FILED: April 6, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-2383
(1:16-cv-01468-AJT-TCB)

CHARLES DERECK ADAMS

Plaintiff - Appellant

v.

DEPARTMENT OF DEFENSE

Defendant - Appellee

ORDER

The court denies the petition for rehearing.

Entered at the direction of the panel: Chief Judge Gregory, Judge Harris, and Senior Judge Shedd.

For the Court

/s/ Patricia S. Connor, Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-2383

CHARLES DERECK ADAMS,

Plaintiff - Appellant,

v.

DEPARTMENT OF DEFENSE,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Anthony John Trenga, District Judge. (1:16-cv-01468-AJT-TCB)

Submitted: January 18, 2018 Decided: January 22, 2018

Before GREGORY, Chief Judge, and SHEDD and HARRIS, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Charles Dereck Adams, Appellant Pro Se. R. Trent McCotter, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Charles Dereck Adams seeks to appeal the district court's order denying relief on his complaint challenging the denial of his request for early retirement from the Department of Defense. We dismiss the appeal for lack of jurisdiction because the notice of appeal was not timely filed.

When the United States or its officer or agency is a party, the notice of appeal must be filed no more than 60 days after the entry of the district court's final judgment or order, Fed. R. App. P. 4(a)(1)(B), unless the district court extends the appeal period under Fed. R. App. P. 4(a)(5), or reopens the appeal period under Fed. R. App. P. 4(a)(6). "[T]he timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Bowles v. Russell*, 551 U.S. 205, 214 (2007).

The district court's order was entered on the docket on September 29, 2017. The notice of appeal was filed on November 30, 2017. Because Adams failed to file a timely notice of appeal or to obtain an extension or reopening of the appeal period, we grant the Government's motion to dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

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

CHARLES DERECK ADAMS, Plaintiff, v. DEPARTMENT OF DEFENSE, Defendant.	)	Civil Action No. 1:16-cv-1468 (AJT/TCB)

ORDER

Plaintiff Charles Adams ("Plaintiff" or "Mr. Adams") is a former employee of Defendant Department of Defense's ("Defendant" or "DOD") Missile Defense Agency ("MDA"). In 2010, MDA denied Mr. Adams' request for early retirement under DOD's Voluntary Early Retirement Authority ("VERA"). The merits of that decision were eventually reviewed by an Administrative Judge of the Merit Systems Protection Board (the "MSPB"), who found in February 2016, after an evidentiary hearing, that Plaintiff had failed to establish that he was entitled to early retirement under VERA or that the denial of his VERA requests was based on discrimination. The MSPB affirmed the Administrative Judge's decision on July 14, 2016. On August 11, 2016, Plaintiff filed this action challenging the MSPB's decision in the United States Court of Appeals for the Federal Circuit. The Federal Circuit transferred the case to this Court because district courts have jurisdiction over "mixed" cases such as this, where a federal employee appeals a personnel action against him to the Merit Systems Protection Board (the "MSPB"), and the employee's objections include discrimination claims. On February 22, 2017, the Court ordered Plaintiff to file and serve a complaint in this action. [Doc. No. 9.] In response, on March 16, 2017, Plaintiff filed a submission [Doc. No. 11], which the Court construed

liberally given Plaintiff's *pro se* status and deemed to be the Complaint in this action [Doc. No. 12].

Presently pending before the Court are Defendant's Motion to Dismiss in Part [Doc. No. 16] and Motion for Partial Summary Judgment [Doc. No. 17] (the "Motions"). Plaintiff was provided *Roseboro* notice [Doc. No. 19] and has filed his opposition to the Motions [Doc. No. 21], along with two subsequent filings in response to Defendant's reply brief [Doc. Nos. 23-24]. Upon consideration of the parties' filings, and for the following reasons, Defendant's Motion to Dismiss in Part is GRANTED, Defendant's Motion for Partial Summary Judgment is GRANTED, and this case is DISMISSED.

