

In the United States Court of Federal Claims

No. 10-755 C
(Filed: September 9, 2011)
NOT FOR PUBLICATION

DONNA KERRIGAN,

Plaintiff,

v.

THE UNITED STATES,

Defendant.



Donna Kerrigan, Seward, Alaska, plaintiff *pro se*.

Jeffrey D. Klingman, Trial Attorney, Donald E. Kinner, Assistant Director, Jeanne E. Davidson, Director, Commercial Litigation Branch, Tony West, Assistant Attorney General, Civil Division, United States Department of Justice, Washington, D.C., for defendant.

OPINION AND ORDER

GEORGE W. MILLER, Judge

Ms. Donna Kerrigan filed a complaint in this court seeking reinstatement to her previous position with the United States Forest Service, a part of the United States Department of Agriculture (“USDA”). She also sought back pay and benefits, attorney’s fees, and punitive damages. On March 11, 2011, the Government moved to dismiss Ms. Kerrigan’s complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Rules of the Court of Federal Claims (“RCFC”) or, alternatively, for failure to state a claim upon which relief can be granted pursuant to RCFC 12(b)(6) (docket entry 8) (“Def.’s Mot.”). For the reasons set forth below, the Court **GRANTS IN PART** defendant’s RCFC 12(b)(1) motion to dismiss for lack of jurisdiction with respect to plaintiff’s claims for attorney’s fees, punitive damages, and all employment claims resolved by Ms. Kerrigan’s settlement with the USDA, which was approved by the Merit Systems Protection Board (“MSPB”). The Court **DENIES IN PART** defendant’s 12(b)(1) motion to dismiss Ms. Kerrigan’s claim for miscalculated accrued annual leave because that claim is within the Court’s jurisdiction. In view of the fact that Ms. Kerrigan has alleged sufficient facts to state a claim upon which relief can be granted, the Court **DENIES** defendant’s 12(b)(6) motion to dismiss that claim.

I. Background

A. *Merit Systems Protection Board Settlement*

The USDA, of which the U.S. Forest Service is a part, employed Ms. Kerrigan as a Minerals Specialist Archaeologist in the Chugach National Forest. *Kerrigan v. Vilsack*, 2009 WL 1529550, *1 (E.E.O.C. May 21, 2009) (“E.E.O.C. Dec.”). Her position entitled her to retirement benefits from the Civil Servant Retirement System, E.E.O.C. Dec. at *4 n.1, and a lump-sum payment for accrued leave upon separation pursuant to 5 U.S.C. § 5552. In December 2003, the USDA removed Ms. Kerrigan from her position, and in January 2004, she challenged her removal before the MSPB. Am. Compl. ¶¶ 5, 8 (docket entry 6, Jan. 10, 2011). Ms. Kerrigan was represented by counsel throughout the MSPB proceedings, which were resolved on November 15, 2004, when she entered into a settlement agreement with the USDA. Def.’s Mot. at App. 6-8 (“Settlement Agreement”).

Pursuant to the Settlement Agreement, the USDA agreed to: (1) rescind the removal action and place Ms. Kerrigan on administrative leave; (2) issue a notice of directed reassignment; (3) allow Ms. Kerrigan to apply for Discontinued Service Retirement (“DSR”) benefits; (4) refrain from providing any employment or character references; and (5) pay \$5000 in attorney’s fees. Def.’s Mot. at App. 6-7. In consideration, Ms. Kerrigan agreed that the settlement satisfied her claims against the USDA and promised not to file any new complaints involving employment-related issues covered by the settlement. Def.’s Mot. at App. 7.

B. *Equal Employment Opportunity Counseling and Review*

As a result of the settlement, Ms. Kerrigan applied for and was granted DSR, but the Government made numerous mistakes when calculating her DSR benefits. E.E.O.C. Dec. at *4. She sought Equal Employment Opportunity counseling and filed a formal complaint alleging that the calculation errors were either retaliation for whistle-blowing or deliberate acts of discrimination. *Id.* at 1. In April 2007, an administrative law judge dismissed her complaint without a hearing, and the Equal Employment Opportunity Commission (“EEOC”) affirmed the dismissal. *Id.* at 1, 5.

The EEOC opinion acknowledged that Ms. Kerrigan’s DSR benefits were incorrectly calculated, but ultimately affirmed the administrative law judge’s decision to dismiss her complaint because there was no evidence that the mistakes were the result of discrimination or reprisal. *Id.* at 4-5. The Commission’s decision noted that the recently reorganized Alaska Region Human Resources office had a “reduced and overworked staff,” which led to “severe quality control problems” and, in particular, “retirement errors were a systemic problem in the relevant region.” *Id.* at 5. The EEOC explained that the Office of Personnel Management (“OPM”) had identified errors in Ms. Kerrigan’s service computation date and sick leave, but OPM corrected these errors by September 21, 2005.¹ *Id.* at 4. The EEOC therefore dismissed

¹ The EEOC investigation found that Ms. Kerrigan’s service computation date and sick leave were originally miscalculated due to clerical errors, but did not address her allegations of

her case. *Id.* at 5. On August 5, 2009, the EEOC denied Ms. Kerrigan's request for reconsideration and sent her a right-to-sue letter. Am. Compl. at Ex. 1.

C. Before the United States District Court for the District of Alaska

Ms. Kerrigan filed a complaint with the United States District Court for the District of Alaska on November 6, 2009. Def.'s Mot. at App. 1-2. On August 24, 2010, that court held that Ms. Kerrigan had unambiguously settled all employment-related claims based on conduct that occurred prior to her resignation from the USDA and dismissed all claims that arose before the settlement date, including claims for reinstatement, back pay with interest, upgraded back pay, and intentional infliction of emotional distress. Def.'s Mot. at App. 4. The District Court in Alaska also dismissed Ms. Kerrigan's claims that accrued after the settlement agreement as meritless—specifically, claims for intentional infliction of emotional distress and discrimination under Title VII. Def.'s Mot. at App. 5. The District Court determined that Ms. Kerrigan's remaining claims against the United States—including claims for punitive damages, retirement miscalculation, and attorney's fees—totaled more than \$10,000 and transferred those claims to the Court of Federal Claims pursuant to 28 U.S.C. § 1631. Def.'s Mot. at App. 5.

D. Before the United States Court of Federal Claims

The transferred case was filed in this Court on November 4, 2010 (docket entry 1). Ms. Kerrigan subsequently filed the same complaint that she had previously submitted to the District Court, which this Court treated as an amended complaint as required by RCFC 3.1(a)(4). January 10, 2011 Order (docket entry 5). Ms. Kerrigan's complaint requested the following relief: (1) vacation of the settlement and reinstatement to her former position; (2) back pay with interest (\$375,000); (3) a back pay upgrade to the GS-11 level; (4) compensation for intentional infliction of emotional distress (\$300,000); (5) payment of accrued attorney's fees (approximately \$35,000); (6) payment of the remaining annual leave balance (\$613); and (7) punitive damages (\$300,000). Am. Compl. ¶ 114.

On March 11, 2011, defendant moved to dismiss Ms. Kerrigan's claims for lack of subject matter jurisdiction and failure to state a claim pursuant to RCFC 12(b)(1) and (6). In response to defendant's motion, Ms. Kerrigan clarified her demands but did not directly address the jurisdictional challenges presented by the Government.² Pl.'s Mot. in Opp'n to Def.'s Mot. at 26-30.

miscalculated annuity payments, inadequate accrued annual leave, or insufficient contributions to her Thrift Savings Plan. E.E.O.C. Dec. at *4.

² In her Motion in Opposition to Defendant's Motion to Dismiss, Ms. Kerrigan clarified the relief she requested, specifically: (1) order OPM to recalculate her annuity benefits; (2) notify OPM that employment documents need to be corrected, including the service computation date, Thrift Savings Plan, and annual leave amounts; (3) order payment for sixteen hours of accrued annual leave (\$613); and (4) review her official personnel folder. Pl.'s Mot. in Opp'n to Def.'s Mot. at 26-30 (docket entry 9, Mar. 31, 2011). The requests are not part of the original pleadings, but the Court will consider them because they arise directly from the originally

II. Legal Standard

When considering a motion to dismiss for lack of subject matter jurisdiction, the Court assumes that all uncontroverted factual allegations are true and draws all reasonable inferences in plaintiff's favor. *See Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995). Although Ms. Kerrigan is entitled to special consideration as a *pro se* plaintiff, *Haines*, 404 U.S. at 520-21, it is still her burden to establish that her claims are within the Court's jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (holding "the burden of establishing [jurisdiction] rests upon the party asserting jurisdiction"). If the Court finds that it lacks jurisdiction over a claim, that claim must be dismissed. *See* RCFC 12(h)(3).

With respect to a motion to dismiss for failure to state a claim pursuant to RCFC 12(b)(6), the Court must accept all plaintiff's factual allegations as true and construe them in the light most favorable to the plaintiff. *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009) (citing *Papasan v. Allain*, 478 U.S. 265, 283 (1986)). A plaintiff's claims will survive a motion to dismiss if she alleges "facts 'plausibly suggesting' . . . a showing of entitlement to relief." *Bank of Guam v. United States*, 578 F.3d 1318, 1326 (Fed. Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)), *cert. denied*, 130 S. Ct. 3468 (2010). A plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for [the claim]." *Ashcroft v. Iqbal*, --- U.S. ---, 129 S. Ct. 1937, 1949 (2009).

III. Discussion

A. *The Court Lacks Jurisdiction Over Claims Resolved by the Terms of the Settlement Agreement*

In her settlement with the USDA, Ms. Kerrigan agreed not to bring any new claims based upon actions related to her employment that occurred before the date of the agreement. Def.'s Mot. at App. 7. Nevertheless, Ms. Kerrigan requests that the Court vacate her settlement agreement with the USDA and allow her to bring claims based on actions that occurred before the date of the settlement, specifically to be reinstated to her former position, to receive back pay at the GS-11 level with interest, and to receive compensation for intentional infliction of emotional distress. Am. Compl. at ¶ 114.

The Court does not have jurisdiction to vacate the agreement because it was approved by the MSPB as a settlement of an adverse personnel action, and therefore is subject to the comprehensive, integrated scheme for resolving such claims established by the Civil Service Reform Act, Pub. L. No. 95-454, 92 Stat. 1111 (Oct. 13, 1978) ("CSRA"). *See Bobula v. United States Dep't of Justice*, 970 F.2d 854, 858 (Fed. Cir. 1992) ("Since the CSRA is an integrated scheme, and since the settlement agreement arose from this integrated scheme, the settlement agreement must be enforced within the procedures provided for in the CSRA or not at all."). Claims for breach of an MSPB settlement agreement or challenges to the settlement itself must

alleged facts. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (discussing the flexibility required in dealing with *pro se* parties).

be made directly to the MSPB or timely appealed to the Federal Circuit. 5 U.S.C. § 7703(b)(1); *see also Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 770 (1985). Therefore, Ms. Kerrigan's claims that were resolved by the terms of the settlement agreement are **DISMISSED** for lack of jurisdiction.

B. *This Court Does Not Have Jurisdiction to Adjudicate Ms. Kerrigan's Claims for Retirement Benefits, Attorney's Fees, or Punitive Damages*

Ms. Kerrigan additionally seeks: (1) review and correction of personnel records by OPM in order to recalculate her annuity benefits and contributions to her Thrift Savings Plan; (2) payment of accrued attorney's fees; and (3) punitive damages (\$300,000). The Court dismisses Ms. Kerrigan's claims for retirement benefits, attorney's fees, and punitive damages for lack of jurisdiction.

1. The Court Does Not Have Jurisdiction Over Ms. Kerrigan's Request for Retirement Recalculation and Correction of Personnel Records

Ms. Kerrigan's claims for damages from an alleged miscalculation of her employment retirement benefits, including mandatory contributions to the Thrift Savings Plan, are not within this Court's jurisdiction. These claims are based on the federal employee retirement statutes that comprise the "Civil Service Retirement System," 5 U.S.C. §§ 8331-8351; *see also Schism v. United States*, 316 F.3d 1259, 1274 (Fed. Cir. 2002) (en banc) (stating that federal employee retirement benefits are enforced through statute rather than contract), and are subject to the exclusive regulatory scheme of the CSRA. *United States v. Fausto*, 484 U.S. 439, 455 (1988); *Ferreiro v. United States*, 72 Fed. Cl. 1, 4-5 (2006), *aff'd*, 501 F.3d 1349 (Fed. Cir. 2007) (holding the Court of Federal Claims lacks jurisdiction over retirement benefit claims because claimants must follow the exclusive procedures outlined in the CSRA). Therefore, pursuant to RCFC 12(b)(1), Ms. Kerrigan's claims related to the amount of her retirement benefits, including contributions to the Thrift Savings Plan, are **DISMISSED**.

2. The Court Does Not Have Subject Matter Jurisdiction Over Ms. Kerrigan's Request for Attorney's Fees for EEOC Proceedings and Her MSPB Appeal

Ms. Kerrigan requests reimbursement of \$35,000 in attorney's fees incurred in connection with the EEOC proceedings and her MSPB appeal. Am. Compl. ¶ 114.E. As noted above, attorney's fees incurred during the MSPB appeal were settled, and the settlement agreement is subject to exclusive enforcement by the MSPB. *See Sacco v. United States*, 63 Fed. Cl. 424, 429-30 (2004), *aff'd*, 452 F.3d 1305 (Fed. Cir. 2006). Therefore, Ms. Kerrigan's request for reimbursement of attorney's fees incurred in connection with her MSPB appeal is not within the Court's jurisdiction and is **DISMISSED**.

The Court also lacks jurisdiction over Ms. Kerrigan's claim for attorney's fees incurred during her EEOC proceedings. The Court does not have subject matter jurisdiction to review EEOC decisions. 28 U.S.C. § 1343(a)(4) ("The district courts shall have original jurisdiction of any civil action . . . [t]o recover damages or secure . . . other relief under any Act of Congress providing for the protection of civil rights . . ."); *Bunch v. United States*, 33 Fed. Cl. 337, 341

(1995), *aff'd*, 78 F.3d 605 (Fed. Cir. 1996) (“[A] claim premised on a violation of Title VII must be brought in district court, not in the Court of Federal Claims.”). The Court therefore similarly lacks jurisdiction over Ms. Kerrigan’s claim for attorney’s fees incurred during the EEOC proceedings, *see Sacco*, 63 Fed. Cl. at 429 (“[Other courts] have jurisdiction over the ‘subject matter’ of Plaintiffs’ underlying [claim] . . . [a]s such, they, and not this Court, have jurisdiction over . . . attorney fees, which are based on those [claims].”), and that claim must therefore be **DISMISSED**.³

3. The United States’ Sovereign Immunity Precludes Ms. Kerrigan’s Claim for Punitive Damages

Ms. Kerrigan also requested \$300,000 in punitive damages, Am. Compl. ¶ 114.G., but the United States has explicitly refused to waive sovereign immunity for punitive damage claims. 28 U.S.C. § 2674; *see, e.g., Greene v. United States*, 65 Fed. Cl. 375, 379 (2005); *Garner v. United States*, 230 Ct. Cl. 941 (1982). This Court may not impose liability beyond the scope of the sovereign’s waiver of immunity as set forth in the Tucker Act, *see* 28 U.S.C. § 1491(a)(1), and the Court therefore does not have jurisdiction to award punitive damages. *See also Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983) (stating waivers of sovereign immunity must “be construed strictly in favor of the sovereign”) (internal quotation marks omitted). Accordingly, Ms. Kerrigan’s claim for punitive damages must be **DISMISSED**.

C. *This Court Has Jurisdiction Over Ms. Kerrigan’s Claim for Accrued Annual Leave, and She Has Stated a Claim for Relief on That Theory*

Finally, Ms. Kerrigan claims that she is owed a total of \$613 for administrative leave that was not included in the lump-sum payment she received for accrued annual leave. Pl.’s Mot. in Opp’n to Def.’s Mot. at 29. This claim is within the Court’s jurisdiction because it is based on a money-mandating statute requiring that federal employees receive a lump-sum payment of accrued annual leave when employment ends. 5 U.S.C. §§ 5551-5553. Ms. Kerrigan’s claim also survives defendant’s RCFC 12(b)(6) motion because she pleads facts upon which relief can be granted.

1. This Court Has Jurisdiction Over Ms. Kerrigan’s Claim for Accrued Annual Leave

Ms. Kerrigan’s claim for lump-sum payment is based on a statutory entitlement granted to eligible federal employees. 5 U.S.C. § 5552 (“[A Federal employee] is entitled to – (1) receive . . . a lump-sum payment for accumulated and current accrued annual or vacation leave in accordance with section 5551”); *Callahan v. United States*, 49 Fed. Cl. 555, 557 (2001), *aff’d per curiam*, 56 F. App’x 947 (Fed. Cir. 2003) (finding § 5551 is money-mandating and that

³ Although Ms. Kerrigan does not identify a legal basis on which she claims to be entitled to attorney’s fees, Title VII, 42 U.S.C. § 2000e-5(k), allows courts to award attorney’s fees to a prevailing party. However, Ms. Kerrigan does not explain on what basis she may be considered a prevailing party with respect to her Title VII claim because the EEOC affirmed the dismissal of her claim and the District Court of Alaska found her Title VII claim to be meritless.

claims based upon it may be heard in the Court of Federal Claims). Accordingly, the Court has jurisdiction to hear this claim.

Although the CSRA divests the Court of jurisdiction over some federal benefit claims, the CSRA does not divest the Court of jurisdiction over claims for accrued annual leave. First, unlike claims for retirement benefits which must be adjudicated by OPM, 5 U.S.C. § 8347(b), Congress chose not to give OPM exclusive jurisdiction over claims for accrued leave. As discussed above, Ms. Kerrigan's claims for retirement benefits may not be heard by this Court because Congress clearly directs that "[OPM] shall adjudicate *all* claims under this subchapter [Tit. 5, Ch. 83, Subch. III]." 5 U.S.C. § 8347(b) (emphasis added). Accrued annual leave payouts are not governed by that subchapter, but rather are governed by Tit. 5, Ch. 55, Subch. VI. When a claim is not "within the coverage of the CSRA and . . . it otherwise falls within the jurisdictional grant of the Tucker Act, the Court of Federal Claims has jurisdiction." *Worthington v. United States*, 168 F.3d 24, 27 (Fed. Cir. 1999). Thus, in the absence of a clear congressional statement divesting this Court of jurisdiction, the Court properly asserts jurisdiction over Ms. Kerrigan's claim for annual leave.

