

USPS Office of Equal Employment Opportunity ("EEO") Compliance and Appeals. Plaintiff's Complaint set forth the following statement of his claim:

Pursuant to 29 C.F.R. § 1614.106(d)[,] I added claims and requested consideration of my additional claims with evidence clearly providing a nexus with my original claim. I was never afforded an opportunity to submit this relevant evidence. The agency failed to properly comply with discovery[.] Moreover, the body of evidence I had prepared was not permitted to be submitted for consideration[,] resulting in violation of my civil rights.

(Pl.'s Compl. at 1-2.)

While Plaintiff paid the filing fee for his Complaint, and apparently does not seek to proceed in forma pauperis, Plaintiff does seek appointment of an attorney. In making that request, Plaintiff described his claim as based on

[j]udicial improprieties. Insufficient and incomplete investigation. Lack of cooperation with agency relevant to discovery. Failure of administrative judge to consider relevant facts subsequent to original order.

(Pl.'s Req. for Appointment of Att'y at 2.)

Defendant filed a motion to dismiss portions of Plaintiff's Complaint on the basis that Plaintiff failed to exhaust administrative remedies as to two of the counts of his EEO complaint.

Discussion

In considering Plaintiff's motion to appoint counsel, this Court is required to review, among other factors, the potential merits of Plaintiff's case. See Tabron v. Grace, 6 F.3d 147, 153

(3d Cir. 1993). Pursuant to such examination of the substance of Plaintiff's case, the Court finds that it lacks subject matter jurisdiction over the claims set forth in the complaint. A district court may, at any time, dismiss any claims over which it lacks subject matter jurisdiction. See Federal Rule of Civil Procedure 12(h)(3).

Defendant's motion assumes that Plaintiff's Complaint alleges the same harassment claimed in his EEO filings.² (Def.'s Mot. to Partially Dismiss Pl.'s Compl.) We are not convinced that Plaintiff's Complaint contains any claim based on discrimination. While we construe a pro se plaintiff's pleadings liberally, we will not insert claims that are simply not present. See Haines v. Kerner, 404 U.S. 519, 520-521, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972).

Plaintiff's Complaint, as set forth above in relevant part, complains of improper procedural maneuverings and determinations during the USPS's consideration of his EEO complaint. The Complaint makes no mention of discrimination, or of any of the circumstances underlying the EEO complaint. Rather, Plaintiff's claim appears to be in the nature of a Bivens action for violation of his due process rights in the course of considering

²Defendant occasionally refers to Plaintiff's "EEOC" filings and various rulings of the "EEOC." Because Plaintiff, to this Court's knowledge, has not sought relief through the Equal Employment Opportunity Commission, commonly known as the "EEOC," we assume that these references are to the USPS Office of EEO Compliance and Appeals.

his EEO claim.

In Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court determined that, while no proper action pursuant to 42 U.S.C. § 1983 lies against an agent of the federal government, a constitutional tort action may be available to vindicate those whose constitutional rights are violated by federal actors. The availability of a Bivens claim, however, has been limited in circumstances where a another comprehensive statutory or regulatory remedy is available. Courts have applied this limitation to claims of federal employees arising out of disputes with their employers. Specifically, the Supreme Court determined that the Civil Service Reform Act of 1978 ("CSRA"), Pub. L. No. 95-454, 91 Stat. 1111 (codified as amended in various sections of Title 5, United States Code). See Bush v. Lucas, 462 U.S. 367 (1983).

The Third Circuit has determined that, where a federal employee's claim arises out of the employment context, the CSRA provides the comprehensive and exclusive set of remedies available to that individual. Sarullo v. United States Postal Svc., 352 F.3d 789, 795 (3d Cir. 2003) (citing Schweiker v. Chilicky, 487 U.S. 412, 423 (1988)). In Sarullo, a former employee attempted to set forth a Bivens claim for malicious prosecution against the USPS. Id. at 794-95. Sarullo's complaint stemmed from the USPS's investigation of alleged drug sales activity in the workplace, and his subsequent termination.

Id. at 795. The court found that Sarullo's claim arose from the "employment context," and that his sole remedy, therefore, was provided for in the CSRA. Id. Thus, the court concluded, the district court "lacked subject matter jurisdiction to hear Sarullo's Bivens claim as such a claim was barred by the comprehensive statutory scheme provided in the CSRA, and should have dismissed the Bivens claim for lack of subject matter jurisdiction." Id. at 796-97.

Plaintiff's claim, like Sarullo's, stems from the procedures implemented in addressing a workplace problem. Plaintiff complains of improper conduct in adjudicating his EEO complaint. Such adjudications, and the behavior of the parties involved therein, are, like the investigation and termination process in Sarullo, personnel actions within the scope of the CSRA. See Sarullo, 352 F.3d at 796-97. Plaintiff's claim likewise arose from the employment context, making the CSRA the sole source of any remedy. Thus, this Court lacks subject matter jurisdiction over Plaintiff's claim, and the Complaint must be dismissed.

Conclusion

For the reasons set forth above, Plaintiff's Complaint is DISMISSED for lack of subject matter jurisdiction, and both Plaintiff's motion for appointment of counsel and Defendant's motion for partial dismissal are DENIED as MOOT.

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

GARY L. HONTZ, : CIVIL ACTION
 :
 v. : 06-628
 :
 JOHN E. POTTER :

ORDER

AND NOW, this 27th day of June, 2006, for the reasons set forth in the accompanying memorandum opinion, it is hereby ORDERED that Plaintiff's Complaint is DISMISSED. It is FURTHER ORDERED that Plaintiff's Request for Appointment of Counsel (Doc. No. 3) and Defendant's Motion to Partially Dismiss Plaintiff's Complaint (Doc. No. 8) are DENIED as MOOT.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.