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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHN P. MORGAN,

NO. CIV. S-09-2649 LKK/DAD

Plaintiff,

v.

O R D E R

JANET NAPOLITANO, SECRETARY,
U.S. DEPARTMENT OF HOMELAND
SECURITY, IMMIGRATION AND
CUSTOMS ENFORCEMENT, FEDERAL
PROTECTIVE SERVICE,

Defendants.

_____ /

On September 21, 2009, plaintiff, a federal employee, filed a complaint against his employer alleging violations of the Age Discrimination in Employment Act ("ADEA") and Title VII. Plaintiff alleged that he "has exhausted all required administrative remedies," but did not provide any detail as to what administrative remedies or agency decisions were made. Compl. ¶ 4. On February 18, 2010, plaintiff filed an amended complaint. On March 1, 2010, the court held a status conference. At this conference, defendant stated that she did not believe that the court had subject matter

1 over the case because plaintiff's claims were not exhausted.
2 Accordingly, the court ordered defendant to file a motion to
3 dismiss for lack of subject matter jurisdiction. The court also
4 granted plaintiff leave to file a second amended complaint ("SAC").

5 On March 11, 2010, plaintiff filed his second amended
6 complaint. In this complaint, plaintiff does not allege any facts
7 concerning whether his claim is properly exhausted despite being
8 aware that defendant was to challenge subject matter jurisdiction
9 on this issue following his filing of the second amended complaint.

10 On March 23, 2010, defendant filed a motion to dismiss for
11 lack of subject matter jurisdiction and failure to state a claim
12 as to plaintiff's Title VII claim and a motion to strike the jury
13 demand under ADEA. Dkt. No. 14. Defendant, however, did not move
14 to dismiss plaintiff's ADEA claim for lack of subject matter
15 jurisdiction. Plaintiff's opposition merely argued that he
16 sufficiently alleged that he exhausted his administrative remedies
17 by his citation to 42 U.S.C. § 2000e-16(c) in support of
18 jurisdiction in the SAC. He continues to state that this reference
19 is sufficient to avoid dismissal under Fed. R. Civ. P. 12(b)(6),
20 for failure to state a Title VII claim.

21 Plaintiff relies on an incorrect standard for determination
22 of subject matter jurisdiction. Defendant moves to dismiss under
23 Fed. R. Civ. P. 12(b)(1). Plaintiff, the party seeking federal
24 jurisdiction, bears the burden of proving that jurisdiction is
25 proper. See, e.g., Lew v. Moss, 797 F.2d 747, 749 (9th Cir. 1986).
26 This is not a question resolved by amendment. Rather, plaintiff

1 must prove that jurisdiction is proper. Plaintiff has not provided
2 any such proof.

3 Both ADEA and Title VII require administrative exhaustion
4 prior to filing a complaint in federal court.¹ The type of
5 exhaustion, however, is somewhat different under each statute.
6 Specifically, under Title VII, plaintiff, as a federal employee,
7 must first contact an EEO counselor at his employer within 45 days
8 from the day the discrimination occurred. 29 C.F.R. §§ 1614.105,
9 1614.106. The EEO counselor, then, will attempt to settle the
10 dispute. Id. If settlement is not reached, plaintiff must file a
11 formal complaint with the EEOC within 15 days of being informed by
12 the EEO counselor about how to file. Id. Plaintiff may then only
13 file a civil complaint in federal court when one of four events has
14 occurred: (1) after 180 days have passed from the day he filed his
15 complaint, if the agency has not issued a decision and no
16 administrative appeal has been filed; (2) within 90 days from the
17 day he receives the agency's decision on his complaint, so long as
18 no appeal has been filed; (3) after 180 days from the day he filed
19 an administrative appeal if the EEOC has not issued a decision; or
20 (4) within 90 days from the day plaintiff received the EEOC's
21 decision on his administrative appeal. 42 U.S.C. §§ 2000e-16(c-d),
22 2000e-5(f) (1).

23
24 ¹ Federal courts have an independent duty to confirm subject
25 matter jurisdiction. The court finds that plaintiff's complaint
26 casts significant doubt over the existence of subject matter
jurisdiction over both of his claims, even though defendant does
not now move to dismiss plaintiff's ADEA claim for lack of
jurisdiction.


1 Under ADEA, plaintiff need not file an administrative
2 complaint, but if he does he must follow the same procedure for
3 filing in federal court as described above. Alternatively,
4 plaintiff may file a notice of intent to sue with the EEOC thirty
5 days before filing his complaint in federal court. 29 U.S.C. §
6 633a(d). If plaintiff fails to complete either process, the court
7 lacks subject matter jurisdiction over his ADEA claim.

8 For the foregoing reasons, the court ORDERS plaintiff to file
9 by 9:00 a.m. on Thursday, May 20, 2010, proof that this court has
10 jurisdiction over both his ADEA and Title VII claims. Such proof
11 includes, but is not limited to, date-stamped complaints filed with
12 the EEOC, final decisions from the EEOC, and a date-stamped notice
13 of intent to sue filed with the EEOC. Where such documentary
14 evidence is not available or requires explanation, plaintiff and/or
15 plaintiff's counsel shall file affidavit(s), under penalty of
16 perjury, concerning the dates of the allegedly illegal acts of
17 defendant, the actions plaintiff took with the EEO Counselor, the
18 EEOC, or any other relevant agency concerning administrative
19 exhaustion, and responses by the EEO Counselor, the EEOC, or any
20 other relevant agency. All documentation and testimony shall be as
21 specific with respect to date as possible. Failure to do so will
22 result in dismissal of plaintiff's complaint for lack of subject
23 matter jurisdiction.

24 IT IS SO ORDERED.

25 DATED: May 17, 2010.

26


LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT