Robinson v. CDC & Prevention

United States District Court for the District of Maryland
September 25, 2008, Decided; September 25, 2008, Filed
CIVIL NO. L-07-2102

Reporter: 2008 U.S. Dist. LEXIS 123961; 2008 WL 8987439

BRIAN C. ROBINSON, Plaintiff v. CENTER FOR DISEASE CONTROL AND PREVENTION ET AL., Defendants

Subsequent History: Affirmed by *Robinson v. CDC, 382 Fed. Appx. 265, 2010 U.S. App. LEXIS 11664 (4th Cir. Md., 2010)*

Prior History: *Robinson v. HUD, 2004 MSPB LEXIS 2008 (M.S.P.B., Nov. 12, 2004)*

Core Terms

terminate, motion to dismiss, probationary

Counsel: **[*1]** For Brian Christopher Robinson, Plaintiff: Mercedes C Samborsky, LEAD ATTORNEY, Law Office of Mercedes C Samborsky, Joppatowne, MD.

For Center for Disease Control and Prevention, Defendant: ***Melanie L Glickson***, LEAD ATTORNEY, Jackson Lewis LLP, Baltimore, MD.

Judges: Benson Everett Legg, Chief United States District Judge.

Opinion by: Benson Everett Legg

Opinion

MEMORANDUM

Now pending are two motions: (i) Defendants' Motion to Dismiss/Motion for Summary Judgment (Docket No. 30), and (ii) Plaintiff's Motion to Stay Proceedings Pending Discovery and for Issuance of Scheduling Order (Docket No. 38). No hearing is necessary as the motions have been fully briefed and a substantial record exceeding 700 pages already exists. *Local Rule 105.6* (D. Md. 2008). For the reasons stated herein, the Court, by separate order, DISMISSES the Plaintiff's Motion to Stay, GRANTS the Defendants' Motion to Dismiss as to all counts, and DISMISSES the case.

I. Background

On October 8, 2003, Robinson was hired under a career-conditional appointment as a Public Health Advisor (GS-0685-11, Step 1) at the Centers for Disease Control and Prevention ("CDC"). (Pl.'s Ex. 8.) As such, he entered federal employment under a mandatory one year probationary **[*2]** status beginning on November 2, 2003. *5 U.S.C. § 7511(a)(1)(A)(i)*; *5 C.F.R. §§ 315.801-.806*. On July 2, 2004, Robinson was given an unfavorable mid-year review in which he was rated as "minimally successful" in three out of five critical areas: "Case Management," "Field Investigations," and "Ad Hoc Committees/Special Projects." (Pl.'s Exs. 6, 10; Def.'s Ex. 1.4.) On August 4, 2004, Robinson was terminated for his "marginal" performance in these critical areas. [1] (Pl.'s Ex. 6.) The termination letter clearly explained Robinson's limited appeal rights as a probationary employee, which Robinson thoroughly exercised.

Seeking review of his termination by the CDC, Robinson filed a "mixed claim" appeal with both the Merit System Protection Board ("MSPB") and the Equal Employment Opportunity Commission ("EEOC"). Before the MSPB, **[*3]** Robinson appealed his purported wrongful termination alleging every basis available to him. Robinson first alleged that his prior federal service had been improperly calculated, meaning that he should not have been subject to the one year probationary period. Administrative Judge Michael Garrety rejected this contention, deciding that Robinson was properly on probationary status during his employment at the CDC. *Brian C. Robinson v. Dep't of Health & Human Services, No. PH-315H-04-0564-I-1, 2004 MSPB LEXIS 2008 (M.S.P.B. Nov. 12, 2004)*. As a probationary employee, Robinson's appeal rights were limited, which affected the resolution of the other issues he raised. See*5 C.F.R. §§*

[1] The record is replete with memoranda documenting performance counseling and "coaching" sessions between Mr. Robinson and his supervisors. The record also contains correspondence amongst Mr. Robinson, his supervisors, and other CDC employees regarding his substandard performance and persistent inability to conform to CDC policies. (See, e.g., Def.'s Ex. 3, Tabs E-Y.)

315.804-.806(c). Robinson appealed his termination on the merits, alleging he was terminated due to partisan political reasons, marital status, and conditions arising before his appointment. Judge Garrety rejected these contentions as well, concluding that Robinson's allegations on these grounds were ″[]frivolous,″ ″conclusory,″ and ″pro forma.″ Robinson did not appeal this decision.