Second, Ms. Kerrigan's claim for accrued leave is not based on an adverse personnel action. The Federal Circuit has consistently held that this Court does not have jurisdiction over claims requiring the court to review adverse personnel actions. *See, e.g., Salinas v. United States*, 323 F.3d 1047, 1048 (Fed. Cir. 2003); *LeBlanc v. United States*, 50 F.3d 1025, 1030 (Fed. Cir. 1995). Ms. Kerrigan's claim for accrued leave does not challenge any adverse personnel action and therefore is not within the scope of the CSRA. *See Mendoza v. United States*, 87 Fed. Cl. 331, 336 (2009) (holding the Court of Federal Claims retains jurisdiction over claims not based on challenges to adverse personnel actions); *Agee v. United States*, 77 Fed. Cl. 84, 88, 91 (2007) (asserting jurisdiction over a claim for federal firefighters' accrued annual leave). In this case, the Court does not need to review the reason USDA placed Ms. Kerrigan on administrative leave, but rather is required to conduct a wholly separate inquiry into whether the Agency improperly failed to include Ms. Kerrigan's administrative leave when calculating the lump-sum payout to which she was entitled.

2. Ms. Kerrigan's Complaint Pleads Facts Upon Which Relief Can Be Granted

In her response to the Government's motion to dismiss, Ms. Kerrigan describes in detail why she believes the Government miscalculated her lump-sum annual leave:

I was never paid the 16 hours of annual leave associated with the 30 days of paid administrative leave . . . [and, w]hen the Agency paid me for 416 hours of lump[-]sum annual leave, it was at my 2003 salary rate because of creating, then canceling, a Notification of Personnel Action that involved my annual pay raise.

Pl.'s Mot. in Opp'n to Def.'s Mot. at 29; *see* Am. Compl. ¶ 114.F. Ms. Kerrigan pleads a plausible case that her annual leave total was miscalculated and the payment to her was made at a rate of pay that was too low. Ms. Kerrigan's allegations are supported by the EEOC opinion that discussed errors committed when USDA's National Finance Center created and then

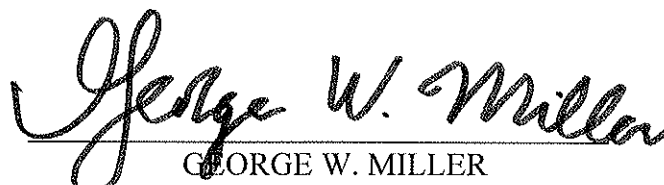
cancelled the record of personnel action involving Ms. Kerrigan. E.E.O.C. Dec. at *4. If, as Ms. Kerrigan alleges, her accrued administrative leave was not included in the calculation of her lump-sum payment and her lump-sum payment was calculated at an incorrect rate, then she would be entitled to relief. Therefore, with respect to this claim, defendant's RCFC 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted is **DENIED**.

CONCLUSION

In view of the foregoing, the Court concludes it lacks subject matter jurisdiction over Ms. Kerrigan's claims for reinstatement, back pay with interest, upgraded back pay, intentional infliction of emotional distress, retirement benefits, modifications to employment record, attorney's fees, and punitive damages. The Court therefore **GRANTS IN PART** defendant's RCFC 12(b)(1) motion and dismisses those claims. The Court **DENIES IN PART** defendant's 12(b)(1) motion and declines to dismiss Ms. Kerrigan's claim for miscalculated accrued annual leave because the Court has subject matter jurisdiction over that claim. The Court also **DENIES** defendant's 12(b)(6) motion to dismiss Ms. Kerrigan's claim for accrued annual leave because she has alleged sufficient facts to state a claim upon which relief can be granted on that theory.

The Court will schedule a status conference with counsel to discuss the nature and timing of further proceedings. Pursuant to RCFC 12(a)(4)(A)(i), the Government shall file its answer to Ms. Kerrigan's complaint insofar as it asserts a claim for accrued annual leave by **Monday, September 26, 2011**.

IT IS SO ORDERED.


GEORGE W. MILLER
Judge