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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

FREDRICK GENTRY, Plaintiff, vs. BARBARA BARRETT, in her official capacity as the Secretary of the United States Air Force, Defendant.	NO. 2:20-cv-00050-SMJ MOTION TO DISMISS RESPONSE BRIEF

I. INTRODUCTION & SUMMARY OF ARGUMENT

Workers can become disabled. Sometimes the stress of job duties even plays a role in causing disabilities. And sometimes disabilities cause their employers to fire them. As part of the termination process, bosses will often instruct the soon-to-be-fired employee to file for disability retirement benefits—a fact that Mr. Gentry

alleges here. (ECF No. 1, ¶36) When that demand is made, employees, like Mr. Gentry, face a Hobson's choice: admit that you are sufficiently disabled in your benefit application so you can get money to survive but forfeit your right to hold your employer accountable in court for violating the law ***or*** choose not to seek disability retirement benefits, get fired, and roll the dice by suing your former employer in court for disability discrimination.

Fortunately the United States Supreme Court recognized this dilemma over twenty years ago holding "[w]hen 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, 803, 807 (1999). *Cleveland* went on to hold that (1) a plaintiff could defeat *summary judgment* by showing he or she could perform the job's essential functions with our without a reasonable accommodation (2) a "reasonable accommodation" included "reassignment to a vacant position" and (3) "[t]he parties should have the opportunity in the trial court to present, or to contest, these explanations, in sworn form where appropriate." Oddly, the Agency cites *Cleveland* in its dismissal motion but nevertheless asks the Court to disregard *Cleveland* by, *inter alia,* ignoring Mr. Gentry's allegations that numerous vacancies existed at the time the Agency fired Mr. Gentry. (ECF No. 1, ¶58, 64) The Agency

would have us conclude (without even hearing Mr. Gentry's side of the story) that the statements Mr. Gentry (a 30+ year civil servant/honorably discharged veteran) made in a *required* disability retirement application somehow barred Mr. Gentry from doing the work he was doing the day he got fired or performing many of the open job positions and foreclose Mr. Gentry's right to hold the Agency accountable in this Court. Tellingly, the Agency cites no case in which a court resolved a fact pattern remotely close to Mr. Gentry's at the Rule 12 stage.

The Agency then goes on to selectively cite the background fact section of Mr. Gentry's complaint for the proposition that Mr. Gentry's entire failure to accommodate claim is "untimely" while ignoring the fact that the "discrete acts" upon which Mr. Gentry bases his failure to accommodate claim include (1) the Agency's failure to assign him to the Registrar vacancy at the time the Agency fired him (2) the Agency's failure to assign him to one of thirteen other vacancies at the time the Agency fired him (3) the Agency's failure to allow Mr. Gentry to continue the duties of his job description that he was fulfilling (in a satisfactory manner) at the time the Agency fired him, or (4) the Agency's failure to offer Mr. Gentry an extended leave option (so he could treat his disability) at the time it fired him. (*See e.g.* ECF No. 1, ¶ 57-58, 60, 63-64)

None of this is news to the Agency. The Agency knows that:

- On May 15, 2018, it fired Mr. Gentry. (Gentry Decl. ¶3)

- On May 29, 2018, Mr. Gentry timely contacted the Agency's EEO counselor. (Gentry Decl. ¶4, Ex. A)

- On June 4, 2018, Mr. Gentry filled out the Initial Interview/Pre-Complaint Intake Form whereupon he checked the "mental disability" box under the "what factors do you believe to be the cause of discrimination against you" question. (Gentry Decl. Ex. B) There is no "failure to accommodate" box to check. *Id.*

- On June 6, 2018, the Agency's EEO counselor categorized Mr. Gentry's claims as:

  On May 15, 2018, Mr. Buchholz, terminated Mr. Gentry's employment on account of his disability by giving Mr. Gentry a Notice of Decision to Remove…effective on May 16, 2018.

  The termination was also caused by the Agency's failure to accommodate Mr. Gentry's actual (PTSD) disability. (Gentry Decl. Ex. C)

- On July 10, 2018, Mr. Gentry filed a formal complaint of discrimination, checked the "disability" box in response to the "why you believe you were discriminated against" question, and learned, on July 16, 2018, that the that Agency accepted the following claims:

  i. On May 15, 2018, Mr. Buchholz, gave the Complaint a Notice of Decision to Remove (Non-Disciplinary) effective on May 16, 2018.

  ii. From June 2016 to May 15, 2018, Mr. Buchholz, failed to accommodate the Complainant's disability (Mental-PTSD). (Gentry Decl. Exs. E & G)

- On or about January 30, 2019, the Agency completed its investigation of the above-referenced complaints, including the failure-to-accommodate claim that is based on the same allegations contained in Mr. Gentry's complaint. The report noted that the Registrar's position was vacant at the time of Mr. Gentry's firing, that there was other work available for Mr. Gentry at the time of the termination, and that other similarly situated workers were given accommodations in the form of extended leave but not Mr. Gentry. (Gentry Decl. at Ex. H, pg. 2-3)

Courts in analogous circumstances have found failure-to-accommodate claims timely, and this Court should do the same. *See infra.* The Agency's Motion to Dismiss (which is really a pre-discovery summary judgment motion in disguise) should be denied. Mr. Gentry should be given his day in court to explain any supposed inconsistencies in his disability application and to contest the Agency's interpretation of his core performance document. The Court should require the Agency which is supposed to be a "model employer" of the disabled (29 C.F.R. § 1614.203(c)) to explain why it couldn't accommodate Mr. Gentry's work-related disability by allowing him to perform the duties he could complete successfully, or reassigning him to one of the many vacancies before firing an employee whose most recent annual performance review read "by all accounts he was doing an excellent job supporting [that Agency's] programs." (ECF No. 1, ¶33)

II. ARGUMENT

A. Motion to dismiss standard.

The Ninth Circuit, post-*Iqbal,* still holds "[t]he text of Rule 8(a) has not been changed since the initial promulgation of the Federal Rules of Civil Procedure in 1938. In relevant part, it provides: (a) Claim for Relief. A pleading that states a claim for relief must contain (2) a short and plain statement of the claim showing that the pleader is entitled to relief." *Starr v. Baca*, 652 F.3d 1202, 1212 (9th Cir. 2011) (*citing Iqbal*). Other courts are in accord holding that *Twombly* and *Iqbal* did not "re-write Rule 12(b) (6) or abandon notice pleading" but note that:

> Since *Twombly* was decided, many lawyers have felt compelled to file a motion to dismiss in nearly every case, hoping to convince the Court that it now has the authority to divine what the plaintiff may plausibly be able to prove rather than accepting at the motion to dismiss stage that the plaintiff will be able to prove his allegations. These motions, which bear a close resemblance to summary judgment motions, view every factual allegation as a mere legal conclusion and disparagingly label all attempts to set out the elements of a cause of action as 'bare recitals.' They almost always, either expressly or, more often, implicitly, attempt to burden the plaintiff with establishing a reasonable likelihood of success on the merits under the guise of the 'plausibly stating a claim' requirement. *Meyer v. Snyders Lance, Inc.*, 2012 WL 6913724, at *1 (M.D. Ga. Dec. 12, 2012).

Indeed, "the Federal Rules do not contain a heightened pleading standard for employment discrimination suits," nor do they require the plaintiff to show the claim will succeed on its merits. *Swierkiewicz v. Sorema, N.A.,* 534 U.S. 506, 515 (2002). Accordingly, if a defendant alleges that a plaintiff's factual allegations are

insufficient to state a claim, the court reviews the allegations under Fed.R.Civ.P. 8(a)'s liberal pleading standards, construes allegations in a light favorable to the non-moving party, accepts the pled facts as true, and draws reasonable inferences in favor of the non-moving party. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.,* 416 F.3d 940, 946 (9th Cir. 2005); *Wyler Summit P'ship v. Turner Broad. Sys. Inc.,* 135 F.3d 658, 661 (9th Cir. 1998). In the employment context, "[a]n employment discrimination plaintiff need not plead a *prima facie* case of discrimination" to avoid dismissal pursuant to Rule 12(b) (6). *Shapour v. California*, 2014 WL 3850012, at *6 (E.D. Cal. Aug. 5, 2014) (*citing Swierkiewicz,* 534 U.S. at 516).

B. Mr. Gentry's failure to accommodate claim is timely.

As a starting point, "[t]he jurisdictional scope of the plaintiff's court action depends on the scope of the EEO [ ] charge and investigation." *McCarthy v. Brennan*, 230 F. Supp. 3d 1049, 1058 (N.D. Cal. 2017). This requirement allows "the agency an opportunity to investigate the charge," provides the "charged party notice of the claim," and "narrow[s] the issues for prompt adjudication and decision." *Id.* (*citing B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1099 (9th Cir. 2002)). Such EEO charges must be construed "with utmost liberality since they are made by those unschooled in the technicalities of formal pleading." *Id.* (*citing Sosa v. Hiraoka*, 920 F.2d 1451, 1458 (9th Cir. 1990)).

Courts further note that the claim of "disability discrimination encompasses disparate treatment—denying an employee equal jobs or benefits because of the employee's disability - *and* failure to accommodate a disability," and that failure to accommodate claims are reasonably related to disability discrimination claims when "the disparate treatment claim arises out of Plaintiff's termination, and he alleges he was terminated because the [Agency failed] to accommodate his disability." *McCarthy*, 230 F. Supp. 3d 1049, at 1059–60. Such an overlap is appropriate when the Agency's "Pre–Complaint Counseling form does not give an employee the option to identify a claim for failure to accommodate a disability and instead steers employees towards alleging only a disparate treatment claim," which, in turn, leads other courts to hold that "courts should be especially lenient—applying something even more flexible than 'utmost liberality' - in construing whether [Agency] administrative complaints like Plaintiff's here include failure to accommodate claims." *Id.* at 1062 (citations and quotations omitted).

The Agency cannot dispute that Mr. Gentry timely filed his disability discrimination claim with the EEO counselor, that the Agency accepted Mr. Gentry's disability discrimination *and* failure-to-accommodate claims even though the Agency's claim forms did not give Mr. Gentry the option to check a "failure to accommodate" box, that the Agency investigated Mr. Gentry's failure-to-

accommodate claim, and that the bases of the failure-to-accommodate claim that the Agency investigated was predicated on the accommodations the Agency failed to give Mr. Gentry at the time of his May 15, 2018, termination. (*See e.g.* Gentry Decl. Exs. A, B, and C) Indeed, Mr. Gentry's failure-to-accommodate claim relies on many of the facts the Agency investigated. (*Compare* ECF No. 1, ¶57-66 *with* Gentry Decl. Ex. H *citing* Report of Investigation pg. 2-3) Accordingly, Mr. Gentry's failure-to-accommodate claim is timely and properly based off of the Agency's failure to accommodate him in numerous ways (extended leave, move to vacant position, assignment to alternate work) on the day he was fired. *See McCarthy*, 230 F. Supp. 3d 1049, at 1059–60.

The Agency nonetheless asks the Court to disregard the Agency's investigation (or the salient paragraphs of Mr. Gentry's complaint) that link Mr. Gentry's failure-to-accommodate claim to what the Agency failed to do on May 15, 2018 (the day it fired Gentry) and instead tie Mr. Gentry's failure-to-accommodate claim to background events occurring in 2016 and 2017. (ECF No. 8, pg. 4-5) But those allegations from 2016 and 2017 are "appropriate background evidence …that, when combined with evidence of the employer's present conduct, gives rise to an inference of unlawful discrimination." *Lyons v. England*, 307 F.3d 1092, 1111 (9th Cir. 2002)(internal quotations and citations omitted). Accordingly, Mr. Gentry

properly and timely pleads a failure-to-accommodate claim, and the Court should disregard the Agency's attempt to tie that claim solely to background facts while ignoring the remainder of Mr. Gentry's complaint.

C. Plaintiff's complaint pleads issues of fact regarding (a) the essential functions of Mr. Gentry's position, (b) whether Mr. Gentry could perform those essential functions, *or* (c) whether Mr. Gentry could perform the essential functions of positions that were vacant at the time the Air Force fired him.

The U.S. Supreme Court holds that a plaintiff should, at the summary judgment stage, "have the opportunity in the trial court to present, or to contest" statements on a disability application that a defendant deems "inconsistent" or "contradictory." *See Cleveland*, 526 U.S. at 803, 807.[1] Such explanations capable of surviving *summary judgment* on a "plaintiff is being inconsistent vis-à-vis his disability application" defense include (a) testimony from the plaintiff that the statement on a disability benefit application was "not an admission of permanent inability to work",[2] (b) the possibility that the

[1] Since this is a summary judgment issue Mr. Gentry declines the Agency's invitation to provide such an explanation at the Rule 12 stage. Moreover, Mr. Gentry has moved to strike the Walter's Declaration and accompanying exhibits.

[2] Indeed, "the nature of an individual's disability may change over time." *Cleveland,* 526 U.S. at 805.

defendant could have accommodated the "disability through an extended leave of absence,"[3] (c) testimony from the plaintiff that the plaintiff's application did not account for the fact that he or she could perform the job with reasonable accommodations, (d) testimony from the plaintiff that the "application is not inconsistent with [his] request to be accommodated through reassignment to a vacant … position" and/or (e) absence of evidence that the plaintiff or plaintiff's doctor could not work in a reassigned position. *Smith v. Clark Cty. Sch. Dist.*, 727 F.3d 950, 959-960 (9th Cir. 2013).

The allegations contained in Mr. Gentry's complaint, which must be construed as true and in Mr. Gentry's favor at this stage, include (a) the allegation that Mr. Gentry "was qualified to perform" the vacant Registrar position (ECF No. 1, ¶58), (b) the allegation that Mr. Gentry's physician opined that the Agency could have reassigned Mr. Gentry to a position where he was not required to perform role playing (ECF No. 1, ¶35), (c) the allegation that Mr. Gentry's physician opined that Mr. Gentry would likely be able to resume directly inflicting duress in a role-play

[3] *See Humphrey v. Mem'l Hosps. Ass'n,* 239 F.3d 1128, 1135 (9th Cir. 2001)("A leave of absence for medical treatment may be a reasonable accommodation under the ADA.").

capacity in the future and that nothing forbade Mr. Gentry from conducting role-playing instruction (ECF No. 1, ¶29), (d) the allegation that the then-JPRA commander, Mr. McGraw, *required* Mr. Gentry to apply for disability retirement, (ECF No. 1, ¶36) and (e) the allegation that the Agency provided leave of absences accommodations to Mr. Gentry's co-workers which, in turn, would have assisted Mr. Gentry in obtaining the treatment needed to address his disability (ECF No. 1, ¶57(a)).

Mr. Gentry alleges much more than a plausible disability discrimination claim. His case should be allowed to proceed to, and beyond, the discovery phase.

III. CONCLUSION

Defendant's motion should be denied.

DATED this 24th day of April, 2020.

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CERTIFICATE OF SERVICE

I certify that on April 24, 2020 I caused the forgoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to all counsel of record.

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