

FILED: April 10, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1047
(1:18-cv-00917-LMB-MSN)

LORETTA J. ALFORD

Plaintiff - Appellant

v.

TINA BALLARD, Executive Director & Chief Executive Officer; KIMBERLY ZEICH, Deputy Executive Director & Chief Operating; AMY JENSEN, Director of Compliance; SCOTT ANDERSON, Regional Administrator of GSA National; HONORABLE JEREMIAH CASSIDY, Chief Administrative Judge; MINDY WEINSTEIN, Acting Director, EEOC; KERMIT JONES; LOUIS BARTALOT

Defendants - Appellees

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed as modified.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 19-1047

LORETTA J. ALFORD,

Plaintiff - Appellant,

v.

TINA BALLARD, Executive Director & Chief Executive Officer; KIMBERLY ZEICH, Deputy Executive Director & Chief Operating; AMY JENSEN, Director of Compliance; SCOTT ANDERSON, Regional Administrator of GSA National; HONORABLE JEREMIAH CASSIDY, Chief Administrative Judge; MINDY WEINSTEIN, Acting Director, EEOC; KERMIT JONES; LOUIS BARTALOT,

Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Leonie M. Brinkema, District Judge. (1:18-cv-00917-LMB-MSN)

Submitted: April 4, 2019

Decided: April 10, 2019

Before NIEMEYER and HARRIS, Circuit Judges, and SHEDD, Senior Circuit Judge.

Affirmed as modified by unpublished per curiam opinion.

Loretta J. Alford, Appellant Pro Se. Rebecca Sara Levenson, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Loretta J. Alford appeals the district court's order dismissing with prejudice her civil action for lack of subject matter jurisdiction and, alternatively, for failure to state a claim. On appeal, we confine our review to the issues raised in the Appellant's brief. *See* 4th Cir. R. 34(b). Because Alford's informal brief does not challenge the bases for the district court's disposition, Alford has forfeited appellate review of the court's order. *See Jackson v. Lightsey*, 775 F.3d 170, 177 (4th Cir. 2014) ("The informal brief is an important document; under Fourth Circuit rules, our review is limited to issues preserved in that brief."). Accordingly, to the extent the district court dismissed Alford's claims for lack of subject matter jurisdiction, we affirm the judgment as modified to reflect that the dismissal is without prejudice. *See S. Walk at Broadlands Homeowner's Ass'n v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 185 (4th Cir. 2013) ("A dismissal for . . . [a] defect in subject matter jurisdiction[] must be one without prejudice, because a court that lacks jurisdiction has no power to adjudicate and dispose of a claim on the merits."). We further deny Alford's motion to appoint counsel. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED AS MODIFIED

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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

LORETTA J. ALFORD,

Plaintiff,

v.

TINA BALLARD, Executive Director & Chief
Executive Officer, U.S. AbilityOne
Commission, et al.,

Defendants.

1:18-cv-00917 (LMB/MSN)

ORDER

Before the Court is defendants' motion to dismiss this pro se complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Plaintiff has responded to the motion. For the reasons that follow, defendants' motion will be granted.¹

Loretta J. Alford ("plaintiff"), a former employee of the U.S. AbilityOne Commission ("AbilityOne"), was terminated in 2014 for accumulating approximately 100 hours of absence without leave, failure to follow her supervisors' instructions, and the unauthorized use of government property. She had been hired in 2011 at the GS-11 level and during her three years of employment had numerous disagreements with her employer. She filed her first complaint with the U.S. Merit Systems Protection Board ("MSPB") in July 2013, alleging that AbilityOne had retaliated against her for engaging in whistleblowing activity. That complaint was dismissed for "fail[ure] to nonfrivolously allege that she made a protected disclosure." Alford v. Comm. for

¹ In a previous Order [Dkt. No. 24], the Court cancelled oral argument on defendants' motion and ruled that the motion could be resolved on the parties' written submissions.

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Appendix B

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Purchase from People Who Are Blind & Severe Handicapped [sic],² No. DC-1221-13-6302-W-1, 2014 WL 793811 (M.S.P.B. Feb. 21, 2014). Plaintiff did not appeal that decision. Instead, she filed a second MSPB complaint in July 2014 challenging her termination and again claiming that she had been subject to “reprisal for whistleblowing disclosures.” That complaint was dismissed as untimely, and she elected not to appeal the dismissal. Alford v. Comm. for Purchase from People Who Are Blind or Severely Disabled, No. DC-0752-14-0892-I-1, 2016 WL 4425109 (M.S.P.B. Aug. 19, 2016). Her third MSPB complaint, this time based on what she generally described as “prohibited personnel practices,” was dismissed as frivolous and as barred by res judicata. See Alford v. Comm. for Purchase from People Who Are Blind & Severely Handicapped, No. DC-1221-17-0554-W-1, 2017 WL 6497479 (M.S.P.B. Dec. 11, 2017). Plaintiff again chose not to appeal. Finally, plaintiff filed a complaint with the U.S. Equal Employment Opportunity Commission (“EEOC”) against the Committee alleging discrimination on the basis of race, color, national origin, religion, sex, and age, as well as retaliation. The EEOC concluded that plaintiff had failed to present genuine issues of material fact on her claims and granted summary judgment in favor of AbilityOne.³

Plaintiff, acting pro se, initiated this civil action in July 2018, naming as defendants eight current or former government employees of AbilityOne, the MSPB, the EEOC, and the General Services Administration (“GSA”).⁴ Her complaint—which includes over 450 pages of exhibits

² The Committee for Purchase from People Who Are Blind or Severely Disabled (the “Committee”) is an independent federal agency that oversees AbilityOne. AbilityOne Program, 71 Fed. Reg. 68,492, 68,492 (Nov. 27, 2006). The incorrect name and typographical error in the caption of plaintiff’s MSPB complaint are apparently taken from plaintiff’s original filing.

³ Plaintiff now argues that although she filed a notice of appeal with respect to the EEOC’s decision, the agency never acted on that appeal. As defendants point out, plaintiff is incorrect; in May 2018, the EEOC affirmed the entry of summary judgment.

⁴ The named defendants include five current or former AbilityOne officials: Tina Ballard, the Executive Director and Chief Executive Officer; Kimberly Zeich, the Deputy Executive Director

related to her employment, termination, and administrative complaints—purports to be based on a “civil rights violation of due process when discrimination has occurred . . . in addition to prohibited personnel practices.”⁵ Plaintiff’s complaint seeks reinstatement, backpay, and other compensatory and punitive damages; reversal of the dismissal of her MSPB and EEOC complaints; and a “court order . . . removing both the MSPB and EEO functions of the agency.”

Defendants have moved to dismiss the complaint for lack of subject-matter jurisdiction, arguing that a series of jurisdictional bars—including statutory provisions establishing time limits, vesting exclusive jurisdiction in other courts, and requiring exhaustion of administrative remedies—prevent the Court from adjudicating her claims. Plaintiff bears the ultimate burden of proving subject-matter jurisdiction. Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982). If “a complaint simply fails to allege facts upon which subject matter jurisdiction can be based[,] . . . all the facts alleged in the complaint are assumed to be true and the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration.” Id. But in the event of a factual dispute over the jurisdictional allegations in the complaint, the court may consider evidence outside the complaint “without converting the proceeding to one for summary judgment.” Id.

and Chief Operating Officer; Amy Jensen, the Director of Compliance; Kermit Jones, the former Chief of Staff; and Louis Bartalot, the former Director of Compliance. The other named defendants are Scott Anderson, GSA Regional Administrator; Jeremiah Cassidy, Chief Administrative Judge for the MSPB; and Mindy Weinstein, Acting Director of the EEOC.

Among the many defects in plaintiff’s complaint is her failure to make clear whether she is suing each defendant in an official or legal capacity (or both). In their motion to dismiss, defendants addressed plaintiff’s claims as against Ballard, Zeich, Jensen, Jones, Bartalot, and Cassidy in their official and personal capacities and as against Anderson and Weinstein in their official capacities only. See Memo. of Law in Supp. of Defs.’ Mot. to Dismiss [Dkt. No. 19] 1 n.1. Plaintiff did not object to this characterization in her opposition to defendants’ motion.

