

MANDATE [EXHIBIT A]

E.D.N.Y. - C. Islip
19-cv-916
Brodie, C.J.

United States Court of Appeals FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of April, two thousand twenty-one.

Present:

José A. Cabranes,
Rosemary S. Pooler,
*Circuit Judges.**

Brian J. Neary,

Plaintiff-Appellant,

v.

20-3584

Jeff T.H. Pon, U.S. Office of Personnel Management,

Defendant,

Donald J. Trump, et al.,

Defendants-Appellees.

Appellant, pro se, moves for appointment of counsel. Upon due consideration, it is hereby ORDERED that the motion for appointment of counsel is DENIED and the appeal is DISMISSED because it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *see also* 28 U.S.C. § 1915(e).

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

Catherine O'Hagan Wolfe



* Judge Bianco has recused himself from consideration of this motion. Pursuant to Second Circuit Internal Operating Procedure E(b), the matter is being decided by the two remaining members of the panel.

MANDATE ISSUED ON 07/13/2021

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 6th day of July, two thousand twenty-one.

Brian J. Neary,

Plaintiff - Appellant,

v.

Jeff T.H. Pon, U.S. Office of Personnel Management,

Defendant,

Donald J. Trump, Donald J. Trump, Margaret Weichert,
The Current Acting Director of OPM,

Defendants - Appellees.

ORDER

Docket No: 20-3584

Appellant Brian J. Neary, filed a motion for panel reconsideration, or, in the alternative, for reconsideration *en banc*. The panel that determined the appeal has considered the request for reconsideration, and the active members of the Court have considered the request for reconsideration *en banc*.

IT IS HEREBY ORDERED that the motion is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk


Catherine O'Hagan Wolfe

[Exhibit B]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BRIAN J. NEARY,

Plaintiff,

MEMORANDUM & ORDER
19-CV-916 (MKB)

v.

MARGARET WEICHERT, ACTING DIRECTOR,
U.S. OFFICE OF PERSONNEL MANAGEMENT,
and DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES OF AMERICA,

Defendants.

MARGO K. BRODIE, United States District Judge:

Plaintiff Brian Neary, proceeding *pro se*, commenced the above-captioned action on September 11, 2018, against Defendant U.S. Office of Personnel Management (the “OPM”) former Director Jeff T.H. Pon¹ and filed an Amended Complaint on September 20, 2018, adding Defendant President of the United States Donald J. Trump.² (Compl., Docket Entry No. 2; Am. Compl., Docket Entry No. 6.)³ Plaintiff alleges that he was denied employment at several federal agencies because he is not a recent graduate and because President Barack Obama’s Executive Order No. 13,562, 5 C.F.R. § 362 (2013) (the “Executive Order”), which promotes the

¹ On January 1, 2019, the Court substituted OPM Acting Director Margaret Weichert for former Director Jeff T. H. Pon pursuant to Rule 25(d) of the Federal Rules of Civil Procedure. (Order dated Jan. 1, 2019, Docket Entry No. 16.)

² Plaintiff commenced the action in the Southern District of New York and the Court consolidated the two pleadings as an “operative complaint.” (Order dated Nov. 8, 2018, Docket Entry No. 9.) On February 15, 2019, the SDNY transferred the case to this District. (Transfer Order dated Feb. 15, 2019, Docket Entry No. 33.)

³ Because the Complaint is not consecutively paginated, the Court refers to the page numbers assigned by the Electronic Case Filing (“ECF”) system.

federal hiring of recent graduates, violates the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (the “ADEA”). (Compl.) The Court liberally construes the Amended Complaint as asserting claims for discrimination in violation of the ADEA.

Defendants move to dismiss the ADEA claims against them pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim or, in the alternative, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction. (Defs.’ Mot. to Dismiss (“Defs.’ Mot.”), Docket Entry No. 49; Defs.’ Reply Mem. in Supp. of Defs.’ Mot. (“Defs.’ Mem.”), Docket Entry No. 50.) Plaintiff opposes the motion to dismiss. (Pl.’s Opp’n to Defs.’ Mot. (“Pl.’s Opp’n”), Docket Entry No. 43; Pl.’s Opp’n to Defs.’ Mot. II (“Pl.’s Opp’n II”), Docket Entry No. 47.) After the parties had fully briefed Defendants’ motion to dismiss, Plaintiff filed a sur-reply, (Pl.’s Sur-Reply, Docket Entry No. 52), which Defendants move to strike as unauthorized, (Letter dated November 5, 2019 (“Defs.’ Mot. to Strike”), Docket Entry No. 53). Plaintiff opposes the motion to strike. (Pl.’s Opp’n to Defs.’ Letter (“Pl.’s Opp’n Letter”), Docket Entry No. 54.)

For the reasons set forth below, the Court denies Defendants’ motion to strike but grants Defendants’ motion to dismiss and dismisses all claims.

I. Background

The Court assumes the truth of the factual allegations in the Complaint for purposes of this Memorandum and Order.

Plaintiff is an unemployed fifty-two-year-old. For several years, he did not work because he was the sole caregiver for his sick mother. (Compl. 13.) Following a lengthy absence, he sought to return to the workforce. (*Id.*) As of September of 2018, Plaintiff had “applied to more than 300+ jobs; not including . . . public-sector applications,” yet he only had “a handful of

interviews.” (*Id.*) Plaintiff alleges that federal jobs restricted to recent graduates have had a “direct impact” on his unemployment because they result in “[o]ne more job that [he] cannot apply” for and “one less viable career opportunity.” (*Id.* at 14.) Plaintiff asserts that everyone should have complete and unrestricted access to every job that the federal government advertises to the public and that the Recent Graduates Program (the “RGP”) job postings are exclusionary. (*Id.*)

Plaintiff asserts an ADEA claim based both on disparate treatment and disparate impact theories, alleging that the Executive Order discriminates on the basis of age and that the OPM⁴ violates the ADEA by promulgating regulations directed by the Executive Order. (*Id.* at 11, 13.)

a. The Recent Graduates Program

In December of 2010, President Obama issued Executive Order No. 13,562, which expressly directed OPM to promulgate regulations implementing, *inter alia*, the Pathways Program. *See* 3 C.F.R. § 13,562 (2011) (executive order); 5 C.F.R. § 362 (implementing legislation); *see also* 75 Fed. Reg. 82,585, 82,585–88 (Dec. 27, 2010) (executive order); 77 Fed. Reg. 28,194, 28,209–10 (May 11, 2012) (implementing legislation) (stating that the “2-year eligibility window is required by Executive Order” such that there is “no discretion” to alter it). The Pathways Program consists of separate programs: the Internship Program, the Presidential Management Fellows Program, and the RGP. *See* 5 C.F.R. § 362. The RGP reserves certain job opportunities to those who have earned a degree within the last two years from a higher

⁴ The OPM is an independent federal agency created pursuant to Reorganization Plan No. 2 of 1978. *See* 5 C.F.R. § 2.0143 (2011); 43 Fed. Reg. 36,037 (Aug. 15, 1978). The head of the office, the OPM Director, is tasked with “[e]xecuting, administering and enforcing the [c]ivil [s]ervice rules and regulations of the President and the Office,” including “promot[ing] an efficient [c]ivil [s]ervice and systematic application of . . . merit system principles, including measures relating to the selection, promotion, [and] performance” of employees. 43 Fed. Reg. at 36,037 §§ 103–104.

education institution, and functions as a “supplement to, rather than a substitute for” hiring entry-level candidates.⁵ 77 Fed. Reg. at 28,195.

Plaintiff asserts that the RGP is based on an “arbitrarily chosen time limitation.” (Compl. 14.) He questions the basis of the requirements and concludes that the RGP violates the ADEA because it has a disparate impact on individuals over fifty years old. (*Id.*) As an example, Plaintiff reviews hiring data from fiscal years 2012 to 2018, which suggest that 3.71% of the total job candidates hired into the RGP were over the age of fifty, whereas 54% of the total workforce is over the age of forty. (*Id.* at 16; *id.* Ex. F, at 57.) Plaintiff contends that these numbers “prove[] intentional age discrimination.”⁶ (*Id.* at 16.)

b. Plaintiff’s job search

Plaintiff has been “unemployed for the past several years” and attributes his “rotten luck” with his job search to his disqualification from positions advertised under the RGP.⁷ (*Id.* at 13.)

⁵ The Executive Order provides flexibility for veterans whose military service precluded applying for such jobs within the two-year window. *See* 3 C.F.R. 13,562; 5 C.F.R. § 362.302(b)(2).

⁶ Defendants contend that agencies do not “hire a majority” via the Pathways Program “for any single entry level [position],” and eligible applicants must meet the merit-based qualifications for hire. (Defs.’ Mot. 5 (quoting 77 Fed. Reg. at 28,194, 28,199).) *See* 75 Fed. Reg. at 82,585, 82,588; *see also* 5 C.F.R. § 362.105(c) (appointments); 5 C.F.R. § 362.302 (eligibility); 5 C.F.R. § 362.303(d) (qualifications). Defendants cite OPM’s final rules, (Compl. 13), which state that the RGP is “open to all . . . recent graduates regardless of age,” and “[e]ligible students and recent graduates will include older individuals who left the workforce and returned to school to prepare themselves for new careers, as well as those who obtained degrees while they took time off from their careers to raise a family,” 77 Fed. Reg. at 28,202.

⁷ Plaintiff previously filed suit against Federal Deposit Insurance Company (the “FDIC”) Chairman Gruenberg, alleging that the FDIC’s participation in the RGP discriminated against older workers. *See Neary v. Gruenberg*, 730 F. App’x 7, 10 (2d Cir. 2018). The Second Circuit affirmed the dismissal of both Plaintiff’s Equal Protection Clause claim and ADEA claim, reasoning, *inter alia*, that Plaintiff lacked standing to challenge the RGP because “[h]e was an

Because Plaintiff obtained his most recent education, a Master's degree, in 2009, he is ineligible for jobs advertised under the RGP. (*Id.* at 9.) According to Plaintiff, the two-year educational qualification requirement for the RGP prohibits him from "applying to jobs that [he is] otherwise fully capable [and] proficient" for based on his "extensive professional background [and] work experience." (*Id.* at 18.) Despite his ineligibility, Plaintiff applied to thirty-three RGP job openings and was "automatically removed [from] consideration." (*Id.* at 17.) Plaintiff argues that his "auto-rejection," (*id.* at 18), "from an additional 2,500 job openings; as advertised within the Drug Enforcement Administration mass recruitment dated 8/2/2018," (*id.* at 17; *id.* Ex. I, at 91), "is the best example showcasing [his] age[]discrimination charge," (*id.* at 18).

Plaintiff further asserts that it is "suspicious[]" that the EEOC does not participate in the RGP, (*id.* at 16), and questionable that since his Complaint was filed, the FDIC no longer

intended beneficiary of the initiative," having graduated within the RGP's educational time requirements. *Id.* The Second Circuit further concluded that while

the government could have adopted a different selection process to identify qualified applicants . . . and [while] it may be true that the selection criteria the program used failed to account for the work preferences of [m]illennials, . . . [t]he government has proffered a rational basis for its hiring practices and [Plaintiff's] allegations are insufficient to raise an inference that those practices violate equal protection.

Id. Finally, in dismissing Plaintiff's ADEA claim, the Court noted that "[Plaintiff] alleges that [fifty-three] of the FDIC's [fifty-four] new hires were under the age of [forty] . . . [b]ut he fails to plead facts that allow us to infer that the applicants ultimately hired were disproportionately younger than [forty], relative to the applicant pool." *Id.* at 12.

Although unrelated to the previous FDIC suit or the suit before the Court, Plaintiff attaches to the Complaint an appeals decision from the Equal Employment Opportunities Commission (the "EEOC") dated August 22, 2018, based on a final agency action arising out of an *FDIC* vacancy announcement on the RGP. (Compl. Ex. A, at 22–25.) According to the EEOC decision — which affirmed dismissal of Plaintiff's administrative complaint — following Plaintiff's ineligibility to apply for an FDIC position under the Pathways Program, Plaintiff timely filed a complaint with OPM alleging that the pathways program "allows the FDIC and all participating federal [a]gencies . . . to use educational time limitations to deliberately exclude older workers from recruitment." (*Id.* at 23.)

participates in the RGP and has removed the two-year educational time constraint from their job vacancies, (*id.* at 17).⁸

Plaintiff's "fundamental complaint is that [he] *should* be able to have complete [and] unrestricted access" to every federal government job advertised to the public. (*Id.* at 14.)

c. The OPM Retirement Services job

Plaintiff applied to an OPM Retirement Services job as an Administrative Specialist, Series 0901, GS-07 grade/pay level,⁹ (*id.* Ex. I, at 86), and asserts that he was "automatically disqualified because of the discriminatory policy [and] . . . [its] exclusionary educational qualification," (*id.* at 18).¹⁰

⁸ Defendants note that the FDIC did not remove the RGP requirement; they only posted — as they routinely do — additional jobs in the competitive service and without the educational time limitation. (Defs.' Mot. n.8.)

⁹ Defendants contend that Plaintiff failed to apply for jobs which were similar to those offered under the RGP, including a vacancy announcement posted by the OPM in December of 2018 "for a position with OPM Retirement Services, for a Legal Administrative Specialist, Series 0901, at GS-7 pay/grade level (in addition to GS-5 positions)," which was "very similar to that [posted with RGP requirements in] June [of] 2018," (the "OPM Retirement Services job"), that Plaintiff was deemed ineligible for. (*Id.* at 7.) The vacancy announcement read "Service: Competitive" and the "announcement nowhere limited eligibility to recent graduates, unlike the previous such announcement in June [of] 2018," yet "Plaintiff failed to apply for that position." (*Id.* at 8.) "Competitive" jobs are those open to the public and not limited by the RGP educational timing requirements. *See* 75 Fed. Reg. at 82,585.

¹⁰ Defendants contend that the application was rejected in August of 2018, and Plaintiff did not exhaust administrative steps to submit his grievance. (Defs.' Mot. 8 (citing Decl. of Jessica Parton ("Parton Decl."), dated Aug. 20, 2019 ¶ 6).) "Plaintiff [neither] contacted an OPM [Equal Employment Opportunity ("EEO")] counsel within the requisite [forty-five] days of such rejection [nor] filed the requisite formal administrative complaint — alleging discrimination on the basis of age or any other basis." (*Id.* at 8 (citing Decl. of Lashonn Woodland ("Woodland Decl."), dated August 20, 2019 ¶ 6).) Defendants also assert that Plaintiff "failed to submit to EEOC a [n]otice of [i]ntent to [s]ue within 180 days of this rejection or at any time since, let alone [thirty] days before filing the instant action against OPM." (*Id.* (citing Woodland Decl. ¶ 7).)

Plaintiff commenced the instant action on September 11, 2018, (*id.*), and seeks suspension of the RGP, monetary damages equal to the number of job announcements he has applied to, and removal of the two-year education limitation from the Pathways Programs, (*id.* at 12).

II. Discussion

a. Standards of review

i. Rule 12(b)(1)

A district court may dismiss an action for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure when the court “lacks the statutory or constitutional power to adjudicate it.” *Huntress v. United States*, 810 F. App’x 74, 75 (2d Cir. 2020) (quoting *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)); *Cortlandt St. Recovery Corp. v. Hellas Telecomms., S.A.R.L.*, 790 F.3d 411, 416–17 (2d Cir. 2015) (quoting *Makarova*, 201 F.3d at 113); *Shabaj v. Holder*, 718 F.3d 48, 50 (2d Cir. 2013) (quoting *Aurecchione v. Schoolman Transp. Sys., Inc.*, 426 F.3d 635, 638 (2d Cir. 2005)). “[C]ourt[s] must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of [the] plaintiff,’ but ‘jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it.’” *Morrison v. Nat’l Austl. Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008) (first quoting *Natural Res. Def. Council v. Johnson*, 461 F.3d 164, 171 (2d Cir. 2006); and then quoting *APWU v. Potter*, 343 F.3d 619, 623 (2d Cir. 2003)), *aff’d*, 561 U.S. 247 (2010). Ultimately, “the party asserting subject matter jurisdiction ‘has the burden of proving by a preponderance of the evidence that it exists.’” *Tandon v. Captain’s Cove Marina of Bridgeport, Inc.*, 752 F.3d 239, 243 (2d Cir. 2014) (quoting *Makarova*, 201 F.3d at 113); *see also Suarez v. Mosaic Sales Sols. US Operating Co.*, 720 F.