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

DEONNE R. NEW	:	**CIVIL ACTION**
	:	
v.	:	
	:	
JESSE BROWN, SECRETARY DEPARTMENT OF VETERANS AFFAIRS	:	**NO. 97-CV-125**

M E M O R A N D U M

WALDMAN, J. **October 21, 1997**

I. Introduction

Plaintiff is a former employee of the Department of Veterans Affairs (the ?Department?). She was employed at the Department's Data Processing Center in Philadelphia. She is suing the Department and its Secretary. She seeks review of a Merit Systems Protection Board ("MSPB") order denying her request to restore her to her former position and claims that she was deprived of employment because of her gender and handicap, was denied procedural due process and was retaliated against for engaging in protected activity.

While plaintiff's damages are not particularized in the complaint, her attorney certified that damages recoverable in this action are in excess of $100,000. Plaintiff also asks the court to declare that defendant Department failed reasonably to accommodate her handicap, discriminated against her because of her handicap and gender in refusing her request for reinstatement and denied her due process by not following procedures in the Department of Labor FECA manual and that, contrary to an MSPB

determination, her separation from employment was related to a compensable injury. Plaintiff also seeks reinstatement to her prior position pursuant to 5 U.S.C. § 8151 and accompanying civil service regulations, and lost wages and benefits.

Plaintiff predicates jurisdiction for her MSPB appeal on 5 U.S.C. § 7703, for her discrimination claims on 42 U.S.C. § 2000e-16 and for her due process claim on 28 U.S.C.§ 1331.

Presently before the court are defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and (6).

II. Factual Background

Accepting her allegations as true, the following pertinent facts appear from plaintiff's complaint.

Plaintiff was first employed at the Department as a secretary/typist in October 1983 and became a permanent employee in February 1984. As a result of an injury in May 1984, plaintiff applied for and received benefits from the Office of Workers' Compensation Programs ("OWCP"). For reasons unspecified by plaintiff, she was removed from her position by the Department in June 1985. After an appeal, the Department was ordered to substitute a written reprimand for removal. This action was affirmed by the MSPB on April 7, 1986.

For reasons also unspecified by plaintiff, she was again removed from her position in January 1987. She appealed that decision to the MSPB. A settlement was reached by which plaintiff was reinstated in April 1987. As a result of poor design of her work space and the amount of walking her position

required, plaintiff's work-related injuries reoccurred and she so informed the Department in May 1987. Plaintiff informed the Department that her physician recommended that she be given a parking space which would reduce the distance she had to walk each day and that her work area be modified.

While plaintiff does not specify when, it appears that she left work sometime between May and July of 1987. She alleges that during the period she did work, she was subjected to numerous instances of sexual harassment of an unspecified nature by unidentified persons.[1]

Plaintiff applied to OWCP in July 1987 ?for benefits arising from the re-injury of [her] back and aggravation of [her] work-related injury.? Plaintiff's physician reported on August 31, 1987 that plaintiff was able to return for four hours per day if her work space was modified and she was provided with a nearby parking space. Thomas Graham told plaintiff she would be notified when these accommodations were ready. The Department adjusted plaintiff's work schedule to four hours per day, assigned her a parking space in the handicapped area and provided her with a wheel chair to facilitate her movement between her car and place of work. The Department, however, did not provide

[1] Despite the interjection of this allegation, the court does not discern from plaintiff's complaint or brief a hostile work environment claim or any claim not premised on her separation from employment. There is no suggestion that plaintiff ever presented and administratively exhausted a hostile work environment claim, and the limitations period for any such claim has long expired.

plaintiff with all of her requested accommodations.

The Department sent plaintiff a letter on September 30, 1987 directing her to return to work by October 7, 1987. Plaintiff refused to return to work because she had not received all of the requested accommodations, and OWCP had not determined that the job she would return to was suitable.

Plaintiff was advised by a letter of February 3, 1988 that she would be separated from her employment effective February 11, 1988 for insubordination and her prolonged absence without leave. Plaintiff appealed this action to the MSPB which initially sustained the separation. On April 5, 1989, the full MSPB affirmed this decision.

The OWCP notified the Department in June 1990 that it had accepted plaintiff's request for compensation for the period from July 29, 1987 through October 14, 1987. On January 22, 1991, OWCP issued a final order denying plaintiff compensation for the period beyond October 14, 1987 for failure to return to work after suitable work was made available for her. In an unspecified series of orders, the last dated April 21, 1993, plaintiff's requests for reversal or reconsideration of the OWCP decision barring further benefits were denied.

Plaintiff wrote to the Department in February 1991 requesting restoration to her position pursuant to 5 U.S.C. § 8151 and 5 C.F.R. Part 252. That request was denied by letter dated March 25, 1991. Plaintiff appealed this denial to the

MSPB. In a decision dated August 12, 1991, the MSPB initially denied plaintiff's request for reinstatement and restoration after determining that plaintiff's separation was not substantially related to her compensable injury. The full MSPB affirmed this decision on April 10, 1992. Plaintiff appealed that decision in 1992 to the district court which ultimately entered summary judgment in favor of the Department in January 1994.

On July 14, 1994, the OWCP vacated its decision of April 21, 1993. The OWCP determined that plaintiff was entitled to compensation to October 2, 1990.[2] The OWCP determined that it had failed to make an appropriate suitability determination.[3] As a result, the decision of the district court was vacated with the consent of the parties and the case was remanded to the MSPB to reconsider its August 12, 1991 decision in view of the July 14, 1994 OWCP decision.

On March 29, 1996, the MSPB reaffirmed the decision of August 12, 1991. Plaintiff filed a petition for review of that decision which was affirmed by the full MSPB in an Opinion and

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[2] It appears from the OWCP memorandum, submitted by plaintiff, that the Office concluded that the effects of the work-related aggravation of her injury "had ceased as of 10/2/90."

[3] It appears from the OWCP memorandum, submitted by plaintiff, that the Office actually concluded that it "did not have an opportunity to advise [plaintiff] that the job was found to be suitable."

Final Order of December 5, 1996. The MSPB determined that the OWCP decision of July 14, 1994 "did not materially affect the agency's denial of plaintiff's request for restoration following a compensable injury," and declined to address her handicap discrimination claim for lack of jurisdiction.

On January 7, 1997, plaintiff filed a petition for review in the United States Court of Appeals for the Federal Circuit seeking judicial review of the MSPB denial of plaintiff's request for restoration to her position and refusal to address her claims of discrimination. At the same time, plaintiff initiated the instant action in this court.

III. Discussion

Defendant asserts that this court lacks jurisdiction over plaintiff's appeal from the December 1996 MSPB decision and that the Federal Circuit is the proper forum in which to adjudicate such a claim.

A district court has jurisdiction over an appeal from a final decision of the MSPB under 5 U.S.C. § 7702 if the claim is a ?mixed claim,? that is one involving a claim appealable to the MSPB as well as a claim of discrimination under § 717 of the Civil Rights of 1964. The Federal Circuit otherwise has exclusive jurisdiction to review final decisions of the MSPB. See 5 U.S.C. § 7703(b). When the MSPB ?does not consider the employee's claim of discrimination on its merits, review of the [MSPB's] determination that it lacks jurisdiction to hear the

employee's claim lies exclusively in the Federal Circuit.? Wall v. United States, 871 F.2d 1540, 1543 (10th Cir. 1989), cert. denied, 493 U.S. 1019 (1990).

Plaintiff concedes that the issue of the MSPB's jurisdiction is appropriately addressed by the Federal Circuit. She nevertheless contends that the case should be stayed rather than dismissed since the Federal Circuit might determine that the MSPB was incorrect in denying plaintiff ?mixed appeal? rights and then this court could be an appropriate forum.

As defendants note, however, even if plaintiff succeeds in convincing the Federal Circuit that this is a mixed case, the result would be that the MSPB, not this court, would have to rule on the discrimination claim. See Wall, 871 F.2d at 1542. Only after the MSPB were to reach a decision on the merits of plaintiff's discrimination claim would the district courts have jurisdiction. Ballentine v. Merit Systems Protection Board, 738 F.2d. 1244, 1246 (Fed. Cir. 1984)(?until the discrimination issue and the appealable action have been decided on the merits by the MSPB, an appellant is granted no rights to a trial de novo in a civil action under [5 U.S.C.] § 7702 or § 7703.?)

A court cannot retain an action for which it lacks jurisdiction for the purpose of staying proceedings to see if circumstances may eventuate which could later support an assertion of jurisdiction. A stay is not a cure for lack of subject matter jurisdiction. Plaintiff's Petition for Review of the Opinion and Order of the MSPB of December 5, 1996 will be

dismissed for lack of subject matter jurisdiction.

Defendants assert that plaintiff's Rehabilitation Act and Title VII claims (Counts I and II) are deficient for failure to show exhaustion of administrative remedies or receipt of a notice of final action regarding the discrimination allegations.[4]

Plaintiff has not alleged or otherwise shown that she has exhausted administrative remedies as required. 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 Title VII. Hornsby v. United States Postal Service, 787 F.2d 87, 90 (3d Cir. 1986); Searcy v. Southeastern Pennsylvania Transportation Authority, 1997 WL 152791, *4 (E.D. Pa. Mar. 27, 1997).

Plaintiff does not refute defendant's contention that she has failed to show satisfaction of the administrative prerequisites for filing a civil action. Rather, she argues that she may yet be able to assert cognizable claims in the future because the Federal Circuit might decide that the MSPB had jurisdiction and thus improperly refused to consider and take "final action" on her complaint of discrimination. At least as to the gender discrimination claim, this scenario seems quite implausible as there is no suggestion that such a claim was ever

[4] The remedies, procedures and rights of Title VII are applied to claims under the Rehabilitation Act. See 29 U.S.C. § 794a(a)(1).

presented to the MSPB.

In any event, plaintiff does not state a cognizable claim but a claim that might become cognizable if certain things eventuate. Should the Federal Circuit rule as plaintiff hypothecates, the Court presumably would refer the claims to the MSPB for final action. Only at some future time thereafter would plaintiff have a civil cause of action. Because it is not inconceivable from the face of the complaint that at some point plaintiff may be able to plead viable claims for gender and handicap discrimination, the Title VII and Rehabilitation Act claims will be dismissed without prejudice.

Plaintiff also appears to assert a Bivens claim (Count III).[5] She alleges that in failing to abide by pertinent civil service regulations, the Department "refused to grant plaintiff the procedural due process to which she was entitled."

Defendants correctly contend that plaintiff is precluded from maintaining a damage claim for a constitutional violation against the Department. See Federal Deposit Insurance Corp. v. Meyer, 510 U.S. 471, 486 (1994). Defendants also correctly contend that the type of elaborate remedial scheme provided by federal civil service law precludes a Bivens claim against a supervising official for taking an allegedly unlawful or unconstitutional adverse employment action. See Bush v.

[5] See Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

Lucas, 462 U.S. 367,388-90 (1983).[6]

Plaintiff argues Bush is inapplicable because it applies only to First Amendment retaliation claims and not to a claim that an agency's "failure to abide by [its] regulations constituted a violation of [plaintiff's] procedural due process rights." Bush is not so limited. See Schweiker v. Chilicky, 487 U.S. 412, 429 (1988) (refusing to recognize Bivens claim for denial of property right without due process in view of elaborate remedial scheme); Dynes v. Army Air Force Exchange Service, 720 F.2d 1495, 1498 (11th Cir. 1983)(rejecting plaintiff's attempt to limit Bush to First Amendment violations and holding that because his "claim arises out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States Bush v. Lucas dictates that the regulatory scheme not be supplemented with a new judicial remedy").

Moreover, plaintiff has failed to show that she was denied procedural due process. A violation of procedural due process occurs only when government fails to provide an adequate means to remedy legal errors or irregularities. See Zinermon v.

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[6] The only individual defendant appeared to be named ex officio and not because of any personal participation in the acts complained of, although plaintiff alleges that as the ranking official he was "responsible for maintaining a program of non-discrimination within the executive agency." In any event, presumably plaintiff would not have spent time arguing why Bush should not be applied if she were not attempting to maintain a Bivens claim against defendant Brown.

Burch, 494 U.S. 113, 125-26 (1990); McDaniels v. Flick, 59 F.3d 446, 459-60 (3d Cir. 1995), cert. denied, 116 S. Ct. 1017 (1996); McKinney v. Pate, 20 F.3d 1550, 1557 (11th Cir. 1994) (en banc), cert. denied, 513 U.S. 1110 (1995); Bello v. Walker, 840 F.2d 124, 1228 (3d Cir.) (procedural due process satisfied when state provides reasonable remedy for legal error by administrators), cert. denied, 488 U.S. 868 (1988). Due process is satisfied by a prior opportunity for an employee to respond to the stated reason for her proposed termination and the subsequent availability of civil service administrative procedures to challenge the termination. See Cleveland Board of Education v. Loudermill, 470 U.S. 532, 547-48 (1985).

Plaintiff was advised in writing that she faced termination for a lengthy absence without leave and defying the order of September 30, 1987 to return to work. She was afforded a week to respond. Plaintiff had and availed herself of a post-termination civil service administrative process by which an aggrieved federal employee may obtain reinstatement with lost benefits. That plaintiff may dislike or disagree with the decisions rendered does not mean that she has been denied due process.

Defendants also argue that any constitutional claim premised on plaintiff's termination on February 11, 1988 or the refusal to reinstate her on March 25, 1991 would be time barred.[7]

[7] In so arguing, defendants appear to acknowledge that plaintiff may have other constitutional claims not readily

The limitations period for any federal constitutional claim would be that prescribed for personal injury claims by the law of the state in which the claim arose. See Kelly v. Serna, 87 F.3d 1235, 1238 (11th Cir. 1996); Kurinsky v. U.S., 33 F.3d 594, 599 (6th Cir. 1994), cert. denied, 514 U.S. 1082 (1995); Van Strum v. Lawn, 940 F.2d 406, 410 (9th Cir. 1991); Bieneman v. City of Chicago, 864 F.2d 463, 469 (7th Cir. 1988), cert. denied, 490 U.S. 1080 (1989); Chin v. Bowen, 833 F.2d 21, 24 (2d Cir. 1987). Thus, the limitations period would be two years from the time plaintiff was first aware or reasonably should have been aware that a defendant had infringed her constitutionally protected rights. See Fassnacht v. U.S., 1996 WL 41621, *2 (E.D. Pa. Feb. 2, 1996); 42 Pa. C.S.A. § 5524. See also Delaware State College v. Ricks, 449 U.S. 250, 258-59 (1980) (limitations period for § 1981 claim runs from time plaintiff first learns of unlawful employment action despite continuing effects of such action).[8]

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discernible from the complaint. At one point plaintiff does seem to suggest that she was deprived of procedural due (cont'd.)

[7] (cont'd.) process because of her handicap and gender. One, however, does not have to be a member of a protected class to enjoy the benefit of due process and the fact that an agency terminates without due process an employee who also falls within a protected class would not duplicate her claim.

[8] The limitations period is effectively the same for legal and declaratory relief essentially predicated on the same underlying substantive right or claim. See Algrant v. Evergreen Valley Nurseries LP, 1997 WL 570840, *7 (3d Cir. Sept. 16, 1997). See also Romer v. Leary, 425 F.2d 186, 187-88 (2d Cir. 1970)(federal declaratory judgment claim seeking reinstatement and back pay for unconstitutional termination barred where limitations period applicable to § 1983 claims had expired).

It appears from her allegations in this as well as earlier cases initiated by plaintiff that she was certainly aware or believed that her constitutional rights had been violated well over two years before this action was initiated.[9]

In view of Meyer and Bush, of course, the only viable constitutional claim would be one for purely equitable relief. Whether any such claim by plaintiff would be time barred turns on whether she is required to exhaust her administrative remedies before she may assert a constitutional claim.

