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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

FREDERICK GENTRY, Plaintiff, vs. BARBARA BARRETT, in her official capacity as Secretary of the UNITED STATES AIR FORCE, Defendant.	No. 2:20-cv-00050-SMJ **MOTION TO DISMISS** Noted without oral argument May 26, 2020

I. INTRODUCTION

Section 501 of the Rehabilitation Act is the exclusive judicial remedy for disability discrimination claims by federal employees. *Boyd v. United States Postal Service*, 752 F.2d 410, 413 (9th Cir. 1985). Section 501 provides for two types of claims: (1) failure to accommodate claims based on 29 U.S.C. § 791(b) and (2) "non-affirmative action" claims of employment discrimination under 29 U.S.C. § 791(f). Federal employees must contact an EEO counselor within forty-five days of a discrete act that forms the basis for either claim. The failure to timely contact an EEO counselor is fatal to a plaintiff's claim.

Gentry's failure to accommodate claim is untimely. Gentry alleges he was denied requested accommodations on June 28, 2017 and December 19, 2017. The denial of requested accommodations is a discrete act which required Gentry to contact an EEO counselor within 45 days. Gentry did not contact an EEO counselor until May 30, 2018, more than five months after his last accommodation request was not granted. Accordingly, Gentry's failure to accommodate claim under 29 U.S.C. § 791(b) is untimely and must be dismissed with prejudice.

While Gentry's "non-affirmative action" claims of employment discrimination under 29 U.S.C. § 791(f), *i.e.* his allegedly discriminatory removal from federal service, was brought to an EEO counselor within 45 days of his removal, this claim is also subject to dismissal for another reason. Gentry made sworn statements in his application for disability retirement about the essential functions of his job and his inability to preform or even be exposed to those functions. Gentry cannot now contradict his prior sworn statements to try to maintain this lawsuit, and he cannot now, in good faith, explain how – despite his prior sworn statements –he could 'perform the essential functions' of his job, with or without 'reasonable accommodation.' Since Mr. Gentry was unable to perform a job's "essential functions," even with a reasonable accommodation, then the Rehabilitation act's protections do not apply.

II. LEGAL ANALYSIS

A. Motion to dismiss standard.

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is proper where the pleadings fail to state a claim upon which relief can be granted. The complaint is construed in the light most favorable to the non-moving party and all material allegations in the complaint are taken to be true; however, the Court may also consider documents referenced in the complaint, although not attached to the complaint, without converting the motion to one for summary judgment. *Walker v. Fred Meyer, Inc.*, 2020 WL 1316691, at *3 n. 1 (9th Cir. Mar. 20, 2020); *see also Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (noting that a court may "take into account documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading." (internal quotation marks omitted)); *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (explaining that the court may "treat such a document as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)"). Accordingly, the Court can

take into account Gentry's application for disability retirement in ruling on this motion.

A. Gentry's failure to accommodate claims is untimely.

A federal employee filing a claim of disability discrimination under the Rehabilitation Act must first exhaust administrative remedies available under Title VII. *See Vinieratos v. U.S. Dept. of Air Force*, 939 F.2d 762, 773 (9th Cir. 1991) (citing *Boyd v. U.S. Postal Serv.*, 752 F.2d 410, 413–14 (9th Cir. 1985)). Federal law mandates that federal employees such as Gentry report alleged discriminatory actions to the EEOC *within forty-five days* of *the discrete act* of discrimination at issue. *See Steele v. Schafer*, 535 F.3d 689, 693 (D.C.Cir. 2008) ("An employee of the federal government who believes that she has been the subject of unlawful discrimination must 'initiate contact' with an EEO Counselor in her agency 'within 45 days of the date of the matter alleged to be discriminatory.'" "[F]ailure to comply with this regulation [is] fatal to a federal employee's discrimination claim." *Lyons v. England*, 307 F.3d 1092, 1105 (9th Cir. 2002) (discussing 29 C.F.R. § 1614.105(a)(1))).

The United States Supreme Court in *Morgan* explains that a plaintiff may assert claims for *discrete acts* only if the plaintiff timely filed an EEOC Complaint for that particular act:

> [D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the [relevant statutory] time period after the discrete discriminatory act occurred.

Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113, (2002). Although *Morgan* discusses this principle in the context of Title VII, the Ninth Circuit has applied its reasoning equally to claims under the Rehabilitation Act. *See Cherosky v. Henderson*, 330 F.3d 1243, 1246–47 (9th Cir. 2003) (holding that denial of employees' request for respirators under the Rehabilitation Act was a discrete act under *Morgan*).

Applying this principle, district courts within the Ninth Circuit have dismissed – and the Ninth Circuit has recently affirmed the dismissal of – claims similar to the failure to accommodate claim Gentry asserts here. *See Gipaya v. Dep't of the Air Force*, 345 F. Supp. 3d 1286, 1298 (D. Haw. 2018), *aff'd sub nom. Gipaya v. Barrett*, 18-17279, 2020 WL 1027811 (9th Cir. Mar. 3, 2020). In *Gipaya*, the plaintiff alleged he requested an ergonomic chair as an accommodation for his disability in late 2010 through mid 2012, but plaintiff did not contact an EEO counselor until early 2013. *Gipaya*, 345 F. Supp. 3d at 1296. The court held that because plaintiff did not contact an EEO counselor within forty-five days of those allegations relating to his failure to accommodate claims, the "claims must therefore be dismissed" with prejudice. *Id. See also Yonemoto v. Shinseki*, 3 F. Supp. 3d 827, 844 (D. Haw. 2014) (denial of accommodation was a discrete act that occurred 45 days before plaintiff contacted EEO and thus was untimely); *Stanfill v. England*, 2005 WL 8162390, at *2 (W.D. Wash. Jan. 5, 2005) (dismissing claims prior to 45 days before plaintiff contacted EEO).

Similarly here, Gentry's allegations regarding his failure to accommodate claim are discrete acts that occurred more than forty-five days before Plaintiff's first contacts with the EEO. Specifically, Gentry *alleges* the following:

- On October 1, 2015, JPRA removed Gentry's permanent staff. ECF No. 1, ¶ 15.
- On July 6, 2016, Gentry was counseled for poor performance. ECF No. 1, ¶ 26.
- On July 8, 2016, Gentry was counseled for poor performance. ECF No. 1, ¶ 28.
- November 2016, JPRA deemed role playing as an essential function of Gentry's job duties. ECF No. 1, ¶ 30.
- June 28, 2017, Gentry's request for reassignment as an accommodation was denied. ECF No. 1, ¶ 32.
- December 19, 2017, Gentry was told he had to apply for retirement. ECF No. 1, ¶ 36.

- December 19, 2017, Gentry made another request for accommodation which was ignored or denied. ECF No. 1, ¶ 38-39.

These discrete acts related to Gentry's failure to accommodate claim occurred well over 45 days before Gentry made contact with the EEO office on May 30, 2018 (*i.e.* well before April 15, 2018). Therefore, defendant's motion to dismiss must be granted as to all incidents of alleged failure to accommodate occurring before April 15, 2018.

B. Gentry's application for disability retirement signed pursuant to 18 U.S.C. § 1001, precludes his non-affirmative action claim of disability discrimination related to his separation from employment.

Gentry's Section 501 non-affirmative action claim is governed by standards contained in the ADA, which are explicitly incorporated into 501(f). 29 U.S.C. § 791(f) (incorporating in relevant part 42 U.S.C. § 12112); 29 C.F.R. § 1614.203(b); *see also Johnson v. Bd. of Tr. of Boundary County Sch. Dist. No. 101*, 666 F.3d 561, 564 n.1 (9th Cir. 2011) (courts rely on ADA cases to interpret related provisions of the Rehabilitation Act) (citing cases); *Lopez v. Johnson*, 333 F.3d 959, 961 (9th Cir. 2003). To establish a prima facie discrimination claim under the ADA and by extension, under § 501 of the Rehabilitation Act, a plaintiff must prove: "(1) that [he] is disabled within the meaning of the ADA; (2) that [he] is a qualified individual with a disability; and (3) that [he] was discriminated against because of [his] disability." *Smith v. Clark Cty. Sch. Dist.*, 727 F.3d 950, 955 (9th Cir. 2013) (emphasis added).[1]

The term "qualified individual" means "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment

[1] Contrary to Plaintiff's allegations, the Ninth Circuit applies a "but for" causation standard when evaluating disability discrimination claims. *Murray v. Mayo Clinic*, 934 F.3d 1101, 1107 (9th Cir. 2019) ("We join our sister circuits in holding that ADA discrimination claims under Title I must be evaluated under a but-for causation standard.").

position that such individual holds or desires." 42 U.S.C. § 12111(8) (emphasis added). A job's "essential functions" are "fundamental job duties of the employment position ..., not includ[ing] the marginal functions of the position." 29 C.F.R. § 1630.2(n)(l). If a disabled person cannot perform a job's "essential functions," even with a reasonable accommodation, then the ADA employment protections do not apply. *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 989 (9th Cir. 2007).

For example, in *Bartolutti*, the plaintiff, a Deputy U.S. Marshal, claimed she could not perform "aggressive law enforcement functions." *Bartolutti v. Mukasey*, 2008 WL 1924195, at *6 (W.D. Wash. Apr. 28, 2008). In expressing her disability, plaintiff stated: "My shoulder injury continues to this day to affect my life and my ability to work . . . this limitation on my ability to lift and reach makes it impossible for me to work in any law enforcement job requiring aggressive law enforcement, including guarding prisoners, making arrests, using firearms, and so on." *Id.* at *3. In analyzing whether Plaintiff was a "qualified individual" the Court noted that there is no dispute that Plaintiff could not preform law enforcement activities inherent with being a Deputy U.S. Marshal. *Id.* at *6. Accordingly, the court held that plaintiff cannot show she is a "qualified individual" under the Rehabilitation and granted summary judgment on this issue. *Id.*

Here too, in his application for disability retirement, Gentry admits he cannot perform, or have interaction with, the activities that are inherent or essential at the Personnel Recovery Academy (PRA), *i.e.* exposure to information related to prisoners or detainees. Specifically, in his application for disability retirement, Gentry writes the following:

- While working I am exposed to role-play situations that have caused me to trigger serious PTSD symptoms including flashbacks and or panic attacks;
- *I am also routinely exposed to information related to prisoners and detainees* this information has also caused flashback and panic attacks.

> The information that I receive on a daily basis is in discussion, written format, and in video examples.
>
> - *I was hired to perform the function of a resistance training instructor* the same job requires duties that caused my PTSD.
> - I am no longer able to perform "role-play', *the job for which I was hired through JPRA/PRA to perform.*
> - I tend to withdraw from social situations, interactions with any type of large group, and interactions with peers as I fear a panic attack will occur.
> - I have had panic attacks and flashbacks both at work and at home. At work they can be brought on when I am simply sitting at my desk when I begin to feel pressure.
> - The first panic attack I had was a result of stress at work; the stress was so bad that I had a panic attack in front of my supervisor. I am occasionally required to interact with him, and every time I do just the thought of what may happen during the interaction can start a panic attack.
> - They have also occurred *as a result of being exposed to specific information dealing with detention(s) or detainees, and since this is my job, there are constant references to them.*

Walters Decl. ¶ 2, Ex. A.

In Gentry's own words, his unique and highly specialized job was being a Resistance Training Instructor in an environment that exposed him to constant references of prisoners and detainees. *See id.* Like a Deputy U.S. Marshal that cannot conduct law enforcement activities due to his disability is not a "qualified individual" under the Rehabilitation Act, the same is true for a Resistance Training Instructor that

cannot be exposed situations where individuals need to resist interrogations.[2]

The Supreme Court has explained that, when "faced with a plaintiff's previous sworn statement asserting 'total disability' or the like, the court should require an explanation of any apparent inconsistency with the necessary elements of an ADA claim." *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 807 (1999). The plaintiff's explanation "must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless 'perform the essential functions' of her job, with or without 'reasonable accommodation.' " *Cleveland*, 526 U.S. at 807.

Noticeably, Gentry cites *Smith v. Clark Cty. Sch. Dist.* in his Complaint to insinuate he can provide such an explanation sufficient to forestall the dismissal of his claim; however, *Smith*, is distinguishable from Gentry's circumstances. In *Smith*, a public school teacher applied for disability retirement stating that due to a back injury she could not perform her duties, including standing for long periods of time, bending, stooping, walking, lifting, and reaching. *Id.* at 953. Smith explained the inconsistency in her retirement application and her ADA claim by claiming her application did not account for her ability to perform her job if she was given the accommodation of sitting down regularly or lying down when needed. *Id.* at 959. The Ninth Circuit stated that this explanation was sufficient for plaintiff to survive summary judgment. *Id.*

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[2] Gentry's allegation that this Core Personnel Document does not mention the essential activities of his position or "role play" does cannot save his claim. Gentry's position required a "TOP SECRET security clearance with SCI background check." Walters Decl. ¶ 3, Ex. B. Given the nature of his work and the work of JPRA, Gentry's unclassified Core Personnel Document used vague language such as requiring him to "conduct programmed training courses." *See id.* In Gentry's disability application, he makes clear that his job required both role play and exposure to prison and detention situations, which he could not preform or be exposed to due to this PTSD.

Importantly, the plaintiff did not claim she could not perform any of the activities inherent in being a public school teacher, for example, being exposed to children, books, or interact with parents. *See id.*

Comparatively here, Gentry's disability retirement application makes clear that he could not perform the activities *inherent* in being a *Resistance Training Instructor*. Gentry cannot contradict his previously sworn statement to try to shape his case to fit the facts in *Smith*. *See id.* Gentry's application for disability retirement precludes him from stating a prima facie claim of discrimination, *i.e.* that he is a "qualified individual."

III. CONCLUSION

Gentry did not contact an EEO counselor within 45 days of the alleged refusal to accommodate his disability. Accordingly, his failure to accommodate claim based on 29 U.S.C. § 791(b) must be dismissed.

Additionally, Gentry should not be allowed to base his discrimination claim on allegations contrary to his sworn representations to the Office of Personnel Management when applying for disability. While the Ninth Circuit has left room for individuals to explain inconsistencies between statements in disability applications and statements made to support a claim under the Rehabilitation act, there are limits. Gentry's sworn statements in his disability application make clear he could not preform, with or without accommodation, the essential functions of a Resistance Training Instructor. Thus, dismissal of his "non-affirmative action" claims of employment discrimination under 29 U.S.C. § 791(f) is also proper.

RESPECTFULLY SUBMITTED: April 3, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Matt Crotty : matt@crottyandson.com

And to the following non CM/ECF participants: N/A

s/Joseph P. Derrig
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