



Cited

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Asnari v. Vilsack

United States District Court for the District of Maryland
November 16, 2009, Decided; November 17, 2009, Filed
Case No.: RWT 09cv269

Reporter: 2009 U.S. Dist. LEXIS 107157; 2009 WL 4014922

HESHMAT ASNARI, Plaintiff, v. TOM VILSACK,
Secretary of Agriculture, Defendant.

Core Terms

subject matter jurisdiction, backpay, surreply

Counsel: [*1] Heshmat Ansari, Plaintiff, Pro se,
Germantown, MD.

For Ed Schafer, Secretary of Agriculture, Defendant:
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For United States of America, Movant: Melanie L
Glickson, LEAD ATTORNEY, Maryland Office of the
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Judges: ROGER W. TITUS, UNITED STATES
DISTRICT JUDGE.

Opinion by: ROGER W. TITUS

Opinion

MEMORANDUM OPINION

Pending before the Court are Defendant Tom Vilsack's
Motion To Dismiss or, in the Alternative, for Summary
Judgment and Motion To Strike Plaintiff's Surreply.
Because the Court lacks subject matter jurisdiction over
Plaintiff Heshmat Ansari's *pro se* Complaint and because
Plaintiff filed his surreply without the Court's permission,
the Court will grant Defendant's Motions by separate
order.

In December of 2001, while employed by the United
States Department of Treasury ("the Treasury
Department"), Plaintiff filed an employment
discrimination suit with the Equal Employment
Opportunity Commission ("EEOC") against the Treasury
Department. (Pl's Compl. 1.) In February of 2003,

Plaintiff left the Treasury Department [*2] and began
working for the United States Department of Agriculture
("Agriculture Department"). (*Id.*) Three years later, on
February 9, 2006, Plaintiff left the Agriculture Department
to work for the United States Department of
Transportation ("Transportation Department"). (*Id.*) On
June 15, 2007, while employed by the Transportation
Department, Plaintiff received a prevailing EEOC
decision, which ordered the Treasury Department to revise
Plaintiff's personnel file to reflect that he was promoted to
a General Schedule ("GS")-15 position and to award him
back pay for the period from September 17, 2001, until
Plaintiff left the agency in February of 2003. (*Id.* Ex.1.)

Pursuant to the EEOC order, the Treasury Department
corrected Plaintiff's Official Personnel Records to reflect
his promotion to a GS-15 position and awarded him back
pay. (*Id.*) In November of 2007, the Treasury Department
delivered copies of Plaintiff's corrected employment
records to the Agriculture and Transportation
Departments. (Pl's Resp. 2.) The Transportation
Department updated Plaintiff's employment record to
reflect his promotion at the Treasury Department and
awarded Plaintiff back pay. (Pl's Compl. 1; Pl's Resp.
[*3] 2.) The Agriculture Department, however, did not
modify Plaintiff's employment records or award Plaintiff
back pay. (Pl's Compl. 1; Pl's Resp. 2.)

On October 2, 2008, Plaintiff filed a petition for
enforcement with the EEOC regarding the Agriculture
Department's refusal to correct his records and to award
him back pay. (*Id.* at 1-- 2 & Ex.2.) The EEOC denied his
petition on October 27, 2008. (*Id.* Ex.2.) In its denial, the
EEOC explained that the EEOC's "jurisdiction to order
corrective action reaches only to the agency against which
the complaint was filed, in this case Department of
Treasury, and not to other agencies, such as [the
Agriculture and Transportation Departments]." (*Id.*)

On November 24, 2008, Plaintiff filed the instant
complaint against the Agriculture Department for failure
to update his personnel records and to award him back pay.
(Pl's Compl. 1.) Plaintiff contends that his employment
record at the Agriculture Department should reflect his

entry position as GS-15, Step 5, and not GS-15, Step 3. (*Id.*) He requests that the Court order Defendant to correct his Official Personnel Records with the Agriculture Department and to award him back pay, with interest, for all wages [*4] and benefits for the period of time beginning February 9, 2003, to January 20, 2006. (*Id.* at 2.)

Because Plaintiff's Complaint did not state a cause of action, Defendant assumed in its motion for summary judgment that Plaintiff was bringing the action pursuant to Title VII of the Civil Rights Act of 1964. (Def's Mot. 11.) In his opposition, Plaintiff clarified that he was bringing this action pursuant to Title 5, United States Code, but he did not specify a particular section. (Pl's Resp. 1.) Instead, he quoted from Chapter 32 of the United States Office of Personnel Management Operating Manual, which provides instructions for processing personnel actions, including corrections of step and salary. (*Id.* at 2.) Defendant argues in his reply that Plaintiff's Title 5 claim is improper and that the Court lacks jurisdiction over the claim. (Def's Reply 2-3.)

In response to Defendant's Reply, Plaintiff filed a response, which the Court construes as a surreply, without having requested leave to file one. Defendant filed a motion to strike Plaintiff's surreply. Pursuant to Local Rule 105.2(a), surreply are not permitted to be filed unless otherwise ordered by the Court. Accordingly, the Court [*5] will grant Defendant's motion to strike Plaintiff's surreply by separate order. The Court notes, however, that Plaintiff's surreply would not have changed this decision.

A motion to dismiss based on lack of subject matter jurisdiction pursuant to *Federal Rule of Civil Procedure 12(b)(1)* raises the question of whether the court has the authority to hear the case. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). The plaintiff bears the burden of persuading the court that it has subject matter jurisdiction. See *id.* Motions to dismiss for lack of subject matter jurisdiction are properly granted where a claim fails to allege facts upon which the court may base jurisdiction. See *id.*

The Court construes Plaintiff's complaint as raising a claim under the Civil Service Reform Act of 1978

("CSRA"), *Pub. L. No. 95-454, 92 Stat. 1111* (codified as amended in scattered sections of 5 U.S.C.). The CSRA is the exclusive remedy for federal employees seeking redress of non-discriminatory personnel actions connected with federal employment. See *United States v. Fausto*, 484 U.S. 439, 443, 108 S. Ct. 668, 98 L. Ed. 2d 830 (1988); *Yokum v. U.S. Postal Serv.*, 877 F.2d 276, 279 (4th Cir. 1989). The Merit Systems Protection Board [*6] ("MSPB") and the United States Court of Appeals for the Federal Circuit have exclusive jurisdiction over federal employment disputes arising under the CSRA. See *Fausto*, 484 U.S. at 448-49; *Pinar v. Dole*, 747 F.2d 899, 905 (4th Cir. 1984); *Davis v. Thompson*, 367 F. Supp. 2d 792, 800 (D. Md. 2005).

This Court lacks jurisdiction over Plaintiff's CSRA claim. Plaintiff has provided no information or evidence of ever having filed a claim or action with the MSPB, and there are no records of an MSPB appeal or an internal administrative grievance at the Agriculture Department. See Def's Reply Ex.2 (Decl. of Paula Lucak). Plaintiff has therefore failed to exhaust his administrative remedies. See *Williams v. Garrett*, No. HAR 91-106, 1991 WL 263561, at *3 (D. Md. Dec. 2, 1991) (applying the exhaustion requirement to MSPB claims). Moreover, even if Plaintiff had filed an MSPB action, jurisdiction over an appeal from that action rests with the Federal Circuit, and not with this Court. Accordingly, this Court must dismiss Plaintiff's Complaint for lack of subject matter jurisdiction.

For these reasons, the Court will grant by separate order Defendant's Motion To Dismiss or, in the alternative, for [*7] Summary Judgment and Defendant's Motion To Strike Plaintiff's Surreply.

November 16, 2009

/s/

ROGER W. TITUS

UNITED STATES DISTRICT JUDGE