

APPENDIX

INDEX TO APPENDICES

Opinion in the United States Court of Appeals for the District of Columbia Circuit (April 14, 2020).....	App. 1
Memorandum Opinion in the United States District Court for the District of Columbia (September 13, 2018).....	App. 14

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 12, 2020

Decided April 14, 2020

No. 18-5330

DEBORAH KATZ PUESCHEL,
APPELLANT

v.

ELAINE L. CHAO, IN HER OFFICIAL CAPACITY AS SECRETARY,
DEPARTMENT OF TRANSPORTATION AND UNITED STATES
DEPARTMENT OF LABOR,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:17-cv-01279)

George M. Chuzy argued the cause and filed the briefs for
appellant.

Christopher C. Hair, Assistant U.S. Attorney, argued the
cause for appellees. With him on the brief were *Jessie K. Liu*,
U.S. Attorney, at the time the brief was filed, and *R. Craig
Lawrence*, Assistant U.S. Attorney. *Damon Taaffe*, Assistant
U.S. Attorney, entered an appearance.

Before: *ROGERS* and *WILKINS*, *Circuit Judges*, and
SILBERMAN, *Senior Circuit Judge*.

Opinion for the Court by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: Deborah Pueschel is a former employee of the Federal Aviation Administration (“FAA”) whose full disability benefits were reduced after she ran for elective office. She sued the Secretary of Transportation for unlawful retaliation and discrimination, and sued the Secretary of Transportation and the Department of Labor for violation of her First Amendment right to run for office without penalty. The district court dismissed her complaint for lack of subject matter jurisdiction and failure to state a claim. Upon *de novo* review, we affirm.

I.

According to the complaint, Pueschel began working for the FAA as an air traffic controller over forty years ago, in 1974. Compl. ¶ 6. Things did not always go well. In 1980, she filed an Equal Employment Opportunity (“EEO”) administrative complaint alleging a pattern of sexual harassment by male employees, and in 1981, she sued the FAA for alleged sexual harassment and reprisal. *Id.* ¶¶ 10, 14. Although losing in the district court, she prevailed on appeal on the ground that she had been subject to a hostile work environment. *Katz v. Dole*, 709 F.2d 251, 256–57 (4th Cir. 1983); Compl. ¶¶ 18–19. Pueschel continued to file other EEO complaints against the FAA in 1990, 1992, 1997, and 2001. Compl. ¶ 21.

Pueschel also suffered physical and emotional injuries stemming from her employment. *Id.* ¶ 11. In May 1981, she injured her back and neck at work and filed a claim for workers’ compensation with the Office of Workers’ Compensation Programs (“OWCP”). *Id.* ¶ 12. When she later called in sick due to back pain on the same day as an illegal air

traffic controllers' strike, *id.* ¶¶ 15–16, the FAA fired her on the assumption that she had participated in the strike and challenged her benefits claim, *id.* ¶ 16. Pueschel appealed and the Merit Systems Protection Board reversed her termination. *Id.* ¶¶ 17, 20. Then, in 1994, Pueschel experienced an anxiety attack on the job and never returned to work. *Id.* ¶ 22.

In September 1998, OWCP granted Pueschel's claims for full disability benefits based on the physical and emotional conditions resulting from her federal employment. *Id.* ¶¶ 23, 25. In 1999, the FAA terminated Pueschel's employment on the ground she was no longer able to work as an air traffic controller, and this time her appeal of the termination of her employment was unsuccessful. *Id.* ¶ 24. Thereafter, Pueschel unsuccessfully ran for the United States House of Representatives between 2000 and 2004 and again between 2012 and 2016. *Id.* ¶ 27.

The FAA informed OWCP by letter of October 9, 2015, that Pueschel had “demonstrated, and continues to demonstrate, the ability to run for elective office,” and that her actions disprove her doctor’s contention she “is ‘permanently disabled’ and that ‘it is doubtful that she will be able to work in any . . . capacity.’” *Id.* ¶ 30 (quoting Letter from FAA to OWCP (Oct. 9, 2015)). In January 2016, OWCP reduced Pueschel’s benefits, stating that she “was now capable of working full time as a ‘customer service representative.’” *Id.* ¶ 31. When Pueschel wrote Margaret Gilligan, the Associate Administrator for Aviation Safety at FAA, on April 9, 2016, about these events and asked to return to work, preferably in the FAA Historian’s office, *id.* ¶ 33 (referencing Letter from Deborah Pueschel to Margaret Gilligan (Apr. 9, 2016)), Gilligan responded by letter of April 15, 2016, that her request was a matter for Human Resources, *id.* ¶ 34 (referencing Letter from Margaret Gilligan to Deborah

Pueschel (Apr. 15, 2016)). On August 8, 2016, Pueschel filed an EEO complaint, the dismissal of which was affirmed by the EEOC’s Office of Federal Operations, which also denied her request for reconsideration. *Id.* ¶¶ 38–42.

Pueschel filed a three count complaint against the Secretary of Transportation and the Department of Labor for violation of Title VII of the Civil Rights Act of 1996, 42 U.S.C. § 2000e–16(a), the Rehabilitation Act of 1973, 29 U.S.C. § 794a, the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*, and the First Amendment of the United States Constitution. Count one alleged that the FAA retaliated against Pueschel in violation of the Rehabilitation Act and Title VII by informing OWCP of her congressional campaigns, which ultimately led to the reduction of her benefits. Compl. ¶¶ 44–46. Count two alleged that the FAA violated the Rehabilitation Act and the Americans with Disabilities Act by discriminating against her when it failed to rehire her after she requested to be hired for a position commensurate with her disability. *Id.* ¶¶ 47–49. Count three alleged that the FAA and OWCP violated Pueschel’s First Amendment right to run for office without penalty by reducing her benefits because she ran for Congress. *Id.* ¶¶ 50–52.

The district court granted the defendants’ motion to dismiss the complaint. *Pueschel v. Chao*, 357 F. Supp. 3d 18 (D.D.C. 2018). The court dismissed Count one for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), finding Pueschel’s retaliation claim amounted to a collateral attack on OWCP’s unreviewable disability benefits determination. *Id.* at 26. The court dismissed Counts two and three for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), finding Pueschel’s discrimination claim against the FAA failed because she was not an “applicant for employment” within the

meaning of Title VII and the Rehabilitation Act. *Id.* at 27. The court found that Pueschel lacked standing to bring a constitutional claim against the FAA, *id.* at 28–29, which she does not challenge on appeal, and that Pueschel failed to state a First Amendment claim against OWCP, *id.* at 29–30.

Pueschel appeals, and our review is *de novo*. *Kim v. United States*, 632 F.3d 713, 715 (D.C. Cir. 2011). Although the court must assume the truth of well pled factual allegations and reasonable inferences therefrom, the court is not required to accept Pueschel’s legal conclusions as correct. *See, e.g., Doe v. Rumsfeld*, 683 F.3d 390, 391 (D.C. Cir. 2012). And as a threshold matter, Pueschel’s complaint must include “sufficient factual matter . . . 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)).

II.

On appeal, Pueschel contends that the district court erred as a matter of law in dismissing Count one of her complaint because it is not directed at any action by OWCP but rather action by the FAA. She contends that the district court erred in dismissing Count two by imposing a non-existent formal application requirement for federal reemployment, relying on a forty-five-year-old, out-of-circuit district court opinion that did not involve a disabled employee trying to return to her former agency. The dismissal of Count three was error, she contends, because the federal government’s demand that she surrender her benefits imposed an unacceptable burden on her ability to run for office. She notes that this court’s precedent did not involve a choice imposed by the government and maintains that the district court’s reliance on the Supreme

Court’s approval of the Hatch Act was inapposite to the issue presented.

A.

The Federal Employees’ Compensation Act (“FECA”), 5 U.S.C. § 8101 *et seq.*, provides that the decision of the Secretary of Labor or her designee “in allowing or denying a payment” of federal workers’ compensation benefits is “(1) final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.” 5 U.S.C. § 8128(b)(1)–(2). Consequently, as to Count one, Pueschel concedes on appeal that the prayer for relief in her complaint is “inartfully worded,” Appellant’s Br. 20, and urges Count one be read as “not . . . directed at any act by OWCP” and “aimed solely at the FAA’s conduct,” *id.* at 14. *See also* Compl. ¶¶ 44–46; Prayer for Relief ¶¶ 1, 4. We agree Count one can be so read, and therefore our review is not barred by the Act.

Even so, the obstacle to Pueschel’s reprisal claim, instead, is the significant gap in time between the FAA’s 2015 letter notifying OWCP of her ability to run for Congress, which Pueschel alleges was retaliatory, Compl. ¶¶ 29, 45–46, and the EEO complaints she filed between 1980 and 2001, *id.* ¶¶ 10, 21. Pueschel suggests this alternative ground should not be reached because the issue was not fully briefed in district court, but the government presented this alternative ground in the district court, and the issue has been fully briefed by the parties on appeal. Our review of the sufficiency of a complaint under Federal Rule of Civil Procedure 12(b)(6) is *de novo*. So “we may independently assess” that sufficiency. *Kaemmerling v. Lappin*, 553 F.3d 669, 676 (D.C. Cir. 2008).

Pueschel maintains that “[a]s a former employee of the FAA, [she] is protected from actions by the FAA directed against her because of discrimination and reprisal claims she filed against the [FAA].” Appellant’s Br. 14. In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), the Supreme Court recognized a former employee’s right to bring retaliation claims, *id.* at 346. But Pueschel overlooks that in the absence of direct evidence of retaliation such claims are generally limited to conduct occurring shortly after the employee’s protected activity. This court has viewed mere temporal proximity to support an inference of causation “only where the two events are very close in time,” *Hamilton v. Geithner*, 666 F.3d 1344, 1357 (D.C. Cir. 2012) (quoting *Woodruff v. Peters*, 482 F.3d 521, 529 (D.C. Cir. 2007)). These cases were resolved on summary judgment, and not a Rule 12 dismissal, but Pueschel cannot deny that there was a gap of almost fifteen years between the FAA’s 2015 letter about her congressional runs and her EEO complaints filed between 1980 and 2001. Here, the lack of temporal proximity prevents the court from drawing a reasonable inference of causality when no additional factual allegations support causation.

Although no bright line rule has been established, the Supreme Court has recognized that “[t]he cases that accept mere temporal proximity between an employer’s knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a *prima facie* case uniformly hold that the temporal proximity must be ‘very close,’” citing approvingly cases where three- and four-month intervals were found insufficient to infer causality between the protected activity and the adverse employment action. *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (quoting *O’Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1253 (10th Cir. 2001)). The Court concluded that an action taken “20 months later suggests, by itself, no causality at all.” *Id.* at 274.

This court, too, has often analyzed temporal proximity in terms of months — not years. *See, e.g., Harris v. D.C. Water & Sewer Auth.*, 791 F.3d 65, 69 (D.C. Cir. 2015) (five months); *Hamilton*, 666 F.3d at 1358 (three months); *Mitchell v. Baldrige*, 759 F.2d 80, 86–87 (D.C. Cir. 1985) (four months). In *Rochon v. Gonzales*, 438 F.3d 1211 (D.C. Cir. 2006), upon considering whether the adverse action “took place shortly after” the protected activity, *id.* at 1220 (quoting *Mitchell*, 759 F.2d at 86), the court concluded that that the plaintiff survived the motion to dismiss because the alleged retaliation occurred “around the time” of his alleged protected activity and thus supported a reasonable inference that the government acted with a retaliatory motive, *id.*

Pueschel alleged that the FAA retaliated almost fifteen years after her protected activity. Compl. ¶¶ 21, 46. Her retaliation claim rests solely on the fact that she was formerly employed by the FAA and filed several EEO complaints between 1980 and 2001. Because these allegations, on their own, do not support a reasonable inference of causality, Pueschel’s complaint fails to raise “more than a sheer possibility that [the FAA] has acted unlawfully.” *Iqbal*, 556 U.S. at 678. Pueschel has shown no basis for the court to reverse the dismissal of Count one as we affirm on the alternate ground of failure to state a claim.

B.

The Rehabilitation Act applies the substantive discrimination standards of the Americans with Disabilities Act to executive agencies, *see* 29 U.S.C. §§ 791(f), 794(d), and it makes Title VII rights, remedies, and procedures available to federal agency “employee[s] or applicant[s] for employment,” *id.* § 794a(a)(1). Because Pueschel is neither an “employee” nor an “applicant” within the meaning of the Rehabilitation Act or Title VII, the district court ruled she failed to state a claim.

Pueschel challenges the district court’s reasoning underlying the dismissal of Count two as assuming a material fact for which there is no support, namely a formal reapplication requirement.

Pueschel maintains that as a former FAA employee she fulfilled any application requirement for reemployment when she wrote to an FAA employee and requested a part-time assignment with the FAA Historian. *See* Compl. ¶ 33 (referencing her April 9, 2016, letter to Margaret Gilligan, FAA Associate Administrator for Aviation Safety). The district court, in her view, incorrectly assumed that this letter was not a sufficient application and that she was required to submit a formal application in order to be an “applicant.” Her letter to Gilligan was incorporated by reference in her complaint and is properly considered on a motion to dismiss. *See EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997).

Even assuming that a former employee’s request for reemployment does not require the formality of an application submitted by an individual with no prior employment history with the agency, Pueschel’s letter to Gilligan did not make Pueschel an “applicant” for employment under the circumstances. Pueschel, on her own initiative, wrote to an FAA employee with whom she was familiar; apparently Gilligan had been managing her EEO complaints since the 1980s, Appellant’s Br. 7 n.4. Gilligan’s reply by letter of April 15, 2016, stated she “was unable to respond” because this was a matter for Human Resources. Compl. ¶ 34. Although Gilligan advised Pueschel that she needed to submit her letter to Human Resources, Pueschel does not allege that she ever did. Neither does she allege that Gilligan had any connection to her requested position or to Human Resources more generally, or that Gilligan had any obligation to forward her

request to Human Resources. Pueschel also fails to allege that her letter obligated the FAA to offer suitable work pursuant to OWCP regulations. *See, e.g.*, 20 C.F.R. §§ 10.505–507. Pueschel alleges only that she received no further response. Compl. ¶ 34.

The district court, therefore, properly ruled that “[s]ubmitting a letter to an employee who does not handle employment-related requests does not make Pueschel an ‘applicant’ with respect to FAA.” *Pueschel*, 357 F. Supp. 3d at 27. At minimum, Pueschel would need to send her letter to someone with the authority to grant her request or with an obligation to forward her request to the proper office or individual. Otherwise, this type of letter “could be sent to any one of hundreds or thousands of agency employees — or, worse, to unattended mailboxes or email accounts — and expose an agency to litigation simply for failing to discover it.” *Id.* Because Pueschel never submitted her request in accordance with the FAA’s division of responsibilities after receiving explicit information on how to do so, Pueschel fails to show that the district court erred in dismissing Count two of her complaint.

C.

After the FAA informed OWCP that Pueschel had demonstrated an ability to run for elective office, disproving her doctor’s contention that she was “permanently disabled” and would be unable to work again in any capacity, Compl. ¶ 30, OWCP reduced Pueschel’s disability benefits, finding that “she was now capable of working full time as a ‘customer service representative,’” *id.* ¶ 31. Pueschel maintains that OWCP’s determination violated the First Amendment because it relied “solely on the fact that she was a candidate” to determine that she was ineligible for certain disability benefits. Oral Arg. Rec. 15:04–12 (Feb. 12, 2020).

In *Branch v. FCC*, 824 F.2d 37 (D.C. Cir. 1987), this court recognized that the “right to seek political office . . . is undeniable, though the Constitution and the Supreme Court’s cases in the area do not pinpoint the precise grounds on which it rests,” *id.* at 47. In *Branch*, a television news reporter maintained that a federal statute “extinguishe[d] his right to seek political office” because it required broadcast media to provide “equal time” to political opponents, and his station management, relying on this statute, had advised him that if he wished to maintain his candidacy he must take an unpaid leave of absence during his campaign. *Id.* at 39, 47. The court held that the statutory burden was “justifiable as ‘both reasonable and necessary to achieve the important and legitimate objectives of encouraging political discussion and preventing unfair and unequal use of the broadcast media.’” *Id.* at 49 (quoting *Paulsen v. FCC*, 491 F.2d 887, 892 (9th Cir. 1974)). The court further reasoned: “[N]obody has ever thought that a candidate has a right to run for office and at the same time to avoid all personal sacrifice” and “many people find it necessary to choose between their jobs and their candidacies.” *Id.* at 48. For support, the court cited the Hatch Act, 5 U.S.C. § 7324(a)(2), which requires government employees to resign from work if they wish to run for certain political offices and which the Supreme Court upheld against constitutional challenge in *U.S. Civil Service Commission v. National Ass’n of Letter Carriers*, 413 U.S. 548, 567 (1973).

Pueschel would distinguish *Branch* and *Letter Carriers* on the ground that neither case involves the federal government’s reduction of disability benefits. In her view this fact is determinative because both cases involved a constitutional challenge to a federal statute and the justifications underlying the federal statutes cited in these cases — prohibiting partisan political activity by federal employees or providing equal

media time to opposing candidates — are irrelevant to OWCP’s decision here and Congress has not passed a statute requiring OWCP to reduce disability payments to beneficiaries running for public office.

The issue is not whether Congress has prohibited political candidates from receiving full workers’ compensation benefits, but whether the burden imposed by the federal statutes in *Branch* and *Letter Carriers* is analogous to the alleged burden imposed by OWCP’s determination. Pueschel alleges that OWCP partially reduced her workers’ compensation benefits because it had determined in view of her ability to run for office that “she was now capable of working full time as a ‘customer service representative.’” Compl. ¶¶ 30–31. That Pueschel may have to choose between retaining full disability benefits and her candidacy “does not differ in kind from the fact ‘many people find it necessary to choose between their jobs and their candidacies.’” *Pueschel*, 357 F. Supp. 3d at 29–30 (quoting *Branch*, 824 F.2d at 48). Furthermore, her complaint contains no allegation that OWCP had animus toward her political activity, either her decision to run for political office or her political views or running for office in general. Absent these types of circumstances, Pueschel’s right to seek political office is “not implicated.” *See Branch*, 824 F.2d at 48. Because her First Amendment contention is foreclosed by our precedent, she has failed to show the district court erred in dismissing Count three of her complaint. To the extent Pueschel contends that OWCP has uniformly interpreted FECA to hold that a beneficiary’s candidacy for office could not play any role in the determination of her disability or her benefits, her reliance on OWCP administrative cases on wage-earning capacity in view of later election to public office is misplaced. At issue here is whether OWCP’s determination that Pueschel demonstrated an ability to perform work by running for public office violated

the First Amendment — not whether her wage-earning capacity was appropriately determined.

Accordingly, we affirm the dismissal of Pueschel's complaint.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEBORAH K. PUESCHEL,

Plaintiff,

v.

ELAINE CHAO, in her Official Capacity as
Secretary, Department of Transportation, *et
al.*,

Defendants.

FILED
SEP 13 2018
Clerk, U.S. District and
Bankruptcy Courts

Civil Action No. 17-cv-1279 (DLF)

MEMORANDUM OPINION

Deborah Pueschel engaged in a long string of employment-related disputes with her employer, the Federal Aviation Administration (FAA), and began receiving full-time disability benefits for work-related injuries from the Office of Worker Compensation (OWCP) in 1998. She later decided to run for Congress. When FAA found out, it contacted OWCP and said Pueschel's campaign activities demonstrated an ability to work that was inconsistent with the full-time disability benefits she was receiving. OWCP reduced Pueschel's benefits accordingly and cleared her for full-time work. Pueschel then wrote FAA to request a job, but never received one. Now, she brings these Title VII and Rehabilitation Act claims against FAA for retaliation and disability discrimination, asserting that FAA retaliated against her by encouraging OWCP to reduce her benefits and that FAA discriminated against her by not giving her a job. Pueschel also brings First Amendment claims against both FAA and OWCP, asserting that they violated her "right to run for Congress without penalty" by taking her campaign activities into account in reducing her benefits. Compl. ¶ 52, Dkt. 1 at 10. Before the Court is defendants' joint Motion to

Dismiss under Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure. Dkt. 15-1 (redacted). For the reasons that follow, the Court will grant the motion.

I. BACKGROUND¹

Pueschel began working for FAA as an Air Traffic Controller in 1974. Compl. ¶ 6. In 1980, she filed an EEO complaint alleging a pattern of sexual harassment by her male colleagues. *Id.* ¶ 10. In 1981, her disputes with FAA began to intensify. First, she was injured at work and filed a claim for worker compensation with OWCP. *Id.* ¶ 12. Next, she filed a federal lawsuit alleging sexual harassment and reprisal. *Id.* ¶ 14. After that, she called in sick due to back pain on the same day as an illegal air traffic controllers' strike. *Id.* ¶ 16. FAA assumed that Pueschel had participated in the strike, so it fired her and challenged her OWCP claim. *Id.*

Pueschel lost her first round of sexual-harassment litigation in federal court but obtained a reversal from the Fourth Circuit in 1983. *Id.* ¶¶ 18, 19.² Three months later, she convinced the U.S. Merit Systems Protection Board to reverse her termination. *Id.* ¶ 20. Things between Pueschel and FAA went smoothly for the next seven years. But Pueschel filed additional EEO complaints against FAA in 1990, 1992, 1997, and 2001. *Id.* ¶ 21. Meanwhile, Pueschel suffered an anxiety attack on the job in 1994 and never returned to work. *Id.* ¶ 22. She requested disability benefits for work-related anxiety and physical injuries arising from the incident, which OWCP granted in 1998. *Id.* ¶ 23. In 1999, FAA terminated Pueschel again—this time because

¹ The facts here are recited as alleged in Pueschel's Complaint and are assumed true, as they must be in considering a motion to dismiss. *See Ctr. for Responsible Sci. v. Gottlieb*, 311 F. Supp. 3d 5, 8 (D.D.C. 2018).

² *See Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983).

she was no longer able to work as an air traffic controller. *Id.* ¶ 24. She unsuccessfully appealed her termination. *Id.*

In 2000, Pueschel set her sights on Congress. *Id.* ¶ 27. She ran for the House of Representatives in 2000–2004 and again in 2012–2016. *Id.* Sometime in 2012, FAA began questioning whether Pueschel’s campaign activities demonstrated an ability to work that was inconsistent with the full-time OWCP benefits she was still receiving. *Id.* ¶ 28. On October 9, 2015, FAA sent a letter to OWCP stating that Pueschel “demonstrated, and continues to demonstrate, the ability to run for elective office” and that her campaigning activities “disprove[d]” the conclusion that she was “permanently disabled” and likely not “able to work in any capacity.” *Id.* ¶ 30. In January 2016, OWCP reduced Pueschel’s disability benefits on the grounds she was then capable of working full time as a “customer service representative.” *Id.* ¶ 31. In March 2016, Pueschel complained to an EEO counselor about what she considered FAA’s “efforts to deprive her of her disability benefits.” *Id.* ¶ 32.

