

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARK D. BAILEY, SR. : CIVIL ACTION
: :
v. : :
: :
ANTHONY J. PRINCIPI, SECRETARY, :
DEPARTMENT OF VETERANS AFFAIRS : NO. 02-942

M E M O R A N D U M

MICHAEL M. BAYLSON, J.

APRIL 25, 2003

I. Introduction

Plaintiff Mark Bailey is a former employee of the Department of Veterans Affairs (the "Department"). He was employed as a pipefitter at the Department's Veterans Affairs Medical Center in Coatesville, Pennsylvania. He is suing the Secretary of the Department seeking review of a Merit Systems Protection Board ("MSPB") decision denying his request to be reinstated to his former position. He also seeks damages. His claims are not well articulated. It appears from a liberal construction of his complaint that plaintiff alleges defendant acted improperly by firing him in retaliation for being a whistleblower and activities he undertook as union president (Count I), and that the defendant violated his rights under Title VII, 42 U.S.C. § 2000(e), the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, the Rehabilitation Act, 29 U.S.C. § 791 (presumably alleged as part of Count II), and the Privacy Act, 5 U.S.C. § 552a (Count III).

Presently before the court is defendant's Motion to Dismiss Plaintiff's Complaint in Part and Motion for Partial Summary Judgment. The defendant seeks to dismiss the ADEA, Rehabilitation Act, and Privacy Act claims for failure to state a cognizable claim.¹ Defendant has also moved for summary judgment on plaintiff's non-discrimination claim in Count I that defendant fired him as reprisal for his union-related activities and for being a whistleblower.

II. Legal Standard

There are two different legal standards applicable.

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a claim while accepting the veracity of the claimant's allegations. See Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987); Winterberg v. CNA Ins. Co., 868 F. Supp. 713, 718 (E.D. Pa. 1994), aff'd, 72 F.3d 318 (3d Cir. 1995). A dismissal for failure to state a claim is also appropriate when it clearly appears that plaintiff can prove no set of facts to support the claim that would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Robb v. Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984).

¹Defendant does not challenge plaintiff's Title VII race discrimination claim in this motion and concedes plaintiff is entitled to discovery.

The legal standard governing defendant's Summary Judgment motion as to Count I is set forth below.

III. Facts

In addressing plaintiff's motion, a court considers pertinent facts from the plaintiff's complaint as well as matters of public record, including documents memorializing decisions of governmental agencies, and documents referenced in the complaint or essential to a plaintiff's claim which are attached to a defendant's motion. See Churchill v. Star Enter., 183 F.3d 184, 190 n.5 (3d Cir. 1999); Beverly Enter., Inc. v. Trump, 182 F.3d 183, 190 n.3 (3d Cir. 1999), cert. denied, 120 S. Ct. 795 (2000); In re Burlington Coat Factory Sec. Lit., 114 F.3d 1410, 1426 (3d Cir. 1997); Arizmendi v. Lawson, 914 F. Supp. 1157, 1160-61 (E.D. Pa. 1996).

Accepting his allegations as true, the following pertinent facts appear from plaintiff's materials.

Plaintiff was employed at the Department as a pipefitter for twenty-one years prior to his termination on September 9, 1998. Pl's Compl. ¶ 6. Defendant terminated plaintiff after charging him with sexual misconduct for engaging in sexual advances, unwanted touching, and offensive language of a sexual nature aimed at two female Department employees. MSPB Initial Decision at 5.

Defendant learned of plaintiff's alleged sexual misconduct on June 19, 1996, when Marsha George, a Personnel Staffing Assistant for defendant, told her supervisor, George Pearson, Chief, Human Resources Management Services, that her sister, Michele Farra, a medical clerk at defendant's facility, had been sexually harassed by plaintiff. Ms. Farra provided a description of plaintiff's conduct to Mr. Pearson, but indicated that she did not wish to file a complaint. Despite Ms. Farra's refusal to file a complaint, Mr. Pearson contacted others to convene an investigation into plaintiff's interactions with the victim. On June 24, 1996, Steve Dizel, Acting Associate Medical Center Director, and Sue Scott, Acting Chief for Human Resource Management Services, interviewed Ms. Farra about the allegations she made about plaintiff. Once again, Ms. Farra indicated that she did not wish to pursue the matter, but Mr. Dizel and Ms. Scott informed her that the charges were very serious and that the agency was obligated to investigate them. Id. at 2.

As the investigation got underway, Ronald Pitcherella, Chief of Pharmacy Service, learned of the allegations against plaintiff. Because Mr. Pitcherella's secretary, Christina March, had previously complained to him about how plaintiff treated her, he met with her and asked for a description of plaintiff's conduct. Mr. Pitcherella passed on Ms. March's description to Mr. Pearson. Id.

Defendant then convened an Administrative Board of Investigation ("ABI") to investigate the situation and interview witnesses. Three individuals from outside the Coatesville facility conducted the investigation. On September 12, 1996, the ABI issued a report finding that the claims plaintiff had engaged in sexual misconduct were credible and met the definition of sexual harassment, that other testimony suggested that plaintiff also may have subjected a minor high school student interning at the agency to inappropriate behavior, and also determined that plaintiff had violated rules and regulations regarding the release of confidential employee medical records. Following the promulgation of the ABI report, the agency recommended that the defendant initiate disciplinary action against the plaintiff for his sexual misconduct and his unauthorized access and disclosure of an employee's confidential medical records. Id. at 4-5.

By notice on October 22, 1996, Stephen Blanchard, Chief of Engineering Service, proposed petitioner's removal because of his sexual misconduct against two female employees which included repeatedly engaging in unwelcome sexual advances, uninvited touching, and offensive language of a sexual nature. Id. at 3.

On November 21, 1996, plaintiff responded to Mr. Devansky, Medical Director of the facility. He informed Mr. Devansky that the ABI failed to view a video tape of an off-duty party he provided it and had not interviewed witnesses he

suggested. Mr. Devansky reconvened the ABI and asked them to consider the additional information. However, the ABI's conclusions and recommendations did not change. Mr. Devansky also met individually with Ms. March and a witness to plaintiff's conduct to assess their credibility. Mr. Devansky convened the ABI a third time after plaintiff accused agency managers of misconduct. Once again, the ABI found these allegations to be meritless. Id. at 3-4.

On January 24, 1997, Mr. Devansky issued a decision sustaining the charges and imposing the penalty of removal. Id.

Plaintiff appealed his termination to the United States Merit Systems Protection Board ("MSPB") alleging that the Department action was motivated by racial discrimination as well as reprisal for his prior equal employment opportunity work as head of his union. After a six-day hearing, Judge McStravick, an administrative law judge with the MSPB, affirmed the Department's decision and denied plaintiff's race discrimination and reprisal claims. Judge McStravick found that the plaintiff had engaged in sexual misconduct toward the two women which created a hostile work environment and was not a pretextual reason for plaintiff's termination. Moreover, the judge found that plaintiff failed to establish a nexus between the alleged retaliation and the removal action. Id. at 6-8.

Thereafter, plaintiff appealed the decision to the full MSPB. The full MSPB issued a Final Order on June 16, 2000, denying Mr. Bailey's petition for review. MSPB Final Order at 2.

On July 13, 2000, plaintiff filed a petition with the Equal Employment Opportunity Commission ("EEOC") seeking review of his Title VII discrimination claims. EEOC Decision Jan. 30, 2002 p. 1. On January 6, 2002, the EEOC issued a decision concurring with the final decision of the MSPB finding no discrimination and issued a right to sue letter. Id.

IV. Discussion

1. Count I: Non-discrimination Claims

The basis for an appeal from an adverse final decision by the MSPB depends on whether the employee raises allegations of unlawful discrimination in the initial MSPB appeal. If the former federal employee does not allege that the adverse action resulted from unlawful discrimination, the employee may only pursue a review of the MSPB's final decision through the United States Court of Appeals for the Federal Circuit which reviews the decision using an abuse of discretion standard. 5 U.S.C. §§ 7703(b)(1), (c)(1).

However, if as here, the employee alleges that the adverse employment action was motivated by illegal discrimination, the employee may seek judicial review of both the discriminatory and non-discriminatory aspects of the MSPB

decision before the appropriate federal court in what is known as a "mixed case." 5 U.S.C. § 7703(b)(2)-(c); Kean v. Stone, 926 F.2d 276, 285 (3d Cir. 1991).

Federal law limits the scope of a district court's ability to review a federal agency's administrative decisions. MSPB determinations on non-discrimination claims are reviewed on the record and set aside only if the "department action, finding or conclusion" is found to be: "1) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; 2) obtained without procedures required by law, rule, or regulation having been followed; or 3) unsupported by substantial evidence." 5 U.S.C. § 7703(c); Carr v. Reno, 23 F.3d 525, 528 (D.C. Cir. 1994). Although § 7703(c) standards technically only apply to appeals from MSPB decisions before the Federal Circuit Court of Appeals, every circuit to rule on the matter has held that non-discrimination claims in "mixed cases" reviewed by district courts should employ the same deferential standard of § 7703(c). See Kelliher v. Veneman, 313 F.3d 1270, 1275 (11th Cir. 2002); Hooven-Lewis v. Caldera, 249 F.3d 259, 265-66 (4th Cir. 2001); Washington v. Garrett, 10 F.3d 1421, 1428 (9th Cir. 1993). Moreover, the factfinder's credibility determination is "virtually unreviewable." Hamsch v. U.S. Dep't of Treasury, 796 F.2d 430, 436 (Fed. Cir. 1990). Meanwhile, the discrimination

claims are "subject to trial de novo by the reviewing court." 5
U.S.C. § 7703(c).

Defendant moves for summary judgment on plaintiff's claim that the MSPB's decision rejecting his reprisal and whistleblowing claims should be reversed as arbitrary and capricious. Plaintiff contends that defendant's proffered reasons for the decision to terminate him, his sexual misconduct, is a pretext for defendant's reprisal resulting from plaintiff's protected activities as a union leader and as a whistleblower.

On July 30, 1999, Administrative Law Judge Terrence M. McStravick issued a written opinion which sustained the Department's charges of sexual misconduct as well as its decision to terminate plaintiff.² In so doing, Judge McStravick found that plaintiff failed to meet his burden of showing that defendant removed him because of his union or whistleblower activities. All of the administrative law judge's findings are supported by substantial evidence in the record.

First, the administrative law judge found that plaintiff had engaged in sexual misconduct with both Ms. Farra and Ms. March warranting removal. This finding was based on the testimony of witnesses and is therefore supported by substantial evidence. In so finding, the judge relied on the testimony of

²On June 16, 2000, the full MSPB denied plaintiff's request for a full board hearing on his claims.

Ms. Farra and Ms. March who both described plaintiff's sexual harassment. He also relied on the testimony of several witnesses who corroborated this testimony. Although plaintiff denied the incidents, the administrative law judge ultimately considered the testimony of others more credible given the reluctance with which the victims came forward, the consistency of their statements, and the lack of an incentive for them to fabricate the incidents.

Second, the administrative law judge found that the Department would have terminated the plaintiff even if he had not engaged in union or whistleblower activities. Specifically, he found that the members of the ABI which initially proposed plaintiff's removal were unaware of plaintiff's union or whistleblower activities. He also considered that plaintiff had been union president for 12 years and had worked with the hospital director, Mr. Devansky, for over five years without any retaliatory action being taken previously, even when relations were strained. Further, he relied on testimony from the union vice-president, Barry Jackson, that whistleblowing activity would not stop even if Mr. Bailey were removed as union president. Moreover, the severity of Ms. Farra's allegations against plaintiff required that the Department investigate plaintiff's behavior. This finding is based on the testimony of witnesses as well as other relevant evidence.