⁵ Plaintiff’s 20-page complaint lacks page numbers, and the 458 pages of attachments thereto are divided into ten exhibits with consecutively numbered pages.

Defendants have also moved to dismiss for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). To survive a Rule 12(b)(6) motion, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. The plausibility standard “is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” Id. (quoting Twombly, 550 U.S. at 570). The Court must “assume the facts alleged in the complaint are true and draw all reasonable factual inferences in [the plaintiff’s] favor,” Burbach Broad. Co. of Del. v. Elkins Radio Corp., 278 F.3d 401, 406 (4th Cir. 2002), but only to the extent those allegations pertain to facts rather than legal conclusions. See Iqbal, 556 U.S. at 678-79. Moreover, although a pro se litigant’s complaint must be construed liberally, see Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam), it must nevertheless comply with proper pleading rules and allege a comprehensible basis for the Court’s jurisdiction. See Giarratono v. Johnson, 521 F.3d 298, 304 n.5 (4th Cir. 2008) (stating that a pro se complaint must still provide “more than labels and conclusions”) (internal quotation marks and citation omitted)); Weller v. Dep’t of Soc. Servs., 901 F.2d 387, 391 (4th Cir. 1990) (“The ‘special judicial solicitude’ with which a district court should view . . . pro se complaints does not transform the court into an advocate.”).

The legal defects in plaintiff’s complaint are legion. To begin, simply analyzing the complaint requires an unacceptable degree of conjecture as to which causes of action plaintiff may be asserting against which defendants and in what capacities. Plaintiff conceivably could be pressing claims under Title VII of the Civil Rights Act of 1964, the Age Discrimination in

Employment Act ("ADEA"), the Civil Service Reform Act ("CSRA"), the Rehabilitation Act, the Administrative Procedure Act, or even Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Yet as explained below, there are fundamental flaws with each of these potential causes of action. The uncertain nature of plaintiff's claims, together with the obvious flaws associated with each, deprives the Court of a reasonable basis on which to test the sufficiency of her complaint.

What is more, many of the conceivable grounds for plaintiff's suit are wholly baseless. For example, she complains that Jones and Bartalot testified against her at her MSPB hearing. Such conduct does not give rise to any cognizable cause of action and in any event would be subject to dismissal under the doctrine of absolute immunity for judicial witnesses, cf. Briscoe v. LaHue, 460 U.S. 325, 340-46 (1983). Assuming plaintiff intended to assert claims based on Title VII, the ADEA, the Rehabilitation Act, or the CSRA, those claims cannot proceed against the named government employees in their individual capacities, as the only proper defendants would be the agency itself or the head of the agency sued in her official capacity.⁶ To the extent plaintiff asserts a claim for damages against the individual defendants based on a theory that they deprived her of due process, that would not constitute a cognizable Bivens claim under binding Supreme Court and Fourth Circuit precedent. See, e.g., Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017); Bush v. Lucas, 462 U.S. 367, 378-80 (1983); Hall v. Clinton, 235 F.3d 202, 205 (4th Cir. 2000). Similarly noncognizable is an independent cause of action against the EEOC or the MSPB for the manner in which they investigated or adjudicated plaintiff's administrative

⁶ As defendants point out, the head of AbilityOne is its Chairman and, because plaintiff's claims ultimately fail for independent reasons, the Court need not consider whether it was sufficient for plaintiff to name as a defendant Ballard, AbilityOne's Executive Director, rather than the Chairman.

complaints. See, e.g., Smith v. Casellas, 119 F.3d 33, 34 (D.C. Cir. 1997) (per curiam) (collecting cases with respect to the EEOC); Woodruff v. McPhie, 383 F. App'x 5, 6 (D.C. Cir. 2010) (per curiam) (applying this caselaw to the MSPB). Further, to the extent plaintiff is advancing the whistleblower retaliation claim that formed the basis of her first MSPB complaint, only the U.S. Court of Appeals for the Federal Circuit has jurisdiction to hear that appeal. See 5 U.S.C. § 7703(b)(1). Insofar as plaintiff's claims are based on conduct considered as part of her first two MSPB complaints, those claims are untimely. Conversely, if her claims are based on conduct outside the scope of her MSPB or EEOC complaints, the Court lacks jurisdiction over those claims for failure to exhaust administrative remedies.⁷

Even setting aside these jurisdictional defects, the allegations in plaintiff's complaint are too vague to survive a Rule 12(b)(6) motion. For example, her allegations that defendants violated federal statutes "relative to the handling of administrative support services, . . . human resources and the handling of personnel [sic] matters" are entirely conclusory and fail to specify what provisions defendants are alleged to have violated or how those violations caused plaintiff harm. Likewise, her claims of employment discrimination—even assuming they are viable despite the exhaustion and timeliness issues discussed above—are not supported by sufficient factual allegations indicating facial plausibility.

Although plaintiff filed an opposition to defendants' motion to dismiss, she did not offer cogent responses to any of their arguments. Instead, she advanced three new arguments: that jurisdiction was proper because she lives and worked in Virginia, that defendants Jones and Bartalot are in default, and that unspecified defendants violated her constitutional rights by

⁷ Plaintiff also apparently seeks certain types of relief that the Court is powerless to award, including the restoration of her security clearance and "remov[al of] the MSPB and EEO functions of the agency."

declining to let her amend her EEOC complaint to include a claim under the Americans with Disabilities Act ("ADA"). None of plaintiff's arguments is successful. Although where she lives and where AbilityOne is located may be relevant to personal jurisdiction or venue, these facts do not affect the Court's subject-matter jurisdiction or her obligation to state a plausible claim. After Jones and Bartalot were served personally, counsel obtained representation authority for those individuals; accordingly, defendants' motion to dismiss was timely submitted on their behalf, and they are not in default. Finally, plaintiff's purported inability to bring an ADA claim was not mentioned in her complaint, and even if it had been, plaintiff has not alleged facts indicating that any ADA claim could have been successful and that she suffered an injury as a result.⁸ Moreover, this claim is essentially an appeal from the EEOC's decision denying her attempt to amend, and such an appeal is now untimely.

Defendants have filed extremely thorough briefs responding to each of the claims potentially implicated by plaintiff's complaint. Rather than repeat those meritorious arguments here, the Court adopts those sections of defendants' briefs to supplement the reasons in this Order. Accordingly, for the reasons stated above and in defendants' briefs, defendants' Motion to Dismiss [Dkt. Nos. 17 and 18] is GRANTED, and it is hereby

ORDERED that plaintiff's Complaint [Dkt. No. 1] be and is DISMISSED WITH PREJUDICE.⁹

⁸ Federal employees alleging disability-based discrimination against a federal government agency must sue under the Rehabilitation Act and not the ADA, see Ruddell v. Triple Canopy, Inc., No. 1:15-cv-01331, 2016 WL 4529951, at *6 (E.D. Va. Aug. 29, 2016), although ADA standards govern in such a Rehabilitation Act suit, see Hooven-Lewis v. Caldera, 249 F.3d 259, 268 (4th Cir. 2001).

⁹ Given the multiple fatal jurisdictional deficiencies in the complaint, the Court concludes that granting leave to amend would be futile.

To appeal this decision, plaintiff must file a written notice of appeal with the Clerk of this Court within 60 days of the date of entry of this Order. A notice of appeal is a short statement indicating a desire to appeal, including the date of the order plaintiff wants to appeal. Plaintiff need not explain the grounds for appeal until so directed by the court of appeals. Failure to file a timely notice of appeal waives plaintiff's right to appeal this decision.

The Clerk is directed to enter judgment in favor of defendants under Fed. R. Civ. P. 58 and to forward copies of this Order to counsel of record and to plaintiff, pro se.

Entered this 27th day of December, 2018.

Alexandria, Virginia

/s/ [Signature]
Leonie M. Brinkema
United States District Judge

**Additional material
from this filing is
available in the
Clerk's Office.**