In April 2016, Pueschel sent a letter to FAA—specifically, to Margaret Gilligan, the Associate Administrator for Aviation Safety, Pl.’s Opp’n Ex. 4, Dkt. 21-4 at 1³—explaining that she had been cleared for full-time work and was requesting a position in the FAA Historian’s office, Compl. ¶ 33. Gilligan wrote back that she was “unable to respond to [Pueschel’s] request as this is a matter to be addressed by the Air Traffic Organization and the Office of Human

³ Because Pueschel incorporated her letter to FAA in her complaint by reference, the Court may consider plaintiff’s copy of that letter on a motion to dismiss. *See EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997) (“In determining whether a complaint fails to state a claim, [the court] may consider only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [the court] may take judicial notice.”).

Resources.” Pl. Opp’n Ex. 4, at 3; *see also* Compl. ¶ 34. Pueschel never heard from FAA again regarding her request. Compl. ¶ 34.

On July 29, 2016, Pueschel initiated the EEO complaint process against FAA, which culminated in a final EEOC decision rejecting her claims on April 3, 2017. *Id.* ¶¶ 35–42. She timely filed this suit within 90 days of receiving that decision. *Id.* ¶ 43; *see also* 42 U.S.C. § 2000e-16(c).

Pueschel brings count I against FAA⁴ for reprisal under the Rehabilitation Act and Title VII. Compl. ¶¶ 44–46. She brings count II against FAA for disability discrimination under the Rehabilitation Act and the Americans with Disabilities Act (ADA). *Id.* ¶¶ 47–49. And she brings count III against both FAA and OWCP⁵ for violating her right to run for Congress without penalty under the First Amendment. *Id.* ¶¶ 50–52.

For relief, Pueschel seeks: findings consistent with all three Counts; \$300,000 in compensatory damages; a position with FAA retroactive to her April 9, 2016 request for employment; a remand of OWCP’s decision reducing her disability benefits with instructions to recalculate them without regard for her candidacy for the House of Representatives; and reasonable attorneys’ fees and expenses. *Id.* at 11. In response to plaintiff’s complaint, defendants filed this joint Motion to Dismiss for lack of subject-matter jurisdiction and failure to state a claim upon which relief can be granted.

⁴ As required by 42 U.S.C. § 2000e-16(c), plaintiff formally names the Secretary of Transportation, Elaine Chao, in her official capacity as the head of Transportation, which includes FAA. For simplicity, the Court will refer to “FAA.”

⁵ Plaintiff formally names the Department of Labor, which includes OWCP. For simplicity, the Court will refer to “OWCP.”

II. LEGAL STANDARDS

Under Federal Rule of Civil Procedure 12(b)(1), a party may move to dismiss an action or claim when the court lacks subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). A motion for dismissal under Rule 12(b)(1) “presents a threshold challenge to the court’s jurisdiction.” *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987). Federal district courts are courts of limited jurisdiction, and it is “presumed that a cause lies outside this limited jurisdiction.” *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Thus, “the plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence.” *Moran v. U.S. Capitol Police Bd.*, 820 F. Supp. 2d 48, 53 (D.D.C. 2011) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)).

“When ruling on a Rule 12(b)(1) motion, the court must treat the plaintiff’s factual allegations as true and afford the plaintiff the benefit of all inferences that can be derived from the facts alleged.” *Jeong Seon Han v. Lynch*, 223 F. Supp. 3d 95, 103 (D.D.C. 2016) (internal quotation marks omitted). Those factual allegations, however, receive “closer scrutiny” than they would in the Rule 12(b)(6) context. *Id.* Also, unlike when evaluating a Rule 12(b)(6) motion, a court may consider documents outside the pleadings to evaluate whether it has jurisdiction. *See Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005). If the court determines that it lacks jurisdiction, the court must dismiss the claim or action. Fed. R. Civ. P. 12(b)(1), 12(h)(3).

Rule 12(b)(6) of the Federal Rules of Civil Procedure allows a defendant to move to dismiss the complaint 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 factual matter sufficient to “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550

U.S. 544, 570 (2007). A facially plausible claim is one that “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This standard does not amount to a specific probability requirement, but it does require “more than a sheer possibility that a defendant has acted unlawfully.” *Id.*; *see also Twombly*, 550 U.S. at 555 (“Factual allegations must be enough to raise a right to relief above the speculative level.”). A complaint alleging facts that are “merely consistent with a defendant’s liability . . . stops short of the line between possibility and plausibility.” *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted).

Well-pleaded factual allegations are “entitled to [an] assumption of truth,” *id.* at 679, and the court construes the complaint “in favor of the plaintiff, who must be granted the benefit of all inferences that can be derived from the facts alleged,” *Hettinga v. United States*, 677 F.3d 471, 476 (D.C. Cir. 2012) (internal quotation marks omitted). The assumption of truth does not apply, however, to a “legal conclusion couched as a factual allegation.” *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted). An “unadorned, the-defendant-unlawfully-harmed-me accusation” is not credited; likewise, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.*

III. ANALYSIS

A. Plaintiff’s Reprisal Claim Against FAA

Plaintiff brings a claim for reprisal under the Rehabilitation Act and Title VII. But Defendants argue that another statute—the Federal Employee’s Compensation Act (FECA)—prevents that claim from proceeding. FECA governs OWCP benefits and provides federal employees with an exclusive remedy against the United States for work-related injuries. *See* 5 U.S.C. § 8116(c). Section 8128(b) of that Act allows the Secretary of Labor to “end, decrease,

or increase” worker compensation “previously awarded.” *Id.* § 8128(a). And it provides that the decision of the Secretary of Labor—or its designees, such as OWCP—is “final and conclusive for all purposes and with respect to all questions of law and fact” and “*not subject to review . . . by a court* by mandamus or otherwise.” *Id.* § 8128(b) (emphasis added). Unless an exception applies, § 8128(b) operates to divest federal courts of subject-matter jurisdiction over OWCP benefit decisions. *See, e.g., Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 779 & n.13 (1985) (listing § 8128(b) as an example of “Congress intend[ing] to bar judicial review altogether”); *Gallucci v. Chao*, 374 F. Supp. 2d 121, 128 (D.D.C. 2005) (finding no “subject matter jurisdiction because federal question jurisdiction is precluded by 5 U.S.C. § 8128(b)”), *aff’d*, No. 05-5280, 2006 WL 3018055 (D.C. Cir. Mar. 2, 2006).

Because the Court is powerless to review OWCP’s decision directly, it cannot do so indirectly by fashioning relief under the Rehabilitation Act and Title VII.⁶ In determining where FECA ends and Title VII and the Rehabilitation Act may begin, courts distinguish between *tort* injuries—which are the exclusive province of FECA—and *discrimination* injuries—which are not. *See Prescott-Harris v. Fanning*, No. 15-1716, 2016 WL 7223276, at *5 (D.D.C. Dec. 12, 2016) (distinguishing between “work-related injuries” and “claims of discrimination, which are different causes of action aimed at redressing different kinds of harms”). Although FECA generally does not bar discrimination claims, *see Williams v. Tapella*, 658 F. Supp. 2d 204, 210–11 (D.D.C. 2009) (collecting cases), “[a] frustrated FECA claimant cannot secure judicial review of a FECA compensation decision by claiming that the Rehabilitation Act entitles her to [relief] . . . when the claim is predicated upon the same illness or injury that gave rise to the Department

⁶ Plaintiff makes no argument to the contrary; she argues only that § 8128(b) does not bar her *constitutional* claims. *Id.* at 12–17.

of Labor's initial [FECA] decision." *Prescott-Harris*, 2016 WL 7223276 at *5 (third alteration in original) (quoting *Meester v. Runyon*, 149 F.3d 855, 857 (8th Cir. 1998), *cert. denied*, *Meester v. Henderson*, 526 U.S. 1144 (1999)); *see also Stubler v. Runyon*, 892 F. Supp. 228, 230 (W.D. Mo. 1994) (finding Rehabilitation Act claim barred where plaintiff "in fact seeks recovery for the same physical condition for which she has received and continues to receive compensation under [FECA]"), *aff'd*, 56 F.3d 69 (8th Cir. 1995) (unpublished table decision). Where Rehabilitation Act claims "have no effect on the Secretary of Labor's determination of factual and legal issues pertaining to plaintiff's FECA claim or eligibility for worker's compensation benefits[,] . . . FECA does not bar" them. *Williams*, 658 F. Supp. 2d at 210. But where the plaintiff "is essentially asking [the court] to hold that the Department of Labor was wrong . . . [s]uch a holding would contravene FECA's prohibition against judicial review of compensation decisions." *Meester*, 149 F.3d at 857. In such a case, the court "will not allow [the plaintiff] to use the Rehabilitation Act to circumvent Congress's intent." *Id.*

Here, Pueschel's sole reprisal theory is that FAA "succeeded in reducing [her] disability/worker compensation benefits by repeatedly complaining to OWCP that [she] was no longer disabled." Compl. ¶ 45. Aside from her initial workplace injury in 1994, however, she does not allege any new "illness or injury" resulting from FAA's complaint to OWCP. Rather, she claims FAA's actions caused OWCP to determine the compensation owed for her *existing* injuries incorrectly. She seeks compensatory damages from FAA calculated to offset OWCP's reduction in disability benefits. And she also asks the Court to remand the OWCP's decision for reconsideration. In substance, Pueschel's claim is a challenge to OWCP's determination, which is both exclusive and unreviewable. Because plaintiff's claim amounts to an attempt to relitigate

OWCP's FECA determination under the banner of the Rehabilitation Act and Title VII, FECA precludes her suit. The Court must dismiss count I.⁷

B. Plaintiff's Discrimination Claim Against FAA

Pueschel also alleges that FAA discriminated against her on account of her disability when it failed to re-hire her after she had been cleared for full-time work. Because Pueschel's discrimination claim focuses on a new discriminatory injury unrelated to the workplace injuries considered by OWCP, it is not barred by 5 U.S.C. § 8128(b).

The Rehabilitation Act applies the substantive discrimination standards of the Americans with Disabilities Act (ADA) to executive agencies, *see* 29 U.S.C. §§ 791(f), 794(a), 794(d), and it makes Title VII rights, remedies, and procedures available to federal agency "employee[s] or applicant[s] for employment," 29 U.S.C. § 794a(a)(1). Pueschel does not claim to be an "employee" for purposes of her discrimination claim, so she must be an "applicant" in order to bring her claim under the Rehabilitation Act. But she is not.

An authoritative dictionary published near the time the relevant provisions were enacted defines "applicant" as "one who makes a usu[ally] formal request esp[ecially] for something of benefit to himself." Webster's Third New International Dictionary 105 (1961). But the parties point to only one case interpreting the term "applicant for employment" as it appears in Title VII and the Rehabilitation Act. In *Hockett v. Administrator of Veterans Affairs*, the court noted the absence of any relevant statutory definition, legislative history, or precedent and gave the term "applicant for employment" a "reasonable construction." 385 F. Supp. 1106, 1111 (N.D. Ohio

⁷ The Court does not reach defendants' argument that plaintiff has failed to allege an employment relationship with FAA under the Rehabilitation Act and Title VII. *See* Defs.' Mot. 8–9, Dkt. 15-1 at 10–11.