Robinson's complaint to the EEOC alleged employment discrimination on two grounds: race and physical discrimination (based solely on a car accident Robinson **[*4]** had on July 27, 2004, approximately one week before his August 4, 2004 termination). (Def.'s Ex. 1.4.) Both the EEO office within the CDC and the Commission on appellate review broadly construed his complaint to include gender discrimination as well. *Brian C. Robinson v. Dep't of Health & Human Services, E.E.O.C. Doc. 01A52245, 2005 EEOPUB LEXIS 2472, 2005 WL 1275239 (May 19, 2005)*. The EEOC dismissed Robinson's appeal, noting that the reviewing agency did not find any actionable allegations, let alone evidence, of any kind of discrimination. *2005 EEOPUB LEXIS 2472, [WL] *2-3*. Robinson did not file suit in district court within the required 90 days. Therefore, these claims cannot be brought in this Court.

Plaintiff, Brian Robinson, filed the instant employment discrimination suit against his former employer, the Centers for Disease Control and Prevention, and twenty four other defendants. Robinson presses four counts against all the defendants: Count 1 alleges that defendants conspired to deny Robinson wages in violation of the Equal Pay Act (″EPA″); Count 2 alleges that defendants conspired to terminate Robinson wrongfully from his position at CDC; Count 3 alleges that defendants conspired to inflict emotional distress on him, and **[*5]** Count 4 alleges breach of contract. No discovery is necessary in this case because considerable information about Robinson's claims exists from the administrative record. Also, Robinson, in opposing the motion, has filed approximately 450 pages of briefs and other materials.

The Motion to Dismiss must be GRANTED.

II. Standard of Review

To survive a motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)*, a plaintiff must plead plausible, not merely conceivable, facts in support of his claim. See *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007)*. The complaint must state ″more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.″ *Id. at 1965*. The court must, however, ″accept the factual allegations of the complaint as true and must view the complaint in the light most favorable to the plaintiff.″ *GE Inv. Private Placement Partners II v. Parker, 247 F.3d 543, 548 (4th Cir. 2001)*.

III. Analysis

Counts 2 (wrongful termination), 3 (intentional infliction of emotional distress), and 4 (breach of contract) must be rejected summarily. As to Count 2, as a probationary employee, Robinson's sole remedy for termination exists **[*6]** under the Civil Service Reform Act (″CSRA″). *Pinar v. Dole, 747 F.2d 899, 913 (4th Cir. 1984)* (holding that federal employees aggrieved by personnel actions are limited to the remedies provided by the CSRA and review by the U.S. Court of Appeals for the Federal Circuit). Robinson unsuccessfully pursued his administrative remedies all the way to the Merit System Protection Board, which concluded that Robinson had been terminated for a valid reason. Robinson did not appeal that ruling. This Court lacks jurisdiction to review the Board's determination, *5 U.S.C. § 7703*.

The Court cannot entertain Count 3 (intentional infliction of emotional distress) because Robinson failed to exhaust his administrative remedies as required by the Federal Tort Claims Act. *28 U.S.C. 2675(a)*. In *Henderson v. United States, 785 F.2d. 121, 123 (4th Cir. 1986)*, the Fourth Circuit held that exhaustion is a subject matter jurisdiction requirement and cannot be waived.

Count 4 (breach of contract) is also defective because the federal employment relationship is governed by statute, not by the law of contract. See *Medlock v. Rumsfeld, 336 F. Supp. 2d 452, 467-68, (D. Md. 2002)*, in which Judge Chasnow granted summary **[*7]** judgment in favor of the defendant.

Robinson's remaining Count, Count 1 (violation of the Equal Pay Act) requires a more detailed analysis, but it too must fail. First, this Court lacks subject matter jurisdiction over the EPA claim. The United States Court of Federal Claims has exclusive jurisdiction over claims against the United States exceeding $10,000 that are founded upon the Constitution, a federal statute, an executive regulation, or a government contract. *28 U.S.C. §§ 1346(a)(2)*, *1491*; *Portsmouth Redevelopment and Housing Authority v. Pierce, 706 F.2d 471, 473 (4th Cir. 1983)*. An EPA claim is a statutory claim. Such a claim is subject to the jurisdictional limit ″if, in whole or in part, it explicitly or in essence seeks more than $10,000 in monetary relief from the federal government.″ *Smalls v. United States, 471 F.3d 186, 190, 374 U.S. App. D.C. 63 (D.C. Cir. 2006)* (internal quotations omitted).

Robinson's Count 1 must be examined to determine if it exceeds $10,000. Robinson claims $6,000 in total unpaid compensation, plus wage loss as a result of his

employment termination, plus attorney's fees and costs (which are recoverable under the statute), as well as liquidated damages arising from the **[*8]** CDC's allegedly "willful" violations. [2] (Compl. 19.) Under the EPA, a successful plaintiff is automatically entitled to liquidated damages in an amount equal to actual damages unless the employer can meet the "substantial" burden of proving, as an affirmative defense, that the employer was acting in good faith and upon reasonable grounds that its conduct was legal. *Richard v. Marriott Corp., 549 F.2d 303, 306 (4th Cir. 1977)*; *Grove v. Frostburg Nat'l Bank, 549 F. Supp. 922, 945-948 (D. Md. 1982)*; see*29 U.S.C. § 260*. Moreover, because attorney's fees and costs are provided for by statute, they too are properly included in the claimed amount for jurisdictional purposes. *Graham v. Henegar, 640 F.2d 732, 735-36 & n.9 (5th Cir. 1981)*. [3]

In this case, Robinson contends that the CDC's violation was willful, meaning that, by definition, the CDC was not acting in good faith. It is the practice of federal courts to accept good-faith allegations of amount in controversy in determining jurisdiction, so as to avoid examining the merits at a preliminary stage. *Hahn v. United States, 757 F.2d 581, 585 (3rd Cir. 1985)*. Accordingly, Robinson's claim is for at least $12,000 (actual damages plus liquidated damages) plus attorney's fees and costs. Thus, Robinson must bring his suit in the Court of Federal Claims. [4]

Second, even if this Court had jurisdiction over Robinson's EPA claim, it would be barred by the statute of limitations. Robinson was terminated effective August 10, 2004. He filed the instant suit on August 7, 2007. The statute of limitations for an EPA claim is two years, but is extended to three years for "willful" violations. *29 U.S.C. 255(a)*. To prove willful conduct under the Equal Pay Act, the plaintiff must show that the employer either knew its conduct **[*10]** was specifically prohibited by the Equal Pay Act or that it showed reckless disregard for that potentiality. *McLaughlin v. Richland Shoe Co., 486 U.S. 128, 108 S. Ct. 1677, 100 L. Ed. 2d 115 (1988)* (negligence is not sufficient).

Robinson conclusorily alleges throughout his complaint and his briefs that the underpayments were willful. To survive a motion to dismiss, Robinson must plead plausible facts in support of his claim of willfulness. See *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007)*. [5] This he fails to do. The EPA provides a remedy only for gender-based pay discrimination. Nowhere in the hundreds of pages that Robinson filed in support of his claim does he provide any facts to substantiate his allegation of gender-based discrimination. Moreover, Robinson's EEOC complaint did not even allege gender-based discrimination, only physical disability and racial discrimination. Nevertheless, the Commission extended its investigation to encompass gender-based discrimination. Yet, the Commission's investigation unearthed no colorable evidence to support such a claim. Therefore, Robinson has failed to adequately plead willfulness as required by the three year statute of limitations, and his EPA claim is dismissed **[*11]** on that basis as well.

IV. Conclusion

For the foregoing reasons, the Court will, by separate order, GRANT the defendants' Motion to Dismiss (Docket No. 30) as to all counts.

Dated this 25th day of September, 2008

/s/ Benson Everett Legg

Benson Everett Legg

Chief Judge

ORDER

Now pending are two motions: (i) Defendants' Motion to Dismiss/Motion for Summary Judgment (Docket No. 30), and (ii) Plaintiff's Motion to Stay Proceedings Pending Discovery and for Issuance of Scheduling Order (Docket No. 38). For the reasons stated in the Memorandum of even date, the Court hereby:

(i) GRANTS the Motion of CDC et al. (Docket No. 30);

(ii) DISMISSES as moot Plaintiff's Motion (Docket No. 38); and

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[2] In aggregate, Robinson claims $23,000,000 in compensatory and punitive damages. (Compl. 25.) Robinson does not delineate from which defendants or in what capacity (official or personal) he seeks this relief. A fair reading of the complaint suggests Robinson seeks this relief against the CDC and the defendants in their official capacity, meaning that Robinson's claim against the United States vastly exceeds $10,000.

[3] Robinson has not waived any recovery above **[*9]** $10,000 to cure his jurisdictional defect.

[4] See, e.g., Barnes v. Levitt, 118 F.3d 404, 410 (5th Cir. 1997); Iyer v. Everson, 382 F. Supp. 2d 749, 759 (E.D. Pa. 2005).

[5] Bare allegations of willfulness are insufficient to preclude summary judgment. See Salmons v. Dollar General Corp., 989 F.Supp. 730, 735 (D. Md. 1996) (Davis, J.); see also Blount v. Dept. of Health and Human Services, 400 F.Supp.2d 838 (D. Md. 2004) (Messitte, J.) (finding EPA claim time barred for lack of allegations of willfulness).

(iii) DIRECTS the Clerk to DISMISS the case.

It is so ORDERED this 25th day of September, 2008.

/s/ Benson Everett Legg

Benson Everett Legg

Chief Judge