacity had no effect on tolling the statute of limitations." App. vol. 1, at 28. In this context, Gloeckl failed to file a timely charge of

discrimination with the EEOC.

[2] Gloeckl maintains, however, that even if we rule that her claim was filed untimely, we should invoke our equitable powers and toll the statutory time limitation to allow her to proceed. In Title VII actions, we have found equitable tolling appropriate when a claimant received inadequate notice of her right to file suit, where a motion for appointment of counsel is pending or where the court has misled the plaintiff into believing that she had done everything required of her.

*Seitzinger v. Reading Hosp. & Med. Ctr.*, 165 F.3d 236, 240 (3d Cir.1999). We have also allowed equitable tolling when plaintiff "in some extraordinary way" was prevented from asserting her rights; or when the plaintiff timely asserted her rights in the wrong forum.

*Id.* (citations omitted). Gloeckl essentially argues that Giant Eagle's failure to bring to her attention part-time, vacant positions invites equitable tolling because the company's inaction lulled her into believing that those positions were not available.

We disagree. Gloeckl has failed to point to any evidence in the record that establishes that Giant Eagle knew, when she requested a transfer to a part-time position in August 2001, that a suitable, part-time position was available or was going to be available in the near future. Indeed, even if Giant Eagle had been aware of an available part-time position in August 2001 and failed to notify Gloeckl about that position, we can not say that its inaction "actively misled" Gloeckl under current case law.

\*\*\*\*\*

\*327 \*\*3 Gloeckl did not timely file her EEOC claim. That failure was not excused by equitable tolling following the limitations period. We thus affirm the District Court's grant of summary judgment for Giant Eagle.

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