

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

SEP 23 2024

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MARILYN TILLMAN-CONERLY,

Plaintiff-Appellant,

v.

OFFICE OF PERSONNEL
MANAGEMENT; LAVERNE WATSON,

Defendants-Appellees.

No. 23-16120

D.C. No. 2:22-cv-01617-DAD-AC

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Dale A. Drozd, District Judge, Presiding

Submitted September 17, 2024**

Before: WARDLAW, BADE, and H.A. THOMAS, Circuit Judges.

Marilyn Tillman-Conerly appeals pro se from the district court's judgment dismissing her action concerning her federal retirement benefits. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal under Federal Rule of Civil Procedure 12(b)(1). *Davidson v. Kimberly-Clark Corp.*, 889 F.3d

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

956, 963 (9th Cir. 2018). We affirm.

The district court properly dismissed Tillman-Conerly's action for lack of subject matter jurisdiction because, under the Civil Service Reform Act, Tillman-Conerly was required to adjudicate her claims before the Office of Personnel Management ("Office"), the Merit Systems Protection Board ("Board"), and the U.S. Court of Appeals for the Federal Circuit. *See* 5 U.S.C. §§ 8347(b), (d) (stating that "[t]he Office shall adjudicate all claims" concerning retirement benefits and that its decisions may be appealed to the Board); 5 U.S.C. § 7703(b) (explaining that certain petitions for review of Board decisions must be filed in the Federal Circuit); 28 U.S.C. § 1295(a)(9) (providing the Federal Circuit with "exclusive jurisdiction" over appeals of the Board's final orders); *Lindahl v. Off. of Pers. Mgmt.*, 470 U.S. 768, 792 (1985) ("Sections 1295(a)(9) and 7703(b)(1) together appear to provide for exclusive jurisdiction over [Board] decisions in the Federal Circuit . . .").

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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NOV 15 2024

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MARILYN TILLMAN-CONERLY,

Plaintiff - Appellant,

v.

OFFICE OF PERSONNEL
MANAGEMENT and LAVERNE
WATSON,

Defendants - Appellees.

No. 23-16120

D.C. No. 2:22-cv-01617-DAD-AC
U.S. District Court for Eastern
California, Sacramento

MANDATE

The judgment of this Court, entered September 23, 2024, takes effect this
date.

This constitutes the formal mandate of this Court issued pursuant to Rule
41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

Appendix A

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARILYN Y. TILLMAN-CONERLY,

Plaintiff,

v.

UNITED STATES OFFICE OF
PERSONNEL MANAGEMENT;
LAVERNE WATSON,

Defendants.

No. 2:22-cv-1617 DAD AC PS

FINDINGS AND RECOMMENDATIONS

Plaintiff is proceeding in this matter pro se, and pre-trial proceedings are accordingly referred to the undersigned pursuant to Local Rule 302(c)(21). Defendant moves to dismiss this case for lack of subject matter jurisdiction. ECF No. 10. Plaintiff opposes the motion. ECF No. 12, 14. The parties appeared before the court for a hearing on the motion on June 28, 2023. For the reasons that follow, the undersigned recommends this case be DISMISSED in its entirety for lack of subject matter jurisdiction.

I. Background

Marilyn Y. Tillman-Conerly, proceeding in pro se, filed her complaint on September 15, 2022. ECF No. 1. Plaintiff paid the filing fee, id., so the complaint was not subject to screening under 28 U.S.C. § 1915(e)(2). Plaintiff asserts federal question jurisdiction because she is suing a federal entity, and diversity jurisdiction because she is a citizen of California, and the defendant is the "Federal Government of another state." ECF No. 1 at 2.

1 The complaint alleges that plaintiff, a retired federal employee, is not receiving her full
2 retirement payments because OPM employee Laverne Watson refuses to pay her the correct
3 monthly retirement benefit amount. Id. Plaintiff received a letter on January 31, 2019, that was
4 dated December 10, 2018, which incorrectly informed her that she received a refund of her Civil
5 Service Retirement Deduction for a period of service that ended before March 1, 1991, and that
6 she must redeposit \$25,955.00 to cover the service; if she did not, her monthly annuity would
7 decrease from \$3,247.00 to \$3,132.00. Id. Plaintiff attempted to resolve the issue with Watson in
8 February of 2019, but the matter was not resolved. Id. at 2-3. On April 2, 2020, plaintiff spoke
9 with OPM employee Mary Joe about the status of correcting her backpay and annuity, and
10 plaintiff was told the matter would be escalated to a supervisor. Id. at 3.

11 On May 8, 2020, plaintiff filed a first suit in this court against OPM and Laverne Watson,
12 which was dismissed without prejudice on December 18, 2020, for failure to complete service of
13 process. Tillman-Conerly v. OPM, 2:20-cv-00950 TLN KJN at ECF Nos. 12, 15. The dismissal
14 was affirmed by the Ninth Circuit on July 2, 2021. Id. at ECF Nos. 21, 22.

15 Defendants move to dismiss this case for lack of subject matter jurisdiction, on grounds
16 that judicial review of a decision of the Office of Personnel Management (“OPM”) is available
17 only in the United States Court of Appeals for the Federal Circuit and only after plaintiff exhausts
18 her administrative remedies with the OPM and at the Merit Systems Protection Board (“MSPB”).
19 ECF No. 10-1. ECF No. 10-1 at 2-3. In opposition to the motion, plaintiff argues that the
20 administrative process is optional and emphasizes that her case involves not only a taking of her
21 property in violation of the Fifth Amendment, but also a government conspiracy and racial
22 discrimination. ECF Nos. 12, 14.

23 II. Analysis

24 A. Legal Standards Governing Motions to Dismiss

25 Federal Rule of Civil Procedure 12(b)(1) allows a defendant to raise the defense, by
26 motion, that the court lacks jurisdiction over the subject matter of an entire action or of specific
27 claims alleged in the action. When a party brings a facial attack to subject matter jurisdiction,
28 that party contends that the allegations of jurisdiction contained in the complaint are insufficient

on their face to demonstrate the existence of jurisdiction. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). In a Rule 12(b)(1) motion of this type, the factual allegations of the complaint are presumed to be true, and the motion is granted only if the plaintiff fails to allege an element necessary for subject matter jurisdiction. Savage v. Glendale Union High Sch. Dist. No. 205, 343 F.3d 1036, 1039 n.1 (9th Cir. 2003); Miranda v. Reno, 238 F.3d 1156, 1157 n.1 (9th Cir. 2001).

B. This Court Does Not Have Subject Matter Jurisdiction

The Civil Service Reform Act (“CSRA”), which overhauled the civil service system and created both the OPM and the Merit System Protection Board (“MSPB”), provides that the OPM “shall adjudicate all claims” regarding retirement benefits. 5 U.S.C. § 8347(b). A final decision of the OPM is subject to review by the MSPB. 5 U.S.C. § 8347(d)(1). A final decision of the MSPB is subject to judicial review by the United States Court of Appeals for the Federal Circuit, which has “exclusive jurisdiction” over such appeals. 28 U.S.C. § 1295(a)(9); 5 U.S.C. § 7703(b)(1), (d); Lindahl v. OPM, 470 U.S. 768, 773 (1985) (recognizing that judicial review of MSPB decisions regarding retirement benefits is available only in the United States Court of Appeals for the Federal Circuit); Rodriguez v. United States, 852 F.3d 67, 83 (1st Cir. 2017) (explaining that the “exclusive remedial framework” provided by the CSRA provides that a plaintiff must pursue retirement claims through the statutory structure – which requires a decision by OPM, followed by an appeal to the MSPB, and finally judicial review in the Federal Circuit); Ashgar v. United States, 23 Cl. Ct. 226, 233 (1991) (“This statutory scheme of administrative review by the MSPB and judicial review by the Federal Circuit is the exclusive avenue for judicial review of claims for [Civil Service Retirement System] benefits denied by OPM.”). This statutory scheme “enables the development, through the MSPB, of a unitary and consistent Executive Branch position on matters involving personnel action, avoids an unnecessary layer of judicial review in lower federal courts, and encourages more consistent judicial decisions.” United States v. Fausto, 484 U.S. 439, 449 (1988) (internal citations omitted).

In this case, plaintiff seeks judicial review of an OPM letter regarding her monthly retirement annuity. She argues that OPM’s actions constitute a government taking and a due

1 process violation in violation of the Constitution, and that going through MSPB is an
2 “administrative option, not a requirement.” ECF No. 12 at 1-2. As explained above, this is not
3 the case: there is a specific statute that governs how benefits-related claims like plaintiff’s must
4 proceed, and this statute deprives the Eastern District of California of jurisdiction over such
5 claims. See Ashgar, 23 Cl. Ct. at 233 (“The sole avenue of relief available to plaintiff,
6 concerning [her] request for ... retirement benefits, is through the statutory and regulatory scheme
7 of administrative remedies established by [the CSRA].”). Judicial review of plaintiff’s OPM
8 letter regarding retirement benefits is thus available *only* in the United States Court of Appeals for
9 the Federal Circuit and *only* after plaintiff exhausts her administrative remedies with the OPM
10 and at the MSPB.

11 Plaintiff cites Knick v. Township of Scott, 139 S. Ct. 2162 (2019), for the proposition that
12 a claim under the Takings Clause may go directly to district court and may not be subject to any
13 administrative exhaustion requirement. ECF No. 12 at 1; ECF No. 14 at 2, 3. Knick involved a
14 lawsuit under 42 U.S.C. § 1983 against a municipality for an uncompensated taking of an interest
15 in real property. The question presented to the Supreme Court in that case involved ripeness, not
16 administrative exhaustion. The Court held that a takings claim becomes ripe when the taking
17 occurs, and that ripeness does not require unsuccessful state court litigation in pursuit of
18 compensation. Knick, 139 S. Ct. at 2167, 2170. Accordingly, a § 1983 plaintiff with a takings
19 claim may go directly to district court—the court with jurisdiction over the lawsuit—without first
20 seeking relief in state court. See id. at 2172. Knick has no bearing whatsoever on plaintiff’s case.

21 Congress has given the district court’s jurisdiction over lawsuits against municipalities
22 under § 1983, so ripe § 1983 claims like the claim in Knicks may be filed in district court. In the
23 Civil Service Reform Act, however, Congress has given exclusive jurisdiction over federal
24 employee benefits disputes to the Federal Circuit, so disputes related to retirement benefits must
25 be taken to the Federal Circuit. Plaintiff’s theory that the dispute over her benefits constitutes an
26 unconstitutional taking does not affect the applicability of the CSRA. Whether or not Ms.
27 Conerly has a cognizable takings claim—or a racial discrimination claim, or a conspiracy claim—
28 is not a question this court has jurisdiction to consider.

III. Pro Se Plaintiff's Summary

The district court cannot consider your case because the Civil Service Reform Act says that challenges to OPM's decisions on retirement benefits can only be judicially reviewed by the United States Court of Appeals for the Federal Circuit, which is in Washington, D.C. That court will consider claims that have been denied first by OPM and then by the MSPB. This is not an optional process, it is the only process available to challenge a benefits determination by OPM.

IV. Conclusion

For the reasons set forth above, the undersigned recommends that defendants' motion to dismiss (ECF No. 10) be GRANTED and that this case be dismissed for lack of subject matter jurisdiction.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Id.; see also Local Rule 304(b). Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may waive the right to appeal the District Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

DATED: June 28, 2023


ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARILYN Y. TILLMAN-CONERLY,

Plaintiff,

v.

UNITED STATES OFFICE OF
PERSONNEL MANAGEMENT, et al.,

Defendants.

No. 2:22-cv-01617-DAD-AC (PS)

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS AND GRANTING
DEFENDANTS' MOTION TO DISMISS

(Doc. Nos. 10, 16)

Plaintiff Marilyn Y. Tillman-Conerly, proceeding *pro se*, initiated this civil action on September 15, 2022. (Doc. No. 1.) This matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On June 29, 2023, the assigned magistrate judge issued findings and recommendations recommending that defendants' motion to dismiss this action due to a lack of subject matter jurisdiction (Doc. No. 10) be granted and that this action be dismissed without leave to amend. (Doc. No. 16.) Those findings and recommendations were served on the parties and contained notice that any objections thereto were to be filed within twenty-one (21) days after service. (*Id.* at 5.) On July 20, 2023, plaintiff filed objections to the pending findings and recommendations. (Doc. No. 17.) Defendants filed a response thereto on August 2, 2023, but they did not file objections of their own. (Doc. No. 18.)

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1 In her objections, plaintiff does not meaningfully address the analysis in the findings and
2 recommendations. Rather, plaintiff merely restates the arguments that she had presented in her
3 opposition to defendants' motion to dismiss (Doc. No. 12). (Doc. No. 17.) But those arguments
4 have already been thoroughly addressed and properly rejected in the findings and
5 recommendations. Thus, plaintiff's objections do not provide any basis upon which to reject the
6 pending findings and recommendations.

7 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), this court has conducted a
8 *de novo* review of the case. Having carefully reviewed the entire file, including plaintiff's
9 objections and defendants' response, the court concludes that the findings and recommendations
10 are supported by the record and by proper analysis.

11 Accordingly,

- 12 1. The findings and recommendations issued on June 29, 2023 (Doc. No. 16) are
13 adopted in full;
- 14 2. Defendants' motion to dismiss (Doc. No. 10) is granted;
- 15 3. This action is dismissed due to a lack of subject matter jurisdiction; and
- 16 4. The Clerk of the Court is directed to close this case.

17 IT IS SO ORDERED.

18 Dated: August 4, 2023

19 Dale A. Drozd
UNITED STATES DISTRICT JUDGE