NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted June 30, 2023*
Decided July 12, 2023

Before

FRANK H. EASTERBROOK *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 22-2946

KYLE W. SHIRLEY,
Plaintiff-Appellant,

v.

MERRICK B. GARLAND, Attorney General of the United States, and RONALD L. DAVIS, Director of the United States Marshals Service,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois.

No. 3:21-cv-841-SPM

Stephen P. McGlynn,
Judge.

O R D E R

Kyle Shirley, a retired Deputy United States Marshal, appeals the dismissal of his complaint, which alleged that his former employer subjected him to disability-based

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

discrimination, retaliation, and violations of the Privacy Act of 1974. The district court ruled that Shirley's claims were barred because he did not timely contact an equal employment opportunity counselor. We affirm, though we clarify that Shirley's pleadings showed that he did not meet the substantive statutory prerequisites for a Privacy Act claim.

We accept as true the factual allegations in Shirley's second amended complaint. *O'Brien v. Village of Lincolnshire*, 955 F.3d 616, 621 (7th Cir. 2020). We also consider the complaint's exhibits, *id*., and documents attached to the motion to dismiss that are referenced in Shirley's complaint and are central to his claims. *See Burke v. 401 N. Wabash Venture, LLC*, 714 F.3d 501, 505 (7th Cir. 2013).

The United States Marshals Service required Shirley to retire in April 2017 because he did not meet his job's physical requirements. In June 2017, Shirley contacted an equal employment opportunity counselor within the Marshals Service; he then a filed formal complaint with the Marshals Service and a charge with the Equal Employment Opportunity Commission, alleging that the Marshals Service discriminated against him based on a disability when it compelled his retirement. Around that time, the Marshals Service's acting director also told Shirley that he would not receive certain credentials—a retirement badge and an identification card under the Law Enforcement Officers Safety Act (LEOSA), 18 U.S.C. § 926C—because he had disparaged a superior on social media and thus was not in good standing with the Marshals Service. (LEOSA cardholders are exempt from certain state and local laws governing the concealed carrying of firearms. *Id.* § 926C(a).)

Shirley waited more than two years to request the credentials again, in an email in July 2019, because a lawyer had advised him to wait until a new, permanent director took office. On August 5, the Marshals Service denied his request based on the 2017 decision that he was not in good standing. After Shirley repeatedly followed up, the Marshals Service reiterated that Shirley's lack of good standing prevented issuance of the credentials.

In January 2020, Shirley contacted an equal employment opportunity counselor at the Marshals Service about the refusals to issue the credentials and then filed a formal complaint with the Marshals Service. The Marshals Service deemed this complaint untimely because Shirley had not—as federal regulations require—contacted a counselor within 45 days of the original refusal to issue the credentials when he retired in 2017. The EEOC agreed when Shirley brought another charge there based on the denial of his 2019 requests.

Shirley then sued the Director of the United States Marshals Service in his official capacity and the Attorney General of the United States (for reasons unclear), alleging that the denial of retirement credentials constituted discrimination based on his disability, in violation of the Rehabilitation Act, 29 U.S.C. § 794, and retaliation for his 2017 complaints, in violation of the Rehabilitation Act and Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-3.

The defendants moved to dismiss Shirley's first amended complaint or, in the alternative, for summary judgment, arguing that Shirley's claim was time-barred because he had not contacted the Marshals Service's EEO counselor within 45 days of the refusal to issue the credentials in 2017. The district court granted the motion and dismissed the complaint without prejudice. The court noted that Shirley contacted the counselor after the 45-day time limit had expired. But the court gave Shirley leave to amend in case he could plausibly plead that within 45 days he neither knew, nor reasonably should have known, that the challenged action was possibly discriminatory or retaliatory. 29 C.F.R. § 1614.105(a)(2).

Meanwhile, Shirley was having difficulty meeting deadlines because he was filing and receiving documents by mail, so he asked the court to adjust his filing and service dates to account for the delay. He also asked that the defendants electronically notify the court each time he was served. The court ordered the defendants to file their response to this request, if any, by June 23, 2022, and they did so one day late with a motion for leave to file instanter, explaining that they had inadvertently calendared the wrong date. The court accepted the late response and ordered that (1) any document mailed to Shirley be deemed received three days after its mailing date and (2) Shirley have an extra three days to meet any non-jurisdictional deadline.

In his second amended complaint, Shirley addressed the requirement of contacting an EEO counselor within 45 days of an unlawful action by alleging that the 2019 refusal to issue the credentials was "the most recent incident in an ongoing case of harassment." (On appeal, he abandons the argument that the allegedly unlawful activity was ongoing through the 2019 refusals, and we do not address it further.) Shirley also newly asserted that "under 5 U.S. Code § 552(d)(2)(A)(B)(i)," the Marshals Service "should have reviewed the record when requested."

The defendants again moved for dismissal or, alternatively, for summary judgment, on timeliness grounds. In his response brief, Shirley elaborated on his new claim, alleging that his 2019 emails requested that the Marshals Service correct its records and that the defendants' response was untimely under 5 U.S.C. § 552 (and

sections "522 and 522a," which are not in the Code). The defendants filed a reply brief, stating that they had "exceptional circumstances" warranting a reply under the court's local rules because they understood only from Shirley's response brief that his new claim relied on the Privacy Act, 5 U.S.C. § 552a; he had not cited it in his complaint nor alleged that he made any request to correct records. The defendants argued that Shirley did not state a Privacy Act claim because he had never asked the Marshals Service to correct its records; if he had, they had timely responded; and the claim was barred by the two-year statute of limitations. Shirley moved to strike the reply, and the court denied his motion.

The court then dismissed the case with prejudice, ruling that Shirley had not timely sought EEO counseling. The court explained that a reasonable person, within 45 days of the refusal to issue the credentials in 2017, would have questioned whether that action was discriminatory or retaliatory. The court concluded that the failure to timely request EEO counseling also required dismissal of the Privacy Act claim.

On appeal, Shirley first contends that the court wrongly dismissed his lawsuit because, he says, the 2019 refusal was a new act of discrimination and retaliation separate from the 2017 denial. Shirley contends that he therefore made timely contact with the EEO counselor in 2020.

The district court got it right. Federal employees who wish to sue under Title VII must first contact their employer's EEO counselor within 45 days of the allegedly unlawful action. *Green v. Brennan*, 578 U.S. 547, 552–53 (2016) (citing 42 U.S.C. § 2000e-16(c); 29 C.F.R. § 1614.105(a)(1)). The same requirement applies to Rehabilitation Act claims. *See Teal v. Potter*, 559 F.3d 687, 691 (7th Cir. 2009) (citing 29 U.S.C. § 794a(a)(1)). Here, as the district court explained, Shirley did not timely contact an EEO counselor: The Marshals Service first told him in 2017 that it would not issue the credentials—contemporaneously with requiring that he retire based on his physical capabilities. Shirley did not contact an EEO counselor until January 2020.

Moreover, even if the 2019 denial were a new, and discrete, instance of alleged discrimination, the 45-day clock would have begun to run on August 5, 2019, when Shirley was again told by the Marshals Service that he would not receive the credentials because he was not in good standing. The 45-day period thus expired in September 2019—well before Shirley contacted the counselor in January 2020.

Shirley protests that, if he waited too long to contact a counselor, we should excuse the delay because the lawyer advised him to wait to seek the credentials again

until the Marshals Service had a new director. But there is no exception to the time limit for contacting an EEO counselor based on incorrect legal advice from an independent attorney. A party who follows such advice is bound by the consequences. *Cannon-Stokes v. Potter*, 453 F.3d 446, 449 (7th Cir. 2006). If Shirley was a client of the lawyer who allegedly led him astray (it is not clear from the pleadings), his grievance is with that attorney.

Next, Shirley contends that the district court erred by dismissing his Privacy Act claim. He argues that his 2019 email asking for the retirement credentials was also a request for the Marshals Service to correct its records about him, and it responded too late. Dismissal of the Privacy Act claim was appropriate, however, because Shirley did not meet the statutory prerequisites for filing it. Under the Privacy Act, a person may ask a federal agency to correct its records about him, and the agency must either do so or explain why it will not. *See* 5 U.S.C. § 552a(d)(2). The Act provides a private cause of action when agencies refuse. *Id*. § 552a(g)(1)). Inherent in this framework is the requirement that, before filing suit, the would-be plaintiff must ask the agency to amend its records. *Diliberti v. United States*, 817 F.2d 1259, 1260 (7th Cir. 1987) (citing 5 U.S.C. § 552a(d)(2), (g)(1)). Shirley's 2019 communication with the Marshals Service asked it to issue the credentials—to create a record, not correct one—and did not even mention his standing upon retirement until the Marshals Service cited it, again, as the reason the credentials would not issue. Shirley's own allegations therefore establish that he could not seek relief under the Privacy Act.

Finally, Shirley challenges as unfair the court's rulings (1) allowing the defendants to file a reply brief to their second motion to dismiss, (2) giving Shirley extra time to meet deadlines without providing for electronic filing, and (3) accepting the defendants' late response to Shirley's motion for assistance meeting deadlines. We review such docket-management rulings for an abuse of discretion, *see Miller v. Chi. Transit Auth.*, 20 F.4th 1148, 1154 (7th Cir. 2021), and we see none here. The court was within its discretion under its local rules to accept the defendants' reply brief. *See Hinterberger v. City of Indianapolis*, 966 F.3d 523, 528 (7th Cir. 2020); S.D. ILL. R. 7.1(c). Further, Shirley never asked for electronic filing privileges (he requested that the defendants electronically docket notices for him), so it was reasonable for the court to give him extended filing and service dates and not impose burdens on the defendants. And the court reasonably granted the defendants' motion for leave to file their one-day-late response instanter based on their excusable neglect. FED. R. CIV. P. 6(b)(1)(B); *see Mayle v. Illinois*, 956 F.3d 966, 968–69 (7th Cir. 2020) (affirming, under excusable-

neglect standard, grant of extension of time to file notice of appeal two days late). Finally, Shirley has not shown that any of these discretionary decisions prejudiced him.

AFFIRMED