Third, the administrative judge determined that the Department met its burden, pursuant to 5 U.S.C. § 7513(a), by showing that the decision to terminate plaintiff would promote the efficiency of the Department. Although an department must show a sufficient nexus between the promotion of service with the conduct subject to discipline, this nexus is met when, as is the present case, the offensive conduct occurred at work. See Parker v. United States Postal Serv., 819 F.2d 1113, 1116 (Fed. Cir. 1987). The administrative judge found it unnecessary for the Department to present evidence that sexual harassment is disruptive to the workplace because plaintiff's conduct is inherently disruptive. Instead, the administrative judge relied on previous MSPB decisions that disciplining an employee for an act of sexual harassment promotes the efficiency of the service. See Woodford v. Dep't of the Army, 75 M.S.P.R. 350, 357 (1997); Jordan v. United States Postal Serv., 44 M.S.P.R. 225, 232 (1990). This conclusion is amply supported.

Finally, the administrative judge determined that the Department decision to terminate plaintiff was reasonable in this context. The appropriate standard of review for a penalty determination is an abuse of discretion standard "unless the penalty is 'so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion.'" Schuck v. Frank, 27 F.3d 194, 197 (6th Cir. 1994)(quoting Parker, 819 F.2d

at 1116). The administrative judge relied on testimony from Mr. Devansky about the Department's zero tolerance policy for workplace sexual harassment and also considered the factors the Department relied on when reaching its determination to terminate the plaintiff when concluding that the penalty was appropriate. Accordingly, the record contains substantial evidence to support this decision.

All of the findings of the administrative judge regarding non-discriminatory reprisal or whistleblowing are supported by substantial evidence in the record and must be upheld. Accordingly, summary judgment on Count I is appropriate.

2. Age Discrimination and Rehabilitation Act Claims

Defendant next moves to dismiss plaintiff's ADEA and Rehabilitation Act claims on the grounds that plaintiff has failed to exhaust his administrative remedies. Before bringing a complaint of discrimination in federal court, a federal employee must exhaust his administrative remedies related to that claim. See Robinson v. Dalton, 107 F.3d 1018, 1022 (3d Cir. 1997); Spence v. Straw, 54 F.3d 196, 199 (3d Cir. 1995). The acts alleged in the complaint must be fairly within the scope of the administrative charge and the investigation that would arise therefrom. See Antol v. Perry, 82 F.3d 1291, 1295 (3d Cir. 1996).

In his response to defendant's motion to dismiss, plaintiff has not alleged or otherwise shown that he has exhausted remedies for his ADEA and Rehabilitation Act claims. See 42 U.S.C. § 2000e-16(c); 29 C.F.R. § 1614.408 (1996). A complaint does not state a claim upon which relief may be granted unless it asserts the satisfaction of the preconditions to suit specified by the statutes. Hornsby v. United States Postal Service, 787 F.2d 87, 90 (3d Cir. 1986).

Plaintiff failed to mention the possibility of age or disability discrimination during his administrative appeals. Accordingly, these claims shall be dismissed.

3. Privacy Act

Lastly defendants move to dismiss plaintiff's Privacy Act claim. The Privacy Act regulates the collection, maintenance, use, and dissemination of information about individuals. See 5 U.S.C. § 552a. The provision of the Privacy Act implicated by plaintiff provides that a department maintaining a system of records must "collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under federal programs." § 552a(e)(2).³ This provision "reflects

³It remains undecided whether § 552a(e)(2) even applies to the federal employment relationship as courts considering § 552a(e)(2) have never directly addressed the facial

congressional judgment that the best way to ensure accuracy, in general, is to obtain information 'directly from the individual whenever practicable.'" Waters v. Thornburgh, 888 F.2d 870, 873 (D.C. Cir. 1989).