Several circuit courts have held that at least where the constitutional question is factually related to nonconstitutional personnel claims and administrative remedies are available, a plaintiff must exhaust those remedies before asserting a constitutional claim in a civil action. See Ferry v. Hayden, 954 F.2d 658, 661 (11th Cir. 1992) (failure of plaintiff to exhaust civil service remedies precludes constitutional claim seeking reinstatement for retaliatory termination); Johnpoll v. Thornburgh, 898 F.2d 849, 850-51 (2d Cir. 1990) (plaintiff must exhaust available administrative remedies before seeking equitable relief from court for alleged due process violation) cert. denied, 498 U.S. 819; Andrade v. Lauer, 729 F.2d 1475, 1492-93 (D.C. Cir. 1984) (plaintiff need not exhaust administrative remedies for nonconstitutional claims to assert

[9] In addition to the 1992 case discussed in her complaint, it appears that plaintiff litigated at least two earlier court cases challenging the Department's actions.

factually unrelated constitutional claim for which no practical administrative remedies are available); Wallace v. Lynn, 507 F.2d 1186, 1191 (D.C. Cir. 1974) (plaintiffs must exhaust administrative remedies before asserting constitutional claims for racially discriminatory and retaliatory suspension from government jobs). This approach to exhaustion seems sound since a federal employee could otherwise circumvent the carefully crafted civil service process by casting his claim in constitutional terms and proceeding directly to court.[10] It seems quite unlikely that Congress intended such a result. Indeed, some courts have held that the elaborate remedial scheme of the CSRA totally preempts judicial consideration even of equitable constitutional claims by federal employees challenging personnel actions. See, e.g., Saul v. U.S., 928 F.2d 829, 843 (9th Cir. 1991); Carter v. Kurzejeski, 706 F.2d 835, 838-39 & n.5 (8th Cir. 1983).

These cases, however, are difficult to reconcile with the law of this Circuit. While not squarely addressing the exhaustion question, the Third Circuit recently held that a federal employee could assert a constitutional claim for equitable relief for a retaliatory demotion after explicitly noting that he had not pursued administrative relief available to him under the CSRA. See Mitchum v. Hurt, 73 F.3d 30, 31, 36 (3d

[10] The civil Service Reform Act ("CSRA") provides relief for gender discrimination in personnel actions and for an adverse action in retaliation for engaging in protected activity. See 5 U.S.C. §§ 2302(b)(1)(A) & (b)(9)(A).

Cir. 1995). It appears that defendants in that case, as in the instant case, did not argue that assertion of a constitutional claim must await exhaustion of administrative remedies. Nevertheless, it is most unlikely that the Court in Mitchum would detail with some precision the administrative remedies available to and forfeited by plaintiff Krumholz and then sanction his constitutional claim without alluding in any way to a duty to exhaust if the Court harbored any belief that such was required.[11]

In any event, the question is somewhat academic at this point. If exhaustion of related nonconstitutional claims is required, plaintiff as noted has at least thus far failed to exhaust them. If exhaustion is not required, then any constitutional claim predicated on the termination or refusal to reinstate would have accrued and lapsed long ago. See Kelly v. City of Chicago, 4 F.3d 509, 512-13 (7th Cir. 1993) (federal due process claim for revocation of business license accrued on date of revocation notice and not after unrequired exhaustion of alternative remedies); Black v. Broward Employment and Training Admin., 846 F.2d 1311, 1314 (11th Cir. 1988) (limitations period for plaintiff's constitutional procedural due process and sex discrimination claims not tolled by her pursuit of federal administrative remedies where exhaustion was not required);

[11] Plaintiff's argument that her constitutional claim is not time barred because she has aggressively pursued her administrative remedies does underscore the point that she was afforded procedural due process.

Coleman v. O'Grady, 803 F. Supp. 226, 228-29 (N.D. Ill. 1992) (pursuit of administrative remedies by terminated employee does not toll limitations period for subsequent federal constitutional claim where exhaustion was not required), aff'd, 19 F.3d 21 (7th Cir. 1994).

Plaintiff's final claim is that the Department retaliated against her for having engaged in protected activities (Count IV). She does not specify the protected activities but presumably refers to some or all of the various claims and appeals she has pressed since 1985. She also does not specify the ground on which she seeks relief.

If plaintiff seeks Bivens relief on constitutional grounds, her claim is precluded by Meyer and Bush. Any claim that plaintiff was terminated or refused reinstatement for a retaliatory reason in violation of a constitutional right would have accrued when defendants made clear that she would be terminated and not reinstated and, consistent with the foregoing, would either be time barred or unexhausted.

If plaintiff means to assert a statutory retaliation claim pursuant to 42 U.S.C. § 2000e(3)(a), she has not alleged or shown that she exhausted her administrative remedies with respect to that claim or any other claim encompassing it. See Robinson v. Dalton, 107 F.3d 1018, 1022 (3d Cir. 1997).

Because it is not inconceivable from the face of the complaint that plaintiff at some point may be able to present a retaliation claim, this count too will be dismissed without

prejudice.

Finally, defendants contend with some force that all of plaintiff's claims are barred by the res judicata effect of prior civil actions she filed in this district in 1988, 1990 and 1992. In particular, Judge Hutton's decision of November 1, 1990 dismissing plaintiff's handicap discrimination claim, which was affirmed on April 17, 1991, would appear to preclude her similar claim in this action. Plaintiff's contention that the intervening OWCP decision of July 1994 obviates the res judicata effect of any prior decision based on a determination that her discharge was not discriminatory is unavailing. Judge Hutton dismissed plaintiff's claim for failure timely to assert it.

Also, of course, res judicata bars any subsequent claim involving the same parties or their privies based on the same material facts or arising from the same underlying events. See U.S. v. Athlone Industries, Inc., 746 F.2d 977, 984 (3d Cir. 1984). Indeed, it appears that Judge Fullam concluded in the 1992 case that plaintiff's similar claims were then precluded by the res judicata effect of her earlier cases.

A resolution of this issue, however, would require consideration of matters beyond those referenced on the face of the complaint and scrutiny of various prior court pleadings and

records to determine precisely what was adjudicated.[12] In any event, the court is not precluding defendants, in any appropriate future context, from asserting res judicata as an affirmative defense consistent with Fed. R. Civ. P. 8(c).

IV. Conclusion

Plaintiff has doggedly challenged her separation from the Department for a decade in an array of legal actions and appeals. The Federal Circuit, with the benefit of the record of this lengthy course of administrative and judicial actions and its expertise in federal personnel issues, would now appear to be in a good position comprehensively to impose order if not repose. In any event, as to her fourth action in this district plaintiff has failed to exhaust administrative remedies for her discrimination claims, has failed timely to assert or otherwise to exhaust administratively any concomitant constitutional claims and has failed to present a cognizable procedure due process claim. This court lacks jurisdiction over her appeal from the Merit Systems Protection Board.

Accordingly, defendants' motion will be granted. This action will be dismissed, without prejudice as to Counts I, II and IV or to plaintiff's right to pursue her MSPB appeal in the Federal Circuit Court. An appropriate order will be entered.

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[12] For instance, defendants are correct that a Rule 41(b) dismissal is preclusive, see Napier v. Thirty or More Unidentified Fed. Agents, 855 F.2d 1080, 1087 (3d Cir. 1988), but it is not immediately clear whether plaintiff's 1988 case was dismissed pursuant to that Rule, Rule 4, Rule 12(b)(2) or Rule 12(b)(5).

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O R D E R

AND NOW, this day of October 1997, upon consideration of defendants' Motion to Dismiss and plaintiff's response thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** in that plaintiff's petition for review of an order of the Merit Systems Protection Board is **DISMISSED** for lack of jurisdiction and plaintiff's complaint in this action is **DISMISSED**, without prejudice as to counts I, II and IV.

BY THE COURT:

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JAY C. WALDMAN, J.