I. BACKGROUND

Plaintiff was an Information Technology Specialist with the MDA. In April 2009, the Defense Intelligence Agency notified Plaintiff that it made a preliminary determination to revoke his security clearance for violations of agency security regulations. Effective June 15, 2009, MDA suspended Plaintiff indefinitely from his position after he lost his security clearance, as his position required access to certain types of classified information. Plaintiff appealed MDA's decision to place him on indefinite suspension to the MSPB, which affirmed that decision, and then to the Federal Circuit, which also affirmed on April 13, 2010. Separately, on July 20, 2009, Plaintiff met with an Equal Employment Opportunity ("EEO") counselor concerning discrimination with respect to his June 15, 2009 indefinite suspension. He filed a formal EEO complaint with the agency on September 22, 2009. On November 25, 2009, the agency dismissed the complaint, which Plaintiff appealed to Equal Employment Opportunity Commission ("EEOC") in December 2009. On April 14, 2010, the final agency arbiter confirmed the revocation of Plaintiff's security clearance. MDA then served Plaintiff with a

Notice of Proposed Removal from employment. On April 20, 2010, Plaintiff submitted an application for early retirement under VERA. MDA denied this request. Plaintiff was subsequently terminated in June 2010. Plaintiff alleges in his Complaint that the decision to deny him early retirement under VERA was based on discrimination against him because of his race and age, and was in retaliation for his appeals concerning his situation, including his appeal to the EEOC. He alleges that other MDA employees were allowed to retire early under VERA, and that he was offered the opportunity to retire early under VERA in 2006. He also contends that MDA offered him early retirement under VERA as part of two settlement offers in exchange for his dropping his various appeals.

II. STANDARD OF REVIEW

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the complaint. *See Randall v. United States*, 30 F.3d 518, 522 (4th Cir. 1994); *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1994). A claim should be dismissed "if, after accepting all well-pleaded allegations in the plaintiff's complaint as true . . . it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999); *see also Trulock v. Freeh*, 275 F.3d 391, 405 (4th Cir. 2001). In considering a motion to dismiss, "the material allegations of the complaint are taken as admitted," *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) (citations omitted), and the court may consider exhibits attached to the complaint, *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F. 2d 1462, 1465 (4th Cir. 1991).

Moreover, "the complaint is to be liberally construed in favor of plaintiff." *Id.*; *see also Bd. of Trs. v. Sullivant Ave. Props., LLC*, 508 F. Supp. 2d 473, 475 (E.D. Va. 2007). In addition, a motion to dismiss must be assessed in light of Rule 8's liberal pleading standards, which

require only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8. Nevertheless, while Rule 8 does not require "detailed factual allegations," a plaintiff must still provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (the complaint "must be enough to raise a right to relief above the speculative level" to one that is "plausible on its face"); *see also Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008). As the Supreme Court stated in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2008), "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the Court to draw a reasonable inference that the defendant is liable for the conduct alleged."

Under Federal Rule of Civil Procedure 56, summary judgment is appropriate only if the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Evans v. Techs. Apps. & Serv. Co.*, 80 F.3d 954, 958-59 (4th Cir. 1996). The party seeking summary judgment has the initial burden to show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). To defeat a properly supported motion for summary judgment, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 247-48 ("[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that

there be no *genuine* issue of *material* fact."). Whether a fact is considered "material" is determined by the substantive law, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* at 248. The facts must be viewed, and all reasonable inferences drawn, in the light most favorable to the nonmoving party. *Id.* at 255; *see also Lettieri v. Equant Inc.*, 478 F.3d 640, 642 (4th Cir. 2007).

In a "mixed" case such as this one, Plaintiff "shall have the right to have the facts subject to trial de novo" on any discrimination claims in his Complaint.[1] 5 U.S.C. § 7703(c)(3). On a motion for summary judgment, "'[n]otwithstanding the de novo nature of the district court's review of discrimination claims, the court may consider evidence from the MSPB's formal record' in addition to the pleadings and discovery adduced in this proceeding." *Butler v. Bair*, No. 1:10-cv-817 (AJT/TRJ), 2010 WL 4623951, at *3 (E.D. Va. Nov. 4, 2010) (citing *Monk v. Potter*, 723 F. Supp. 2d 860, 872 (E.D. Va. 2010), *aff'd sub nom. Monk v. Donahoe*, 407 F. App'x 675 (4th Cir. 2011)). The Court reviews any other claims in the Complaint (which would fall within the category of nondiscrimination claims) based on the administrative record to determine whether the MSPB's decisions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; "obtained without procedures required by law, rule or regulation having been followed"; or "unsupported by substantial evidence." 5 U.S.C. § 7703(c); *Hooven–Lewis v. Caldera*, 249 F.3d 259, 265-66 (4th Cir. 2001).

[1] Discrimination claims are those where the employee or applicant alleges "discrimination prohibited by—(i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), (ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)), (iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), (iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or (v) any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph." 5 U.S.C. § 7702(a)(1)(B). This includes claims of retaliation under these sections. *See Diggs v. Dep't of Hous. & Urban Dev.*, 670 F.3d 1353, 1357 (Fed. Cir. 2011); *see also Bonds v. Leavitt*, 629 F.3d 369, 384 (4th Cir. 2011) ("Although neither the Supreme Court nor our court has squarely addressed whether 2000e–16(a) prohibits retaliation, reading these provisions together leaves us with little doubt that Congress incorporated the protections against retaliation afforded to private employees by 2000e–3(a).") (internal quotation marks and citations omitted).

III. DISCUSSION

As an initial matter, to the extent that Plaintiff's Complaint raises claims based on anything other than the denial of early retirement under VERA—including Plaintiff's reassignment, suspension, and termination from MDA, and his attempt to obtain a civilian retiree card after his employment at MDA ended—such claims are barred by the doctrine of claim preclusion because they all have been decided in federal court. *See Pittston Co. v. United States*, 199 F.3d 694, 704 (4th Cir. 1999) (Claim preclusion bars re-litigation of claims where "1) the prior judgment was final and on the merits, and rendered by a court of competent jurisdiction in accordance with the requirements of due process; 2) the parties are identical, or in privity, in the two actions; and, 3) the claims in the second matter are based upon the same cause of action involved in the earlier proceeding.").[2] While Plaintiff's filing that the Court construed to be his Complaint appears to reassert such claims, Plaintiff apparently agrees in his opposition that they are not a part of this case. *See* [Doc. No. 21 at 2] ("This appeal is totally different than any previous appeal. It deals with the discriminatory denial of VERA, and not reassignment, suspension, termination, or the Denial of my DoD Civilian Retiree ID Card. MDA is simply trying to use multiple non-related claims to get this one dismissed."). In any event, claims based on Plaintiff's reassignment, suspension, and termination from MDA, and his attempt to obtain a civilian retiree card after his employment at MDA ended are dismissed to the extent they are asserted.

[2] The prior judgments were rendered in *Adams v. Merit Systems Protection Bd.*, 651 F. App'x 993 (Fed. Cir. 2016), *cert. denied*, -- S.Ct. ---, 2017 WL 1540529 (U.S. May 1, 2017) (claims based on reassignment); *Adams v. Dep't of Def.*, 371 F. App'x 93 (Fed. Cir.), *cert. denied*, 562 U.S. 920 (Oct. 4, 2010) (claims based on suspension); *Adams v. Dep't of Def.*, 688 F.3d 1330 (Fed. Cir. 2012) (claims based on termination); Order, *Adams v. Dep't of Def.*, No. 1:15-cv-1143-AJT-JFA (E.D. Va. Sept. 30, 2016) (ECF No. 22), *aff'd*, — F. App'x ---, 2017 WL 1226133 (4th Cir. Apr. 3, 2017) (claims based on denial of retiree ID card).

