IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HOWARD C. KIBURZ,	:	
	:	
Plaintiff	:	**CIVIL ACTION NO. 1:04-CV-02247**
	:	
v.	:	**(Judge Kane)**
	:	
GORDON R. ENGLAND, Secretary, United States Department of the Navy,	:	
	:	
Defendant	:	

MEMORANDUM AND ORDER

Before the Court is Defendant's motion for partial summary judgment on Plaintiff's complaint. (Doc. No. 17.) The motion has been fully briefed and is ripe for disposition. For the reasons that follow, the motion will be denied.

I. BACKGROUND[1]

Plaintiff had been employed by the United States Department of Navy ("Navy") as a senior software engineer at the Navy Fleet Material Support Office[2] in Mechanicsburg, Pennsylvania. (Doc. No. 20 at ¶ 4.) Plaintiff's position with the Navy involved computer programming at a high level of difficulty and significance. (Id. at ¶ 8.) Plaintiff was responsible for special projects, design changes, and other software applications or operations that were complicated by extensive and significant interactions with other information technology systems. (Id. at ¶ 9.) As part of Plaintiff's

[1] The following information was taken from the parties' undisputed statements of material facts. (Doc. Nos. 20, 23.)

[2] Now known as the Navy Supply Information Systems Activity.

responsibilities, he was required to meet frequently with users, computer analysts, and programmers. (Doc. No. 23 at ¶ 11.)

Plaintiff suffers from severe degenerative joint disease and moderate spinal stenosis at multiple levels, which has been referred to as severe arthritis of the spine. (Doc. No. 20 at ¶ 13.) This condition causes unpredictable spells of severe, incapacitating pain. (Id. at ¶ 14.) Plaintiff's physician advised the Navy that Plaintiff's incapacitating pain and dysfunction would continue and likely worsen over time, and he further recommended that the Navy accommodate Plaintiff's condition with a suitable chair and a flexible work schedule. (Id. at ¶¶ 15, 16.) Plaintiff's physician noted, however, that even if the Navy met these accommodations, there would still be periods of time when Plaintiff would be unable to work. (Id. at ¶ 17.)

The Navy and Plaintiff engaged in a series of attempts to reach an agreement that could accommodate both Plaintiff's and the Navy's needs; however, this process ultimately failed. (Id. at ¶¶ 18-20.) As a result, Plaintiff missed significant periods of work, most of which was unscheduled.[3] (Id. at ¶ 23.) Following the extended periods of absence, Plaintiff's supervisor, Ferguson, wrote to advise Plaintiff that upon his exhaustion of leave under the Family Medical Leave Act, Plaintiff's leave without pay would no longer be approved. (Id. at ¶ 27.) Ferguson further advised Plaintiff that the Navy needed to be able to predict confidently Plaintiff's availability to schedule time-sensitive meetings and classes. (Id. at ¶ 28.) In addition, Plaintiff was advised that if he was unable to come to work and be

[3] From June 21, 1999 through July 1, 2000, Plaintiff used 727.5 hours of leave due to medical problems. (Doc. No. 20 at ¶ 21.) Additionally, from February 13, 2001 through October 19, 2001, Plaintiff also used 718.5 hours of leave, most of which was without pay due to Plaintiff's limited amount of earned annual sick leave. (Id. at ¶ 22.)

available for meetings and classes then further action, including removal, may be required. (Id. at ¶ 29.) However, Plaintiff continued to miss work and the Navy terminated Plaintiff effective May 3, 2002. (Id. at ¶ 34.)

Plaintiff filed a complaint with the Merit System Protection Board ("MSPB") stating the following claims: (1) his termination violated the merit system rules governing termination of federal employees; and (2) his removal constituted disability discrimination under the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq.[4] (Id. at ¶¶ 36-37.) An Administrative Law Judge ("ALJ") issued an Initial Decision on September 20, 2002. On Plaintiff's first claim, the ALJ concluded that Plaintiff's absences had not continued for a reasonable time after he was warned about the possibility of termination. As a result, the ALJ ordered the Navy to reinstate Plaintiff retroactively to May 3, 2002, and to pay him all back pay and benefits. (Id. at ¶ 45.) The ALJ dismissed Plaintiff's second claim concluding that Plaintiff was not a "qualified individual" entitled to relief under the Rehabilitation Act .[5] (Id. at ¶¶ 44-47.)

Both the Navy and Plaintiff filed petitions for review to the MSPB full board ("Board"). (Doc. No. 20 at ¶ 48.) On June 23, 2003, while the appeal was pending, Plaintiff accepted a voluntary early retirement program for which he was eligible. (Id. at ¶ 51.) Shortly thereafter, on July 5, 2005, Plaintiff

[4] A federal civil service employee against whom an adverse employment action has been taken may appeal to the Merit Systems Protection Board. 5 U.S.C. § 7513. The MSPB is a quasi-judicial federal administrative agency charged with overseeing and protecting the merit system, and adjudicating conflicts between Federal employees and employers. Sloan v. West, 140 F.3d 1255, 1259 (9th Cir. 1998).

[5] A "qualified individual" is defined as an individual with a disability who is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer. 29 C.F.R. § 1614.203(a)(6); Mengine v. Runyon, 114 F.3d 415, 418 (3d Cir. 1997).

filed a second complaint with the MSPB claiming that his voluntary retirement constituted a constructive discharge in violation of the Rehabilitation Act because the Navy failed to accommodate his medical condition. (Id. at ¶ 53.) However, because Plaintiff's appeal to the Board was still pending, the ALJ dismissed Plaintiff's complaint "without prejudice to its refiling no later than fifteen days from the date of the Board's final decision in the prior appeal."[6] (Id. at ¶ 60.) On September 5, 2004, the Board issued its decision regarding Plaintiff's appeal, which became final on September 16, 2004, and denied both parties petition for review. (Id. at ¶ 71.) As a result and pursuant to the order dismissing Plaintiff's second complaint, Plaintiff needed to file a "notice of intent to refile" within fifteen days of the MSPB's final decision on Plaintiff's appeal. (Id. at ¶ 72.) Plaintiff never filed such a notice. (Id. at ¶ 73.)

On October 12, 2004, Plaintiff initiated this civil action pursuant to the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 et seq. ("RHA"). (Doc. No. 1.) In the complaint, Plaintiff brings an official capacity suit against the Secretary of the United States Department of Navy, Gordon R. England (hereinafter "Navy"). The two count complaint asserts the following claims under section 504(a) of the RHA, 29 U.S.C. § 794(a): disability discrimination in the form of failure to accommodate ("Count I"); and constructive discharge for failing to accommodate Plaintiff's disability ("Count II"). On April 11, 2005, Defendant filed a motion for partial summary judgment on Count II of Plaintiff's complaint pursuant to Rule 56 of the Federal Rules of Civil Procedure. (Doc. No. 17.)

II. STANDARD OF REVIEW

[6] In the order dismissing Plaintiff's second complaint to the MSPB, the ALJ stated that Plaintiff could refile his second complaint by simply filing a "notice of intent to refile." (Id. at ¶ 61.)

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. A factual dispute is material if it might affect the outcome of the suit under applicable law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is genuine only if there is sufficient evidentiary basis which would allow a reasonable fact-finder to return a verdict for the non-moving party. Id. at 249. When deciding a motion for summary judgment, the Court views the facts in the light most favorable to the nonmoving party, who is "entitled to every reasonable inference that can be drawn from the record." Merkle v. Upper Dublin Sch. Dist., 211 F.3d 782, 788 (3d Cir. 2000).

Once the moving party has shown that there is an absence of evidence to support the claims of the non-moving party, the non-moving party may not simply sit back and rest on the allegations in his complaint; instead, he must "go beyond the pleadings and by [his] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) (internal quotations omitted). Summary judgment should be granted where a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial." Id. at 322.

III. DISCUSSION

Count II of Plaintiff's complaint asserts a claim for constructive discharge for failing to accommodate Plaintiff's disability as required under section 504(a) of the RHA, 29 U.S.C. § 794(a). The RHA provides that anyone receiving federal funds may not discriminate against an "otherwise

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