1974).⁸ Although the court did not consider contemporaneous dictionary definitions, it echoed the formality contemplated by *Webster's Third* and “concluded that ‘applicant for employment’ . . . contemplates a person who has filed a written application for a particular position with a government agency, or who has sought to file such an application but has been denied the opportunity.” *Id.* The court “further concluded that the written application need not necessarily be on a form supplied by the agency, as long as the writing submitted by the applicant particularizes the position sought and supplies the information requested in the agency’s application form.” *Id.*

The court provided several reasons for its construction. First, Title VII “placed a new administrative responsibility on all federal agencies.” *Id.* at 1112. Because Title VII’s “complaint procedure is complex and expensive, the triggering event which gives individuals the power to invoke it should be as concrete and specific as possible.” *Id.* Second, Title VII is limited “by its own terms only to ‘personnel actions’ of federal agencies” and thus “contemplates some official act or procedure,” which “[i]n the context of hiring . . . must mean the actual rejection of an application.” *Id.* Third, “the submission of a written application is an act which is entirely within the control of the individual who desires to apply. Therefore, requiring such an application will not place a new or significant burden upon an individual who wishes to invoke [Title VII’s] grievance procedure.” *Id.*

The Court finds *Hockett*’s reasoning persuasive and adds only that the written application must also be submitted to a person or office responsible for receiving such applications. Without that requirement, a written “application” could be sent to any one of hundreds or thousands of

⁸ The court in *Hockett* interpreted the term as it appears in a parallel Title VII provision incorporated by reference in the Rehabilitation Act. *See* 29 U.S.C. § 794a(a) (Rehabilitation Act); 42 U.S.C. § 2000e-16 (Title VII).

agency employees—or, worse, to unattended mailboxes or email accounts—and expose an agency to litigation simply for failing to discover it. That approach would not make the “triggering event” for Title VII grievance procedures “as concrete and specific as possible.” *Id.* Nor would it focus agency responsibility on an “official act or procedure.” *Id.* Moreover, submitting a written application to the person or office responsible for processing applications “is an act which is entirely within the control of the individual who desires to apply” and thus would “not place a new or significant burden upon an individual who wishes to invoke [Title VII’s] grievance procedure.” *Id.*

Here, Pueschel bases her standing as an “applicant” on one letter that she sent to the Associate Administrator for Aviation Safety, Margaret Gilligan. *See* Pl.’s Opp’n, Dkt. 20-1 at 19–20 (redacted); Pl.’s Opp’n Ex. 4, at 1–2. In that letter, plaintiff explained that Gilligan was the “lead attorney” on her case before the Merit Systems Protection Board thirteen years prior. Pl.’s Opp’n Ex. 4, at 1. She then recapped her disputes with the FAA and requested a position as an FAA Historian. *Id.* at 1–2. Gilligan sent a letter in return stating she was “unable to respond to [plaintiff’s] request as this is a matter to be addressed by the Air Traffic Organization and the Office of Human Resources.” *Id.* at 3.

Submitting a letter to an employee who does not handle employment-related requests does not make Pueschel an “applicant” with respect to FAA. She merely sent a letter to an individual FAA employee with whom she was familiar. Moreover, Gilligan did not actually reject Pueschel’s request for employment; she merely directed her to the organization and office responsible for handling employment-related requests. Because Pueschel did not submit a written application to the office responsible for receiving applications for employment, she was

not an “applicant” within the meaning of Title VII and the Rehabilitation Act. The Court therefore must dismiss count II.

C. Plaintiff’s First Amendment Claims

Finally, Pueschel alleges that both FAA and OWCP violated her First Amendment rights: FAA by informing OWCP of her candidacy for Congress; and OWCP by considering that candidacy in determining her disability benefits. As a threshold matter, neither 5 U.S.C. § 8128(b) nor sovereign immunity deprive this Court of jurisdiction to consider those claims.

Defendants do not dispute that § 8128(b) permits judicial review of plaintiff’s constitutional—as opposed to statutory—claims. Defs.’ Reply, Dkt. 23 at 6–7. But even if an agency “does not contest that the court has jurisdiction to review substantial constitutional claims, the court must make its own determination of its jurisdiction.” *Lepre v. Dep’t of Labor*, 275 F.3d 59, 64 (D.C. Cir. 2001).

In *Lepre*, the D.C. Circuit held that § 8128(b) did not bar judicial review of a due process challenge to the procedures used by OWCP in calculating the plaintiff’s benefits. *Id.* at 68. In reaching that conclusion, it considered the text of § 8128(b), relevant Supreme Court precedent, and the fact that “[w]ithout exception, every other circuit to consider the scope of § 8128(b) has concluded that it does not bar judicial review of constitutional claims.” *Id.* Since *Lepre*, courts in this Circuit have recognized that “[t]he general finality of administrative adjudications set out in § 8128(b) ‘does not bar judicial review of constitutional claims.’” *Hall v. Dep’t of Labor*, 289 F. Supp. 3d 93, 99 (D.D.C. 2018) (quoting *Lepre*, 275 F.3d at 67–68), *appeal filed*, No. 18-5100 (D.C. Cir. Apr. 12, 2018); *see also Gallucci*, 374 F. Supp. 2d at 125 (“It is well established that this court has subject matter jurisdiction to review a decision made under FECA if there has been a constitutional violation.”). Following *Lepre* and other courts, the Court concludes that § 8128(b) does not deprive this Court of jurisdiction over Count III.

Even though the Court is not deprived of jurisdiction by § 8128(b), defendants argue that the Court lacks jurisdiction for a different reason: sovereign immunity. *See* Defs.' Mot. 18. "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *FDIC v. Meyer*, 510 U.S. 471, 475 (1995). And sovereign immunity is "jurisdictional in nature." *Id.*; *see also id.* ("[T]he terms of the United States' consent to be sued in any court define that court's jurisdiction to entertain the suit." (internal quotation marks and alteration omitted)).

The Administrative Procedure Act (APA), however, waives the Federal Government's sovereign immunity with respect to suits challenging the action or inaction of a federal agency, so long as the plaintiff does not seek monetary damages. 5 U.S.C. § 702. And its waiver "applies to any suit whether under the APA or not." *Chamber of Commerce of the U.S. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996).

Thus, the APA's waiver of sovereign immunity covers constitutional challenges to OWCP determinations to the extent plaintiff "seek[s] an order that the Office of Workers' Compensation redetermine his entitlement [to benefits]." *Czerkies v. Dep't of Labor*, 73 F.3d 1435, 1438 (7th Cir. 1996) (en banc). That is precisely what plaintiff seeks here. She "has specifically limited her prayer on Count 3" to a "[r]emand [of] OWCP's decision reducing [her] worker compensation benefits with instructions to redecide the issue without regard for Plaintiff's candidacy for Congress." Pl.'s Opp'n 17 (quoting Compl. 11). Because plaintiff does not seek monetary relief but only "a direction that the [OWCP] process h[er] claim in conformity with [the Constitution]," *Czerkies*, 73 F.3d at 1438, the APA's waiver of sovereign immunity extends to her claim.

1. Standing as to FAA

“[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III.” *Lujan*, 504 U.S. at 560. To demonstrate standing, a “plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Because plaintiff’s First Amendment claim against FAA falters at step three—redressability—it must be dismissed.

As discussed, plaintiff explicitly limits her prayer for relief on Count III to remanding *the OWCP*’s decision, with instructions *to the OWCP* to reevaluate her disability benefits. But such a remand-with-instructions would in no way bind *FAA* as a third party. Without a request for judicial relief regarding FAA, a finding that FAA “violated Plaintiff’s First Amendment right” in the abstract, Compl. 11, would amount to an advisory opinion prohibited by Article III, *see Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth., WMATA*, No. 17-7059, 2018 WL 4000492, at *3 (D.C. Cir. Aug. 17, 2018) (“[A] federal court has no power to render advisory opinions or decide questions that cannot affect the rights of litigants in the case before them.”). The Court must therefore dismiss Count III as to defendant FAA.

2. Failure to State a Claim as to OWCP

Defendants argue that no right to run for office without penalty exists and that, if one does, it was not violated here. Defs.’ Reply 7–9. The Court agrees with defendants’ latter argument.

The D.C. Circuit has recognized that the “right to seek political office . . . is undeniable, though the Constitution and the Supreme Court’s cases in the area do not pinpoint the precise grounds on which it rests.” *Branch v. F.C.C.*, 824 F.2d 37, 47 (D.C. Cir. 1987). In *Branch*, a

television reporter challenged an FCC rule that required the station he worked for to give his political opponents “equal time” on the air if he chose to run for office. *Id.* at 39. The frequency of the reporter’s broadcasts made doing so impracticable, so the station told the reporter he would have to take an unpaid leave of absence during the campaign, with no guarantee of reinstatement. *Id.* The reporter thus had to choose between his job and running for office. Nevertheless, the court upheld the regulation and found that the “right to seek political office” was “not implicated.” *Id.* at 47–48. It reasoned that the rule did not “impose[] an undue burden on [the reporter’s] ability to run for office” because “nobody has ever thought that a candidate has a right to run for office and at the same time to avoid all personal sacrifices.” *Id.* at 48. “Even if the practicalities of campaigning for office are put to one side,” the court noted, “many people find it necessary to choose between their jobs and their candidacies.” *Id.* The court observed that the Hatch Act “requires government employees to resign from work if they wish to run for certain political offices” and imposes “many more intrusive restrictions as well,” yet the Supreme Court had upheld that Act, and similar state restrictions, against constitutional challenge. *Id.* (citing *Clements v. Fashing*, 457 U.S. 957 (1982); *U.S. Civil Serv. Comm’n v. Ass’n of Letter Carriers*, 413 U.S. 548 (1973); *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947)).

Even if OWCP reduced Pueschel’s disability benefits based on her candidacy—a fact defendants vigorously dispute, *see* Defs.’ Reply 7—in doing so, OWCP imposed no more significant burden than the equal time rule in *Branch*. There, the plaintiff had to choose between his job and running for office. Here, Pueschel did not lose her disability benefits entirely because she ran for office. She experienced only a partial reduction in compensation. But just as “nobody has ever thought that a candidate has a right to run for office and at the same time to

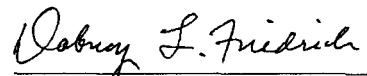
avoid all personal sacrifices,” *Branch*, 824 F.2d at 48, nobody has ever thought that a candidate has a right to run for office *and at the same time to receive full-time disability benefits*. And the fact Pueschel may have had to choose between her disability benefits and her candidacy does not differ in kind from the fact “many people find it necessary to choose between their jobs and their candidacies.” *Id.*

Indeed, this case is even simpler than *Branch*. There, the plaintiff’s candidacy *directly* impacted his employment. Here, however, Pueschel’s candidacy played at most an indirect role in OWCP’s reduction. *See* Pl.’s Opp’n. 25 (acknowledging that “OWCP’s decision did not directly concern the First Amendment”). Pueschel does not allege that her candidacy alone triggered the reduction. Rather, she argues that OWCP’s “citation of her campaign activities as evidence to support the reduction” amounted to an unconstitutional “burden.” Pl.’s Opp’n 22. Because having one’s candidacy considered as one factor in reducing disability benefits is no more significant than the burden of direct job loss upheld in *Branch*, plaintiff’s “right to seek political office” is “not implicated.” 824 F.2d at 47–48.

It is important to note what plaintiff does not allege. She does not claim that OWCP reduced her benefits based on the viewpoint or content expressed in her campaign. Nor does she claim that OWCP punished her for associating with a particular party or that OWCP purposefully retaliated or discriminated against her because of her candidacy—for political reasons, professional reasons, or otherwise. Rather, she argues her right to run for office was impermissibly burdened by OWCP’s benefit reduction. Finding that theory foreclosed by D.C. Circuit precedent, the Court will dismiss what remains of count III.

CONCLUSION

For the foregoing reasons, the Court grants defendants' motion and dismisses counts I, II, and III. A separate order consistent with this decision accompanies this memorandum opinion.



DABNEY L. FRIEDRICH
United States District Judge

Date: September 13, 2018