To state a claim under § 552a(e)(2), a plaintiff must allege that the defendant failed to elicit information from the plaintiff "to the greatest extent practicable," the violation of the Act was willful or intentional, and defendant's violation had an adverse impact on the plaintiff. See Hudson v. Reno, 130 F.3d 1193, 1204-05 (6th Cir. 1997), cert. denied, 525 U.S. 822 (1998), overruled in part on other grounds, Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843 (2001); see also Darst v. Social Security Administration, 172 F.3d 1065, 1068 (8th Cir. 1999). Allegations of mental distress or embarrassment are sufficient to meet the adverse effect requirement. See Quinn v. Stone, 978 F.2d 126, 135 (3d Cir. 1992); Albright v. United States, 732 F.2d 181, 186 (D.C. Cir. 1984).

Plaintiff alleges in his brief supplementing the Privacy Act allegation in his complaint that the Department violated his rights under the Privacy Act of 1974, 5 U.S.C. § 552a, by failing to obtain information from the plaintiff "about [his] alleged misconduct to the greatest extent

applicability of the section to the employment context. See Carton v. Reno, 310 F.3d 108, 111 (2d Cir. 2002).

practicable . . . before speaking to other individuals." Pl's. Resp. p. 2. The claim stems from plaintiff's belief that the Department failed to approach him directly before interviewing his accusers and other witnesses. By alleging in his complaint that the Department's violation of § 552a(e)(2) had an "adverse effect" on him by subjecting him to "rumor, innuendo, embarrassment, and ridicule," plaintiff seeks a civil remedy under 5 U.S.C. § 552a(g)(1)(D).

Plaintiff has failed to plead the facts necessary to give rise to liability. A complaint must set forth facts sufficient to outline the elements of a claim. See Plasko v. City of Pottsville, 852 F. Supp. 1258, 1261 (E.D. Pa. 1994). Plaintiff merely alleges that the "agency's Privacy Act violation was intentional and willful and had an adverse effect on Mr. Bailey's employment." Compl. ¶ 20. No facts are provided to support plaintiff's allegation that the Department willfully or intentionally violated plaintiff's rights under the Privacy Act. See Britt v. Naval Investigative Serv., 886 F.2d 544, 551 (3d Cir. 1989)(requiring plaintiff to show that an agency violated his rights by acting "without grounds for believing [its actions] to be lawful, or by flagrantly disregarding others' rights under the [Privacy] Act" in order to prevail)(quoting Albright v. United States, 732 F.2d 181, 189 (D.C. Cir. 1984)).

Accordingly, plaintiff has failed to present the facts necessary to state a claim under the Privacy Act. By not alleging facts that the Department acted willfully or intentionally when failing to first collect information directly from him to the greatest extent practicable, he does not sufficiently state a claim. However, the Court cannot preclude the possibility that plaintiff may be able to state a claim. Accordingly, this claim will be dismissed without prejudice with leave to amend within 14 days.

V. Conclusion

Consistent with the foregoing, this court will grant defendant's motion for summary judgment on plaintiff's non-discrimination claims alleged in Count I because the MSPB's decision was not arbitrary and capricious nor procedurally lacking, and was supported by substantial evidence in the record. Second, this court will dismiss plaintiff's ADEA and Rehabilitation Act claims alleged in Count II because plaintiff failed to exhaust his administrative remedies related to those claims. Finally, this court will grant defendant's motion to dismiss plaintiff's Privacy Act claim without prejudice and with leave to amend because it cannot conclude with certainty that plaintiff is unable to state a claim. An appropriate Order will be entered.

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O R D E R

AND NOW, this day of April, 2003, upon consideration of defendant's Motion to Dismiss Plaintiff's Complaint in Part and Motion for Partial Summary Judgment (Doc. #7) and plaintiff's response thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** in part and denied in part as follows: summary judgment is granted on Count I; the ADEA and Rehabilitation Act claims in Count II are dismissed with prejudice but defendant has not moved as to the Title VII race discrimination claim in Count II; and

the Privacy Act claim in Count III is dismissed without prejudice with leave to amend within 14 days of this order.

BY THE COURT:

MICHAEL M. BAYLSON, J.