A. Discrimination

Absent direct evidence of racial discrimination, the prima facie elements of race discrimination claim under Title VII are: "(1) satisfactory job performance; (3) adverse employment action; and (3) different treatment from similarly situated employees" of a different race. *See Coleman v. Md. Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010), *aff'd*, 566 U.S. 30 (2012). A plaintiff need not plead his prima facie case to state a claim, but he must plead facts that make the statutory cause of action plausible, including some basis from which to infer that the employer's actions were based on race. *See, e.g.*, *McCleary-Evans v. Md. Dep't of Transp.*, 780 F.3d 582, 585 (4th Cir. 2015), *cert. denied*, 136 S. Ct. 1162 (2016); *Coleman*, 626 F.3d at 190. The elements of a prima facie case of age discrimination under the Age Discrimination in Employment Act ("ADEA") are substantially similar, *see Warch v. Ohio Cas. Ins. Co.*, 435 F.3d 510, 513 (4th Cir. 2006),[3] except that a "plaintiff suing under the ADEA must show that 'but for' age discrimination," as opposed to being only a motivating factor, "the adverse employment action would not have occurred." *Kirkland v. Mabus*, 206 F. Supp. 3d 1073, 1082 (E.D. Va. 2016) (citing *Gross v. FBL Fin. Servs. Inc.*, 557 U.S. 167, 176 (2009)).

Even assuming that denial of his request for early retirement under VERA can constitute an adverse employment action,[4] Plaintiff has failed to plausibly state a claim for race or age discrimination based on MDA's denial of his VERA request. Plaintiff's Complaint contains no allegations of direct evidence of discrimination based on his race or age with respect MDA's

[3] "Generally speaking, to establish a prima facie case of unlawful age discrimination, [the plaintiff] must show that (1) he is a member of the protected class; (2) he was qualified for the job and met [the employer's] legitimate expectations; (3) he was discharged despite his qualifications and performance; and (4) following his discharge, he was replaced by a substantially younger individual with comparable qualifications." *Warch*, 435 F.3d at 513.

[4] *Compare Hottenroth v. Vill. of Slinger*, 388 F.3d 1015, 1033 (7th Cir. 2004) ("[A]n adverse employment action does not include an employer's refusal to grant an employee a discretionary benefit to which she is not automatically entitled."), *with Paquin v. Fed. Nat'l Mortg. Ass'n*, 119 F.3d 23, 32 (D.C.Cir.1997) ("An employer's withdrawal of a voluntary benefit . . . may constitute adverse action.").

denial of early retirement under VERA; and the Court must assess whether he has alleged facts from which inferences of race or age discrimination are plausible. There is no basis from the Plaintiff's Complaint or the documents attached thereto to plausibly infer that MDA's denial had anything to do with Plaintiff's race or age. In that regard, Plaintiff only alleges that MDA denied his early retirement request under VERA "despite the fact that they authorized it for others in my office and MDA at large." Compl. [Doc. No. 11] at 7. While Plaintiff also alleges that none of the twenty-two individuals in MDA's Senior Executive Service are African Americans and that he was replaced by a younger individual, these allegations do not make plausible Plaintiff's claims of unlawful discrimination in connection with MDA's denial of early retirement under VERA. More specifically, there are no allegations that any non-African American, or individual of significantly different age than Plaintiff, who were on indefinite suspension for losing security clearance were granted early retirement under VERA. Indeed, there are no factual details in Plaintiff's Complaint regarding the other individuals who worked for MDA that received early retirement under VERA. Thus, the Complaint's factual allegations "fail[] to establish a plausible basis for believing" that any non-African Americans, or employees of a significantly different age than Plaintiff, "were actually similarly situated" to Plaintiff "or that race [or age] was the true basis for" MDA's denial of early retirement under VERA. *See Coleman*, 626 F.3d at 190. While the allegations could be "consistent with discrimination," they do "not alone support a reasonable inference that the decisionmakers were motivated by [racial or age] bias." *See McCleary-Evans*, 780 F.3d at 586. For these reasons, Plaintiff has failed to plausibly state a claim for discrimination based on race in violation of Title VII or based on age in violation of the ADEA.

B. Retaliation

To state a claim for retaliation, a plaintiff must plausibly allege that (1) he "engaged in a protected activity"; (2) "the employer acted adversely against" him; and (3) "a causal connection between the protected activity and the asserted adverse action." *Ziskie v. Mineta*, 547 F.3d 220, 229 (4th Cir. 2008). Plaintiff alleges that MDA's denial of early retirement under VERA after he had filed an appeal with the Equal Employment Opportunity Commission ("EEOC") (and his other appeals not based on allegations of discrimination) demonstrates that MDA's denial was retaliatory. He also alleges that MDA made him settlement offers that included approval of early retirement under VERA in exchange for him dropping his various challenges, although he does not allege when these settlement offers occurred, and that MDA had previously offered him early retirement under VERA in 2006. As an initial matter, the settlement offers cannot form the basis for the adverse action in a retaliation claim. *See, e.g., Sicher v. Merrill Lynch*, No. 09 C 1825, 2011 WL 892746, at *4 (N.D. Ill. Mar. 9, 2011) ("Payments offered to a former employee in exchange for a release of legal claims . . . are a discretionary benefit and do not constitute adverse employment action where those payments are not required by a contract."). *Cf.* Fed. R. Evid. 408. Moreover, the temporal proximity between Plaintiff's EEOC appeal, which occurred in December 2009, and MDA's denial of his April 20, 2010 VERA request is too great to establish a causal connection in itself, as "[e]ven a mere ten-week separation between the protected activity and termination 'is sufficiently long so as to weaken significantly the inference of causation between the two events.'" *Perry v. Kappos*, 489 F. App'x 637, 643 (4th Cir. 2012) (quoting *King v. Rumsfeld*, 328 F.3d 145, 151 n.5 (4th Cir. 2003); *see Pascual v. Lowe's Home Centers, Inc.*, 193 F. App'x 229, 233 (4th Cir. 2006) ("In this case, at least three to four months separated the termination of Pascual's employment and the claimed protected activities. We find

that this time period is too long to establish a causal connection by temporal proximity alone."). For these reasons, Plaintiff has failed to plausibly state a claim for retaliation based on his protected activity appealing the agency's decision to the EEOC.

C. Entitlement to VERA

To the extent Plaintiff's Complaint alleges that he is entitled to early retirement under VERA's terms, the Court reviews this non-discrimination claim based on the administrative record to determine whether the Administrative Judge's and MSPB's decisions were arbitrary and capricious. Upon the review of the administrative record, it the Court concludes that the Administrative Judge's and MSPB's decisions finding that Plaintiff was not entitled to early retirement under VERA were well-reasoned and support by substantial evidence. Indeed, the statute authorizing VERA for the Department of Defense says only that an employee "may" receive early retirement provided certain conditions are met. *See* 5 U.S.C. § 9902(f).

IV. CONCLUSION

For these reasons, upon consideration of Plaintiff's Complaint and the exhibits attached thereto, the Motions and the filings in support thereof and in opposition thereto, it is hereby

ORDERED that Defendant's Motion to Dismiss in Part [Doc. No. 16] be, and the same hereby is, GRANTED; and it is further

ORDERED that Defendant's Motion for Partial Summary Judgment [Doc. No. 17] be, and the same hereby is, GRANTED; and this case is DISMISSED.

This is a final order for purposes of appeal. To appeal, Plaintiff must file a written Notice of Appeal with the Clerk of the Court within sixty (60) days of the date of this Order. A Notice of Appeal is a short statement stating a desire to appeal an order and identifying the date

of the order Plaintiff wishes to appeal. Failure to file a timely Notice of Appeal waives Plaintiff's right to appeal this decision.

The Clerk is directed to forward a copy of this Order to all counsel of record and to Plaintiff and to enter judgment in favor of Defendant under Federal Rule of Civil Procedure 58.

/s/
Anthony J. Trenga
United States District Judge

Alexandria, Virginia
September 29, 2017

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