

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

GLENDALE STEWART,

Plaintiff,

v.

ERIK K. SHINESKI,
Secretary, Department of Veterans Affairs,

Defendant.

OPINION and ORDER

10-cv-456-slc¹

Plaintiff Glendale Stewart is suing defendant Erik Shineski for race, color and disability discrimination. In particular, plaintiff alleges that defendant discriminated against him by delaying his hire as a housekeeping aid, treating him less favorably than others similarly situated after his hire and then terminating him. Now before the court is defendant's motion to dismiss the case for two reasons: (1) plaintiff engaged in "contumacious" behavior during the administrative proceedings; and (2) plaintiff filed this lawsuit before he received a final administrative decision. Neither of these arguments amounts to a reason to dismiss defendant's lawsuit. Therefore, I am denying defendant's

¹ I am exercising jurisdiction over this case for the purpose of this order.

motion to dismiss.

A. Failure to Cooperate

“[E]xhaustion of administrative remedies is required when the Title VII plaintiff is a federal employee” such as plaintiff. Doe v. Oberweis Dairy, 456 F.3d 704, 712 (7th Cir. 2006). The general requirement is found in 42 U.S.C. § 2000e-16(c), but the details are left for the administrative regulations promulgated by the Equal Employment Opportunity Commission. Relevant to this case, the employee must file a complaint with the employing agency, which may then conduct an investigation. 29 C.F.R. § 1614.106. After the investigation is complete, the employee has two options: (1) request a hearing before an administrative law judge; or (2) request an “immediate final decision” from the agency. 29 C.F.R. § 1614.108(f).

According to defendant, plaintiff requested a hearing before an administrative law judge, but that judge concluded that the request was “withdrawn” because of plaintiff’s “contumacious” behavior and a statement from plaintiff that “he would like to exercise his right to file this claim in U.S. District Court.” Defendant argues that plaintiff’s conduct should be construed as a refusal to cooperate that requires dismissal of this case for failure to exhaust administrative remedies.

Defendant's argument that dismissal is appropriate in this case has a number of

potential problems. First, it is not clear what type of behavior before the agency requires a conclusion that the employee did not exhaust his administrative remedies. In Doe, 456 F.3d at 709, the court concluded that a Title VII claim of a *private* employee may not be dismissed for failing to cooperate with the EEOC during administrative proceedings because “neither the regulations nor Title VII makes cooperation a condition of the complainant's being able to sue.” In particular, the court held that the plaintiff’s refusal to be interviewed by EEOC staff did not constitute grounds for dismissing the federal lawsuit. Id.

The court seemed to reach the opposite conclusion with respect to *federal* employees in Hill v. Potter, 352 F.3d 1142, 1146 (7th Cir. 2003), in which the court stated that an employee’s “refus[al] to cooperate with the EEOC” is “a failure to exhaust.” In Doe, the court explained that there are different rules for private and public employees because

the statutory framework is different. In private-sector cases the EEOC must bring a lawsuit if it wants to obtain relief for a victim of discrimination. But in federal-employee cases it can provide that relief through its own administrative process. 42 U.S.C. § 2000e-16(b). That is a situation in which exhaustion is invariably required—indeed by the Administrative Procedure Act, as we saw earlier. For otherwise the claimant would have an arbitrary choice of forums, and the courts would be burdened with litigation that could have been conducted, perhaps more expeditiously and expertly, before the administrative body. That is not a course open to the private-sector Title VII claimant, because the EEOC cannot enforce the statute administratively on behalf of such a claimant, but only by filing a suit.

Id. at 712 (citations omitted).

Unfortunately, in Hill, the court did not explain what it meant by the phrase “refuse

to cooperate” or even identify what the plaintiff had done (or refused to do) in that case. The court stated only that the EEOC “refused to give [plaintiff] any relief, on the ground that he had failed to cooperate with it when he had first filed charges with the agency.” Hill, 352 F.3d at 1143. The court did not elaborate.

Regardless of the scope of a federal employee’s duty to “cooperate,” there is a threshold issue raised by defendant’s motion relating to the facts that I may consider in resolving it. Generally, a court may not consider any facts outside the complaint in resolving a motion to dismiss. Fed. R. Civ. P. 12(d); Doss v. Clearwater Title Co., 551 F.3d 634, 639-40 (7th Cir. 2008). Surprisingly, defendant does not even acknowledge this general rule, despite relying on several affidavits and many documents in support of his motion to dismiss. There is an exception to the general rule for public records generally and agency decisions in particular, In re Salem, 465 F.3d 767, 771 (7th Cir. 2006), so I will assume for the purpose of this motion that I may take judicial notice of the administrative record in this case. However, this exception only goes so far. Even if I can consider the documents themselves, this does not mean that I can take judicial notice of the facts underlying those documents. Courts are not required or permitted to give deferential review in Title VII cases to agency findings. Chandler v. Roudebush, 425 U.S. 840, 864 (1976) (“[F]ederal employee[s] [have] the same right to a trial de novo as private-sector employees enjoy under Title VII.”). Because plaintiff denies that he engaged in any inappropriate behavior before

the administrative law judge, I could not resolve this issue before summary judgment and possibly not even then.

Even if I could consider defendant's allegations on a motion to dismiss, the evidence defendant cites does not necessarily support a finding that plaintiff was "uncooperative." Defendant cites language in which plaintiff accused the administrative law judge of being "unprofessional" and biased, but all of the appellate cases defendant cites in support of his position involved more than mere rudeness or disrespect. In each of them, the plaintiff disobeyed an order or failed to take an action required by the regulations. Rann v. Chao, 346 F.3d 192, 196 (D.C. Cir. 2003) (refusal to submit materials requested by agency); McBride v. CITGO Petroleum Corp., 281 F.3d 1099, 1106 (10th Cir. 2002) (failure to meet agency deadlines); Khader v. Aspin, 1 F.3d 968, 971 (10th Cir. 1993) (refusal to submit materials requested by agency); Tanious v. IRS, 915 F.2d 410, 411 (9th Cir. 1990) (failure to appear at hearings); Davis v. Potter, 301 F. Supp. 2d 850, 860 (N.D. Ill. 2004) (refusal to respond to agency order). In this case, defendant does not cite any instance in which plaintiff failed to take a required action during the administrative proceedings.

Even if I assumed that the administrative law judge had the power to end the proceedings, that is not what the judge purported to do. Rather, according to the documents defendant cites, the judge determined that plaintiff's *request for a hearing* was withdrawn. Jukubiak Decl., dkt. #15, exh. A. Defendant cites no rule or regulation for the proposition

that forfeiting one's right to an administrative hearing means forfeiting the right to bring a lawsuit. Rather, under the EEOC's regulations, a hearing is an option that the employee may elect, but if the employee declines the hearing, it simply means that the matter is referred for a "final decision." 29 C.F.R. § 1614.108(f). See also Martinez v. Department of U.S. Army, 317 F.3d 511, 511 (5th Cir. 2003) ("[W]ithdrawing a request for an EEOC hearing [is] not a failure to cooperate with the administrative process."). That seems to be what happened in this case. According to the documents submitted by defendant, after the administrative law judge canceled the hearing, he directed the agency to "issue a Final Agency Decision on the merits of the complaint." Jakubiak Decl., dkt. #15, exh. D.

Defendant cites McGinty v. U.S. Dept. of Army, 900 F.2d 1114, 1117 (7th Cir. 1990), for the proposition that, "once a plaintiff chooses a particular administrative process, he is required to make a good faith effort to complete this process prior to filing suit." Dft.'s Br., dkt. #13, at 10. However, McGinty is distinguishable because, in that case, the employee abandoned the administrative process midway and attempted to proceed directly to federal court. That is not what happened in this case. Although defendant says that plaintiff told the administrative law judge that he wanted to proceed to federal court, he never actually withdrew his complaint. This fact also distinguishes the district court cases that defendant cites. Gagnon v. Potter, 2006 WL 2051730, *3 (N.D. Ind. 2006); Wiley v. Johnson, 436 F. Supp. 2d 91, 95 (D.D.C. 2006). Accordingly, I cannot conclude in the

context of a motion to dismiss that any behavior by plaintiff during the administrative proceedings requires dismissal of his case.

B. Premature Filing

Defendant's alternative argument is that plaintiff filed his lawsuit too soon. In particular, defendant says that plaintiff failed to wait until he received a final decision from the agency. Plaintiff filed this lawsuit in August 2010; the agency issued its final decision in October 2010. Under Hill, 352 F.3d at 1145-46, filing a Title VII lawsuit prematurely requires dismissal of the complaint without prejudice to refile it at the proper time.

The problem with defendant's argument is that § 2000e-16(c) gave plaintiff the right to file a lawsuit when he did:

[A]fter one hundred and eighty days from the filing of the initial charge with the department, agency, or unit . . . until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

Courts have been uniform in interpreting this provision to mean that a plaintiff has a right to file a lawsuit in federal court if he has not received a final decision from the agency within 180 days from the time he filed his administrative complaint. "[T]he right to sue is absolute after 180 days even if the agency is still mulling over whether to grant the individual some

administrative remedy.” Mays v. Principi, 301 F.3d 866, 869 (7th Cir. 2002). See also Murthy v. Vilsack, 609 F.3d 460, 465 (D.C. Cir. 2010) (“Section 2000e-16 provides that a federal employee must wait 180 days, absent final action by the EEOC, before filing a lawsuit in the federal district court.”); Mathirampuzha v. Potter, 548 F.3d 70, 74-75 (2d Cir. 2008) (“The employee may then file a civil action (i) within 90 days of notice of a final agency decision on his or her EEO complaint, or (ii) after 180 days from the filing of the EEO complaint if the agency has not yet rendered a decision.”); Martinez, 317 F.3d at 511 (“42 U.S.C. § 2000e-16(c) allows federal employees to file suit in federal court if an agency has not taken final action within 180 days.”); Walters v. Parsons, 729 F.2d 233, 237 (3d Cir. 1984) (“At the end of the 180 day period the employee is entitled to sue, regardless of the pendency of EEOC proceedings.”).

In this case, defendant says that plaintiff filed his initial complaint on October 15, 2008. He filed this lawsuit in August 2010, well after the 180-day waiting period. Defendant seems to believe that the 180-day period was “reset” once plaintiff asked for a hearing. This might be a sensible result, but there is no support for it in the statute. That is, § 2000e-16(c) says only that the agency has 180 days to issue a final decision once the employee files the administrative complaint; the statute does not create an exception when the employee requests a hearing. The court of appeals has stated that “no requirements beyond those in the statute should be imposed.” Doe, 456 F.3d at 710. I decline to create

an extra-statutory requirement in this case, even if the requirement might be a reasonable one.

Defendant suggests that its hearing-versus-no-hearing distinction is supported by § 2000e-16(c) because of the limitation in the provision that an employee may file a federal lawsuit only if he is “aggrieved . . . by the failure to take final action on his complaint.” Although defendant’s argument on this point is not entirely clear, he seems to be arguing that plaintiff was not “aggrieved” by the delay because the agency was acting within its internal deadlines. Dft.’s Br., dkt. #13, at 12-13 (noting that, when plaintiff filed lawsuit, only 42 days had passed since administrative law judge directed agency to issue a final decision and deadline for issuing decision under 29 C.F.R. § 1614.110(b) is 60 days).

Defendant identifies no court that has adopted his strained interpretation of “aggrieved.” For example, in Mays, 301 F.3d 866, the court of appeals did not suggest that the agency’s internal deadlines have any relevance to the employee’s right to sue. Rather, the court stated that an employee’s right to sue is “absolute” if more than 180 days have passed since he filed his administrative complaint. Accordingly, I conclude that plaintiff was “aggrieved” within the meaning of § 2000e-16(c) because he had not received any relief on his complaint in 180 days. The statute required no more before plaintiff filed this lawsuit.

ORDER

IT IS ORDERED that defendant Erik Shineski's motion to dismiss, dkt. #12, is DENIED.

Entered this 22d day of February, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge