

United States Court of Appeals
For The Eighth Circuit
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March 04, 2022

Ms. Susan Kay Slivicki
11621 76th Street, N.E.
Fairdale, ND 58229

RE: 21-3627 Susan Slivicki v. Denis McDonough

Dear Ms. Slivicki:

Enclosed is a copy of the dispositive order entered today in the referenced case.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing must be received by the clerk's office within the time set by FRAP 40 in cases where the United States or an officer or agency thereof is a party (within 45 days of entry of judgment). Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. Pro se petitions for rehearing are not afforded a grace period for mailing and are subject to being denied if not timely received.

Michael E. Gans
Clerk of Court

CMD

Enclosure(s)

cc: Mr. Clerk, U.S. District Court, North Dakota
Ms. Tara Vavrosky Iversen

District Court/Agency Case Number(s): 3:20-cv-00070-ARS

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

No: 21-3627

Susan Kay Slivicki

Plaintiff - Appellant

v.

Denis McDonough, Secretary of Veterans Affairs

Defendant - Appellee

Appeal from U.S. District Court for the District of North Dakota - Eastern
(3:20-cv-00070-ARS)

JUDGMENT

Before GRUENDER, SHEPHERD, and STRAS, Circuit Judges.

This court has reviewed the original file of the United States District Court. It is ordered by the court that the judgment of the district court is summarily affirmed. See Eighth Circuit Rule 47A(a).

March 04, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

United States District Court
District of North Dakota

Susan Kay Slivicki,

Plaintiff,

JUDGMENT IN A CIVIL CASE

vs.

Case No. 3:20-cv-70

Denis McDonough, Secretary of Veterans Affairs,

Defendant.

- Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.
- Decision on Motion.** This action came before the Court on motion. The issues have been considered and a decision rendered.
- Stipulation.** This action came before the court on motion of the parties. The issues have been resolved.
- Dismissal.** This action was voluntarily dismissed by Plaintiff pursuant to Fed. R. Civ. P. 41(a)(1)(ii).

IT IS ORDERED AND ADJUDGED:

Pursuant to the Order filed on October 26, 2021, it is ORDERED that Slivicki's complaint, (Doc. 1; Doc. 30), is DISMISSED without prejudice.

Date: October 26, 2021

ROBERT J. ANSLEY, CLERK OF COURT

by: /s/ Shantel Jagol, Deputy Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA**

Susan Kay Slivicki,)
)
Plaintiff,)
)
vs.)
)
Denis McDonough, Secretary of Veterans)
Affairs,)
)
Defendant.)

Case No. 3:20-cv-70

ORDER

Plaintiff Susan Kay Slivicki, proceeding pro se, filed a complaint¹ against the Secretary of Veterans Affairs (VA) alleging breach of a settlement agreement and discrimination and retaliation in violation of the Americans with Disabilities Act (ADA). The VA moved to dismiss, asserting this court's lack of jurisdiction and Slivicki's failure to state a claim. (Doc. 35). Slivicki opposes the motion. (Doc. 38).

Background

Slivicki is a former employee of the Department of Veterans Affairs. (Doc. 30-4, p. 2). In 1998, Slivicki was working as a housekeeping aide at the Fargo, North Dakota, Veterans Affairs Medical Center when she suffered an on-the-job injury to her back and right foot. Id. Doctors recommended she limit walking and standing to one to two hours per day. Id. As a result of this limitation, the VA placed Slivicki in temporary light work positions from November 1998 to December 1999. Id. While in the light work positions, Slivicki persistently applied for other positions within the VA but was not hired for any other position. Id. at 3. When Slivicki's temporary light work positions expired on

¹ Slivicki filed two documents captioned as complaints. (Doc. 1; Doc. 30). The parties agreed the two documents together would be considered as one Amended Complaint. (Doc. 33).

December 19, 1999, the VA did not assign her to a new position. Id. at 3. In 2004, Slivicki sued the VA, alleging disparate treatment because of her gender and disability and retaliation motivated by her sister's Equal Employment Opportunity Commission complaint against the VA. Id.

The VA moved for summary judgment in Slivicki's 2004 case, and District Judge Ralph Erickson denied the VA's motion. Id. at 11.² Slivicki's case was scheduled to proceed to trial, but the parties settled shortly before trial.

Slivicki signed a settlement agreement on January 15, 2007, and a VA official signed it on January 22, 2007. (Doc. 24-1, p. 5). In that document, the VA agreed to pay Slivicki a sum of money in exchange for her agreement to "fully, finally and forever settle and release all matters . . . relating to plaintiff's employment with the VA[.]" Id. at 2. The agreement provided that Slivicki "may voluntarily seek employment with any VA across the nation[.]" Id. at 3.

Slivicki repeatedly sought employment with the VA after the 2007 settlement. From 2007 to 2015, Slivicki sent over fifty employment applications to the VA but was not hired for any position. (Doc. 44, p. 4). On September 24, 2019, and October 24, 2019, Slivicki filed formal complaints with the VA alleging violation of the settlement agreement because of failure to rehire her. (Doc. 37, pp. 3-4). The VA dismissed both

² Rule 56 of the Federal Rules of Civil Procedure supplies the standard for summary judgment. A court grants summary judgment if there are no genuine disputes of material fact and the moving party is entitled to judgment as a matter of law. If that standard is met, the court applies the law to the facts and directs judgment for the moving party. If the court concludes there are genuine issues of material fact to be decided by a fact-finder, the case proceeds to trial.

complaints as untimely. (Doc. 37-6; Doc. 37-11). On January 31, 2020, the EEOC upheld the dismissals on appeal. (Doc. 30-9).

Slivicki filed the complaint in this case on April 30, 2020, alleging the VA breached the settlement agreement by not rehiring her, disparate treatment because of a disability, and retaliation. (Doc. 1; Doc. 30).³

Law and Discussion

1. Subject Matter Jurisdiction

The VA asserts this court lacks jurisdiction over Slivicki's breach of contract claim. (Doc. 35). Federal courts have limited jurisdiction, and the party asserting federal court jurisdiction bears the burden of establishing the court's subject matter jurisdiction. Ark. Blue Cross & Blue Shield v. Little Rock Cardiology Clinic P.A., 551 F.3d 812, 816 (8th Cir. 2009). In this case, sovereign immunity presents an obstacle to subject matter jurisdiction.

To sue the United States, a plaintiff must show a waiver of sovereign immunity. United States v. Bormes, 568 U.S. 6, 10 (2012). The court cannot have jurisdiction over a claim against a federal agency unless the United States has waived sovereign immunity. The United States may partially waive sovereign immunity, granting subject matter jurisdiction only to certain federal courts over certain types of claims Id.

³ Slivicki requests a change of venue from this district to the EEOC. (Doc. 38, p. 1). Under the federal venue statute, 28 U.S.C.A. § 1404, the court may transfer a case to another federal district but not to an administrative agency like the EEOC. Thus, the court cannot grant Slivicki's request to transfer her case to the EEOC. Even if the court could make such a transfer, the EEOC has already considered and denied Slivicki's claims. (Doc. 37).

A. Breach of Contract Claim

Slivicki argues the VA breached the settlement agreement by failing to rehire her. (Doc. 1, p. 1). The United States responds that this court is without subject matter jurisdiction because claims to enforce a contract against the United States may be filed only in the United States Court of Federal Claims. (Doc. 36, p. 16).

Slivicki characterizes Judge Erickson's decision as finding the VA "guilty of wrongful termination, non-accommodation of OWCP injury, unfair hiring practices, disparate treatment . . . , defamation of character/slander . . . , [and] EEOC Retaliation." (Doc. 38, p. 1). In actuality, Judge Erickson did not find the VA "guilty" of any wrong; rather, he concluded only that factual issues precluded summary judgment against Slivicki. In agreeing to settle the 2004 case, Slivicki forfeited the right to trial of those factual issues in exchange for a sum of money.

A settlement agreement is a contract. Harris v. Brownlee, 477 F.3d 1043, 1047 (8th Cir. 2007). Claims to enforce a contract—including a settlement agreement—against the United States fall under the purview of the Tucker Act. 28 U.S.C.A. § 1491. That Act grants exclusive jurisdiction to the Court of Federal Claims over contract claims against the United States for amounts exceeding ten-thousand dollars. Id. Thus, if Slivicki seeks to enforce a contract against the United States for an amount exceeding ten-thousand dollars, this court cannot hear her claim.

In seeking to enforce a settlement agreement against the United States, Slivicki requests at least forty-two thousand dollars in backpay. (Doc. 30, p. 5). Thus, her claim meets both criteria of the Tucker Act: the type of claim and the statutory claim amount. See 28 U.S.C.A. § 1491. For that reason, Slivicki's claim could only be brought in the Court of Federal Claims, and this court is without subject matter jurisdiction.

Even if this court had jurisdiction, Slivicki's breach of contract claim would not be successful. The settlement agreement does not include a condition saying the VA would rehire Slivicki. Instead, it says that she "may voluntarily seek employment" with the VA and that a letter of commendation would be written on her behalf. (Doc. 24-1, p. 3). But nowhere is an offer of employment promised. Thus, Slivicki fails to state a claim for breach of the settlement agreement.

B. Bivens Claim

On her civil cover sheet, Slivicki checked a box indicating she sought to bring a Bivens claim against the VA. (Doc. 30, p. 3). "A Bivens claim is a cause of action brought directly under the United States Constitution against a federal official acting in his or her individual capacity for violations of constitutionally protected rights." Buford v. Runyon, 160 F.3d 1199, 1203 n.6 (8th Cir. 1998). A suit against an officer in his or her official capacity, like defendant Secretary of Veterans Affairs Denis McDonough here, is treated as a suit against the United States. Id. at 1203. And a Bivens claim cannot be brought against "the United States and its agencies because of sovereign immunity." Id. Thus, Slivicki's Bivens claim must be dismissed for lack of subject matter jurisdiction.

1. Failure to State a Claim

The VA challenges the remainder of Slivicki's claims under either Federal Rule of Civil Procedure 12(b)(6) or, alternatively, Rule 56. (Doc. 35). As to those claims over which the court has jurisdiction, the court considers defendant's motion under Rule 12(b)(6).⁴ To state a cognizable claim, a complaint must meet the requirements of

⁴ In considering a motion to dismiss, in addition to the complaint, the court may also "consider matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned without

Federal Rule of Civil Procedure 8(a)(2), as interpreted by Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), Ashcroft v. Iqbal, 556 U.S. 662 (2009), and their progeny. To meet the Twombly/Iqbal standard, a complaint must present a “plausible” claim and must give the defendants fair notice of the claim and grounds upon which it rests. E.g., Zink v. Lombardi, 783 F.3d 1089, 1098 (8th Cir. 2015). When the factual content of a complaint allows the court to reasonably infer a defendant is liable for the alleged misconduct, the complaint has stated a facially plausible claim. Iqbal, 556 U.S. at 678. In other words, the complaint must “possess enough heft to ‘sho[w] that the pleader is entitled to relief.’” Twombly, 550 U.S. at 557 (quoting Fed. R. Civ. P. 8(a)(2)). While facts alleged in the complaint are to be accepted as true, conclusory allegations of the elements of a cause of action are insufficient to state a claim that is plausible on its face. Id. In construing a pro se complaint, a court is to take a liberal approach and is to hold a pro se litigant to a less stringent pleading standard than would be required of attorneys. Erickson v. Pardus, 551 U.S. 89, 93 (2007).

A. Validity of the Settlement Agreement

Slivicki argues that if the settlement agreement did not require the VA to rehire her, the settlement agreement is invalid because the provision related to rehiring—that Slivicki “may voluntarily seek employment” with the VA—was not communicated to her.

converting the motion into one for summary judgment.” Zean v. Fairview Health Servs., 858 F.3d 520, 526 (8th Cir. 2017) (quoting Miller v. Redwood Toxicology Lab, Inc., 688 F.3d 928, 931 n.3 (8th Cir. 2012)). The court’s conclusion that Slivicki failed to state a claim upon which relief can be granted relies solely on the complaint and documents, including the settlement agreement and EEOC records, that are embraced by the complaint.

(Doc. 38, p. 2). The VA’s “refusal to discuss reemployment,” Slivicki argues, “does not just allow them to add it into a contract and call it good[.]” *Id.*

Settlement agreements are governed by basic principles of contract law. Sheng v. Starkey Lab'ys, Inc., 53 F.3d 192, 194 (8th Cir. 1995). One basic principle of contract law is that a party who agrees to a writing is assumed to know its contents. Even if a party was unaware of a term, the agreement covers “unknown as well as known terms.” Restatement (Second) of Contracts § 157 (1981). The provision that Slivicki “may voluntarily seek employment” with the VA was in the document she signed. (Doc. 24-1, p. 3). This provision was communicated to her, at the very least, by its inclusion in the written agreement. Thus, the contract cannot be considered invalid on that basis, and Slivicki fails to state a claim upon which relief could be granted.

B. Discrimination and Retaliation

The VA contends Slivicki’s claims for discrimination and retaliation should be dismissed for failure to exhaust administrative remedies, failure to state a claim, and settlement and waiver. Slivicki unsuccessfully applied for over fifty positions at the VA and alleges she was denied those positions because of discrimination based on her disability and because of retaliation motivated by her previous litigation against the VA. (Doc. 44, p. 4).

Slivicki’s discrimination and retaliation claims are analyzed under the Americans with Disabilities Act. See Hill v. Walker, 737 F.3d 1209, 1213 (8th Cir. 2013) (describing disability discrimination and retaliation claims as properly brought under the ADA). To bring a claim under the ADA, a plaintiff must initiate contact with the EEOC within forty-five days of a discriminatory event before bringing a claim in federal court. 29 C.F.R. § 1614.105.

The VA's denial of Slivicki's job applications, (Doc. 44, p. 4), are the alleged discriminatory events. Slivicki alleges she was most recently denied rehiring in 2015. *Id.* Slivicki says she "contacted the Fargo EEO office & left three message that were never returned," (Doc. 38, p. 3), but does not mention the dates of her attempted contacts. Slivicki's first documented contact with the EEOC was in 2018, and she did not file a formal EEOC complaint until 2019. (Doc. 37; Doc. 37-8). Slivicki did not contact the EEOC within forty-five-days of an alleged discriminatory event. Thus, Slivicki has not properly exhausted her administrative remedies, and her discrimination and retaliation claims must be dismissed for failure to state a claim.

Even assuming Slivicki did contact the EEOC within the forty-five-day window, her complaint nonetheless fails to state a claim upon which relief can be granted. Proving a discrimination or retaliation claim under the ADA requires, among other elements, a showing of causation. E.E.O.C. v. Prod. Fabricators, Inc., 763 F.3d 963, 969 (8th Cir. 2014). In other words, Slivicki must allege facts connecting her unsuccessful job applications to her disability or past litigation against the VA. Here, the allegations in Slivicki's complaint are insufficient to make that connection. A substantial amount of time has passed since Slivicki's 2004 lawsuit against the VA, and it is not apparent either her disability or previous litigation were the cause of her not being hired. For that reason, the complaint fails to state a claim upon which relief can be granted.

Slivicki also alleges the VA discriminated and retaliated against her when it failed to submit her injury to the Office of Workers' Compensation Programs. (Doc. 38, p. 3). But Slivicki's complaint does not connect the VA's alleged failure to submit her injury to the OWCP to her disability or to her previous litigation. Without these facts, the complaint fails to state a claim upon which relief can be granted. Slivicki alleges her

workers' compensation claim was wrongly denied. Id. However, this court does not have jurisdiction to review workers' compensation decisions made by the Secretary of Labor. See 5 U.S.C. § 8128(b).

Finally, the court notes Slivicki cannot bring claims related to any matters that arose prior to the 2007 settlement. For example, Slivicki alleges wrongful termination, defamation, and retaliation motivated by her sister's complaint to the EEOC. (Doc. 1, p. 3). Those claims were included in Slivicki's 2004 lawsuit, id., and she agreed to release them in the settlement agreement, (Doc. 24-1, p. 2). The settlement agreement is a valid contract in which Slivicki agreed to release the VA from any potential claims, known and unknown, that arose before the date of the settlement. Thus, any claims involving matters that occurred before January 15, 2007, must be dismissed for failure to state a claim.

Conclusion

This court does not have subject matter jurisdiction over Slivicki's claims for breach of the settlement agreement. As to her discrimination and retaliation claims, she failed to properly exhaust administrative remedies. The remainder of her complaint fails to state a claim upon which relief can be granted. It is therefore **ORDERED** that Slivicki's complaint, (Doc. 1; Doc. 30), is **DISMISSED** without prejudice.

JUDGMENT SHALL BE ENTERED ACCORDINGLY.

Dated this 26th day of October, 2021.

/s/ Alice R. Senechal

Alice R. Senechal

United States Magistrate Judge

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

No: 21-3627

Susan Kay Slivicki

Appellant

v.

Denis McDonough, Secretary of Veterans Affairs

Appellee

Appeal from U.S. District Court for the District of North Dakota - Eastern
(3:20-cv-00070-ARS)

ORDER

The petition for rehearing by the panel is denied.

April 26, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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