

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

LEE A. MELLAND,

Plaintiff,

v.

JANET NAPOLITANO, Secretary,
Department of Homeland Security and
TRANSPORTATION SECURITY ADMINISTRATION,

Defendants.

OPINION and ORDER

10-cv-804-bbc

Plaintiff Lee Melland worked as a security officer for defendant Transportation Security Administration at the Dane County Regional Airport from September 2002 until she was terminated in September 2009. In this civil action for monetary and injunctive relief, plaintiff contends that the Transportation Security Administration retaliated against her and discriminated against her on the basis of her sex and disability when it denied her promotions, removed her training duties, issued her a letter of reprimand, denied her a service award, opposed her workers' compensation claim, gave her an unfair performance rating and ultimately terminated her from employment. She brings claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e -2000e-17, and the Rehabilitation Act,

29 U.S.C. §§ 791 and 794.

Now before the court is defendants' motion to dismiss certain of plaintiff's claims. Dkt. #14. Defendants contend that two alleged acts of discrimination identified in plaintiff's complaint should be dismissed as untimely and unexhausted, namely, plaintiff's allegations that she was denied promotions in March 2006 and November or December 2007. In addition, defendants contend that plaintiff's claims under the Rehabilitation Act should be dismissed because former employees of the Transportation Security Administration are ineligible to seek relief under the Act.

Plaintiff concedes that she cannot seek redress for the two promotions because she failed to exhaust her administrative remedies with respect to those events. Plt.'s Br., dkt. #18, at 1. Therefore, I will grant defendants' motion to dismiss with respect to those claims and will not consider them further. Also, I will dismiss plaintiff's claim under the Rehabilitation Act because the claim is preempted by the Aviation and Transportation Security Act.

OPINION

Under the Rehabilitation Act, federal agencies are prohibited from discriminating on the basis of an individual's disability. 29 U.S.C. §§ 791, 794; Teal v. Potter, 559 F.3d 687, 691 (7th Cir. 2009). Plaintiff contends that defendants violated the Act by discriminating

against her on the basis of a mental disability. In particular, she alleges that she was involved in a non-work-related motor vehicle accident that caused her to suffer a concussion and memory loss. A few weeks later, she was accused of smoking in a government vehicle in violation of a tobacco-use policy. According to plaintiff, her memory loss rendered her unable to dispute the accusation. Defendants concluded that she was guilty of the violation and issued her a letter of reprimand, denied her a service award and refused to interview her for an instructor position. Plaintiff contends that her concussion and memory loss were a disability and that defendants discriminated against her by refusing to credit her explanation of memory loss during investigation of the smoking charge.

Defendants contend that plaintiff's claim is preempted by the Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597, which Congress passed shortly after September 11, 2001. That Act established defendant Transportation Security Administration as the federal agency responsible for airport security screening and charged the Administration with improving aviation security and establishing qualification standards for airport security screeners. Joren v. Napolitano, 633 F.3d 1144, 1146 (7th Cir. 2011). The Act provides that "[n]otwithstanding any other provision of law, the Under Secretary of Transportation for Security may employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal service for . . . individuals . . . to carry out the screening functions." 49 U.S.C. § 44935 (codified as a note).

In a recent case, the Court of Appeals for the Seventh Circuit addressed the issue whether the Aviation and Transportation Security Act “prohibit[s] security screeners from successfully bringing discrimination claims against the [Transportation Security Administration] under the Rehabilitation Act.” Joren, 633 F.3d at 1146. The court of appeals began its analysis by noting that the only other circuit to consider the question had concluded that the Act preempts the application of the Rehabilitation Act to security screeners. Id. (citing Castro v. Secretary of Homeland Security, 472 F.3d 1334, 1337 (11th Cir. 2006) (holding that Aviation and Transportation Security Act preempts Rehabilitation Act hiring standards)); see also Conyers v. Rossides, 558 F.3d 137, 144 (2d Cir. 2009) (holding that Act’s “notwithstanding” clause overrides provisions in Administrative Procedures Act); Pino v. Hawley, 480 F. Supp. 2d 818, 825 (W.D. Pa. 2007) (holding that Rehabilitation Act is preempted by Aviation and Transportation Security Act); Tucker v. Ridge, 322 F. Supp. 2d 738, 743 (E.D. Tex. 2004) (same). In addition, the court of appeals found that the language in the Act signaled “Congress[’] inten[t] to enhance the Secretary’s flexibility in hiring security screeners to allow selection without regard to the prohibitions against disability discrimination in the Rehabilitation Act.” Joren, 633 F.3d at 1146. The court concluded that “the plain language of the [Aviation and Transportation Security Act] preempts application of the Rehabilitation Act to security screeners.” Id.

The court of appeals’ decision in Joren is directly on point and requires dismissal of

plaintiff's claim under the Rehabilitation Act. Plaintiff's attempt to distinguish Joren is not persuasive. She argues that the Aviation and Transportation Security Act preempts the application of the Rehabilitation Act only to the Transportation Security Administration's decision to hire, maintain the employment of or provide accommodations for security officers with disabilities. Plt.'s Br., dkt. #18, at 3. She contends that her claim is not preempted because it is a "discrimination" claim, not a claim for accommodation of her disability or alteration of the Administration's policies. Id. at 6.

However, the plaintiff's claim in Joren was also a "discrimination" claim and was not based solely on a failure to accommodate. In that case, the plaintiff contended that "her supervisor discriminated against her based on her disability" by refusing to accommodate her blood-clotting disorder, as well as by "refus[ing] to recognize her seniority, requir[ing] her to participate in excessive and unnecessary job training, contact[ing] her doctor without her permission, and add[ing] notations to her personnel file that would derail her efforts to transfer" In addition, the supervisor, "summoned her to the airport for a meeting . . . [that] greatly distressed [the plaintiff]" and caused her to resign. Joren, 633 F.3d at 1145. Later, the supervisor refused to send the plaintiff the paperwork she needed to maintain her health insurance coverage. Id. Although the plaintiff in Joren alleged that her supervisor discriminated against her in a variety of ways, the court of appeals did not consider any of the particular allegations of discrimination to be relevant to its analysis of the preemption

issue. That is, the court did not limit its holding to particular claims under the Rehabilitation Act; instead, it stated that the question before it was whether “discrimination claims against the [Transportation Security Administration]” are preempted and answered without qualification that the Aviation and Transportation Security Act “preempts application of the Rehabilitation Act to security screeners.” Id. at 1146. The holding is unambiguous and requires dismissal of plaintiff’s claim.

ORDER

IT IS ORDERED that the motion to dismiss, dkt. #14, filed by defendants Transportation Security Administration and Janet Napolitano is GRANTED. Plaintiff Lee Melland’s claims that defendants discriminated against her by denying her promotions in March 2006 and November or December 2007 are DISMISSED for plaintiff’s failure to exhaust her administrative remedies. Plaintiff’s claim under the Rehabilitation Act, 29 U.S.C. §§ 791 and 794, is DISMISSED because it is preempted by the Aviation and Transportation Security Act.

Entered this 9th day of May, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge