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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTHONY J. SILVERIA,
Plaintiff,
v.
ROBERT WILKIE, et al.,
Defendants.

No. 2:18-cv-412-TLN-KJN PS

ORDER

Presently pending before the court is a motion to dismiss on various grounds filed by defendant Robert Wilkie, Secretary, U.S. Department of Veterans Affairs. (ECF No. 18.) Plaintiff Anthony Silveria, proceeding without counsel, opposed the motion, and defendant filed a reply brief. (ECF Nos. 21, 24.)¹ For the reasons discussed below, the court GRANTS IN PART defendant’s motion and TRANSFERS the action to the Northern District of California.

In short, plaintiff, a former employee of the United States Department of Veterans Affairs (“VA”) in Oakland, California, alleges that he was improperly removed from his position on June 29, 2014, because the VA discriminated against plaintiff based on his mental disability. Plaintiff

¹ The motion was submitted for decision without oral argument on the record and written briefing pursuant to Local Rule 230(g). (ECF No. 23.)

1 filed the instant action on February 23, 2018, alleging claims under the Americans with
2 Disabilities Act and other federal laws. The operative first amended complaint, filed on May 11,
3 2018, names the current Secretary of the VA, as well as three of plaintiff's former supervisors
4 based in Oakland, California.

5 As a threshold matter, defendant contends that the action should be dismissed for
6 improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3). That argument has merit.

7 Although plaintiff asserts an ADA claim, the Rehabilitation Act, and not the ADA, applies
8 to federal agencies. See, e.g., Enica v. Principi, 544 F.3d 328, 338 n.11 (1st Cir. 2008).

9 "Employment discrimination claims under the Rehabilitation Act are governed by Title VII's
10 venue provision, 42 U.S.C. § 2000e-5(f)(3)." Kunamneni v. Gutierrez, 2009 WL 1068891, at *1
11 (N.D. Cal. Apr. 21, 2009) (citing Bolar v. Frank, 938 F.2d 377, 377-78 (2d Cir. 1991)). Section
12 2000e-5(f)(3) provides:

13 Such an action may be brought in any judicial district in the State in
14 which the unlawful employment practice is alleged to have been
15 committed, in the judicial district in which the employment records
16 relevant to such practice are maintained and administered, or in the
17 judicial district in which the aggrieved person would have worked
but for the alleged unlawful employment practice, but if the
respondent is not found within any such district, such an action may
be brought within the judicial district in which the respondent has his
principal office.

18 42 U.S.C. § 2000e-5(f)(3).

19 Here, plaintiff admits that the alleged unlawful employment practice occurred at the VA's
20 Regional Office in Oakland, where he and the three supervisors named as defendants in the
21 complaint worked, and which is located in the Northern District of California. Indeed, plaintiff
22 moved to Sacramento only at some point after his termination. Plaintiff also concedes that his
23 records are kept at the VA's Regional Office in Oakland. Plaintiff's only potentially colorable
24 argument is that he made a request to transfer to Sacramento in 2013, which was denied, positing
25 that he would have worked in Sacramento but for the denial of the transfer. However, based on
26 the limited record before the court, it is far from clear that the denial was an unlawful
27 employment practice or was even part of plaintiff's discrimination claim in the underlying
28 proceedings before the Merit Systems Protection Board ("MSPB") or the Equal Employment

1 Opportunity Commission (“EEOC”). Indeed, the final decision by the EEOC, which advised
2 plaintiff of his right to file a civil action in federal district court, references only plaintiff’s “claim
3 that the Agency discriminated against him on the bases of disability (mental) and reprisal when he
4 was removed from his position on June 29, 2014.” (ECF No. 7 at 10.) As such, plaintiff has not
5 adequately demonstrated that he would have worked in Sacramento but for an alleged unlawful
6 employment practice by the VA. Piedmont Label Co. v. Sun Garden Packing Co., 598 F.2d 491,
7 496 (9th Cir. 1979) (noting that a plaintiff has the burden of showing that venue is proper in the
8 applicable district). Finally, plaintiff’s remaining arguments for venue in the Eastern District of
9 California are so insubstantial and unsupported as to not warrant further discussion.

10 Having concluded that plaintiff failed to adequately show that venue is proper in the
11 Eastern District of California, the court declines to reach defendant’s remaining asserted bases for
12 dismissal. The only question remaining is whether the action should be dismissed without
13 prejudice or transferred to the Northern District of California. See 28 U.S.C. § 1406(a) (“The
14 district court of a district in which is filed a case laying venue in the wrong division or district
15 shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in
16 which it could have been brought.”). Although defendant requests dismissal, the court finds that
17 transfer is more appropriate in this case. Plaintiff, as a *pro se* litigant, was likely unaware of the
18 procedural complexities of venue and largely motivated by a desire to have his case heard in the
19 court closest to where he presently lives. As such, having to repay the filing fee for a new action
20 in the Northern District appears unwarranted. Furthermore, it is unclear (and the court makes no
21 finding) whether dismissal would have any effect on plaintiff’s ability to file a new action in light
22 of any applicable statutes of limitation. Therefore, the court concludes that transfer is more
23 appropriate.

24 Accordingly, IT IS HEREBY ORDERED that:

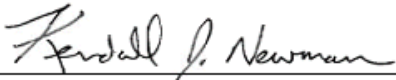
- 25 1. Defendant’s motion to dismiss (ECF No. 18) is GRANTED IN PART based on
26 improper venue.
- 27 2. This action is TRANSFERRED to the United States District Court for the Northern
28 District of California.

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3. This order is without prejudice to defendant’s right to file an appropriate responsive motion or pleading in the Northern District of California, and the court expresses no opinion on the merits of plaintiff’s substantive claims.

4. The Clerk of Court shall close this case.

Dated: November 29, 2018


KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE