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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HARRIS L. WINNS,
Plaintiff,
v.
MERIT SYSTEMS PROTECTION
BOARD, et al.,
Defendants.

Case No. 15-cv-02313-HRL

**ORDER DENYING PLAINTIFF'S
MOTION FOR LEAVE TO FILE
SECOND AMENDED COMPLAINT**

**ORDER TRANSFERRING CASE TO
FEDERAL CIRCUIT**

**ORDER DENYING AS MOOT MOTION
FOR INTRA-DISTRICT VENUE
CHANGE AND MOTION TO DISMISS**

Re: Dkt. Nos. 16, 21, 27, 28

Plaintiff Harris L. Winns, pro se, sues the U.S. Postal Service (“USPS”) and Postmaster General Megan Brennan.¹ Plaintiff challenges both a final order by the Merit Systems Protection Board (“MSPB”) and an initial decision by a MSPB Administrative Judge. Defendants have moved to dismiss the first amended complaint. Plaintiff has moved for leave to file a second amended complaint and for an intra-district change in venue. The parties also briefed whether the court should transfer this case to the Federal Circuit.

The parties have expressly consented to magistrate jurisdiction. The court heard arguments on August 4, 2015. The court has considered the moving and responding papers as

¹ Plaintiff named the Merit Systems Protection Board as a defendant in the original complaint, but not in the amended complaint. Because the original complaint is without legal effect, it appears that Plaintiff is no longer attempting to sue the MSPB. See *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 927 (9th Cir. 2012) (en banc).

1 well as the arguments presented at the hearing. The court lacks subject-matter jurisdiction over
2 this appeal from a jurisdictional dismissal by the MSPB. The court transfers this case to the
3 United States Court of Appeals for the Federal Circuit.

4 **Background**

5 Plaintiff worked for the USPS. The USPS fired him in October 2014. Plaintiff filed an
6 appeal with the MSPB to challenge the firing and an administrative judge dismissed the appeal for
7 lack of jurisdiction. Plaintiff filed a petition for review and the MSPB issued a final order that
8 affirmed the administrative judge’s initial decision.

9 The MSPB is an independent, quasi-judicial agency in the executive branch that was
10 established to discourage personnel decisions that are not based on merit and to protect employees
11 in federal agencies against illegal managerial practices. A federal employee who is fired or suffers
12 some other adverse or disciplinary action, including reprisal for disclosures protected by the
13 federal Whistleblower Protection Act, may appeal to the MSPB. An administrative judge in one
14 of the MSPB’s regional offices adjudicates the appeal and issues an initial decision. The
15 employee may then file a petition for review with the full three-member Board. Following the
16 Board’s final decision, the employee may appeal to a federal appellate or district court depending
17 on the nature of his claims. *See* 5 U.S.C. § 7703.

18 Here, the administrative judge concluded in the initial decision that “the Board lacks
19 jurisdiction over this appeal on any basis” and granted the agency’s motion to dismiss. *See* Dkt.
20 No. 1 at 73. The MSPB’s final order denied Plaintiff’s petition for review and adopted the
21 administrative judge’s initial decision as the MSPB’s final decision because the “administrative
22 judge properly dismissed the appeal for lack of jurisdiction.” Dkt. No. 7 at 30.

23 Plaintiff filed this case in May 2015. The initial complaint appears to conclude with the
24 same prayer for relief that Plaintiff previously submitted to the MSPB—it asks “this Honorable
25 Merit Systems Protection Board” for certain remedies under Title VII of the Civil Rights Act of
26 1964, and it is dated January 27, 2015. Dkt. No. 1 at 66-67. Plaintiff replaced that complaint with
27 a first amended complaint, which he captioned as a “Petition for review from the Merit Systems
28 Protection Board in case no. SF-0752-15-0165-II.” Dkt. No. 7 at 1. Plaintiff alleges that the

1 MSPB’s initial decision and final order were wrongly decided. The remedies requested in the
2 initial complaint have been removed. Instead, Plaintiff requests that this court vacate and reverse
3 the MSPB’s initial and final decisions. Dkt. No. 7 at 24.

4 Defendants moved to dismiss the first amended complaint under Federal Rule of Civil
5 Procedure 12(b)(1) for lack of subject matter jurisdiction. Plaintiff filed two oppositions and
6 Defendants filed a reply. Plaintiff also filed a motion for leave to file a second amended
7 complaint, a proposed second amended complaint, a motion for intra-district change of venue, and
8 a brief that opposes transfer of this case to the Federal Circuit under 28 U.S.C. 1631.

9 **Defendants’ Motion to Dismiss**

10 “A jurisdictional challenge under Rule 12(b)(1) may be made either on the face of the
11 pleadings or by presenting extrinsic evidence.” *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d
12 1136, 1139 (9th Cir. 2003) (citing *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000)). Here, the
13 defendants raise a factual attack on jurisdiction. Thus, “[u]nlike a Rule 12(b)(6) motion, a Rule
14 12(b)(1) motion can attack the substance of a complaint’s jurisdictional allegations despite their
15 formal sufficiency, and in so doing rely on affidavits or any other evidence properly before the
16 court.” *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989). “It then becomes necessary
17 for the party opposing the motion to present affidavits or any other evidence necessary to satisfy
18 its burden of establishing that the court, in fact, possesses subject matter jurisdiction.” *Id.* “The
19 district court obviously does not abuse its discretion by looking to this extra-pleading material in
20 deciding the issue, even if it becomes necessary to resolve factual disputes.” *Id.* (citing *Thornhill*
21 *Publishing Co. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979)). Additionally,
22 where, as here, jurisdictional issues are separable from the merits of the case, the court may weigh
23 the evidence and determine the facts in order to establish its power to hear the case. *See id.*

24 Review of an MSPB decision is available either in the Federal Circuit or in federal district
25 court, and the proper forum depends on the nature of the MSPB decision.² *Kloeckner v. Solis*, 133

26 _____
27 ² Review of an MSPB decision that addresses solely whistleblower reprisal claims brought under 5
28 U.S.C. § 1221 is available in the Federal Circuit or in any other circuit court of competent
jurisdiction. 5 U.S.C. § 7703(b)(1)(B). Although Plaintiff raised a whistleblower reprisal claim
before the MSPB, it is not clear if he raised it under § 1221 or merely as an affirmative defense to
his termination (which would be adjudicated under another statute). Even if he raised it under §

1 S. Ct. 596, 600-01 (2012). 5 U.S.C. § 7703 governs judicial review of the MSPB’s decisions.
2 Petitions to review MSPB decisions “shall be filed in the . . . Federal Circuit,” except that “[c]ases
3 of discrimination” shall be filed in district court under the enforcement provisions of the federal
4 antidiscrimination statutes. *Kloeckner*, 133 S. Ct. at 601.

5 Jurisdictional dismissal, however, must be appealed to the Federal Circuit, regardless of
6 whether the case involves discrimination allegations. *Sloan v. West*, 140 F.3d 1255, 1261 (9th Cir.
7 1998). If the MSPB concludes it does not have jurisdiction over an employee’s appeal, then “any
8 appeal” from the MSPB’s jurisdictional dismissal “must be filed in the Federal Circuit Court of
9 Appeals.” *Id.* at 1261.

10 Here, Plaintiff requests that the court review the MSPB’s initial decision and final order,
11 both of which dismissed his claims for lack of jurisdiction. In the initial decision, the
12 administrative judge concluded that “the Board lacks jurisdiction over this appeal on any basis”
13 and granted the agency’s motion to dismiss. Dkt. No. 1 at 73. In the final order the MSPB denied
14 Plaintiff’s petition for review, affirmed the initial decision, and held that the initial decision would
15 be the final decision because the “administrative judge properly dismissed the appeal for lack of
16 jurisdiction.” Dkt. No. 7 at 30. This court lacks jurisdiction to review MSPB’s jurisdictional
17 dismissal.

18 Plaintiff argues in his opposition briefs that the MSPB’s decisions were wrong. That
19 argument is irrelevant to whether this court has jurisdiction to hear this appeal.

20 In addition, Plaintiff argues that the Federal Circuit does not have jurisdiction over mixed
21 cases,³ citing to *Kloeckner*. In *Kloeckner*, however, the Supreme Court granted certiorari “to
22 resolve a Circuit split on whether an employee seeking judicial review should proceed in the
23 Federal Circuit or in a district court when the MSPB has dismissed her mixed case on procedural
24 grounds.” *Kloeckner*, 133 S. Ct. at 603. The Supreme Court’s resolution of a circuit split related
25 to procedural dismissal did not disturb a distinct rule about jurisdictional dismissal. *Conforto v.*

26 1221, it was not his sole claim. Therefore, he cannot seek review in a circuit court other than the
27 Federal Circuit. 5 U.S.C. § 7703(b)(1)(A).

28 ³ Discrimination cases are referred to as “mixed cases,” because they involve both (1) an
employment action appealable to the MSPB, and (2) an allegation that prohibited discrimination
was a basis for the employment action.

1 *Merit Sys. Prot. Bd.*, 713 F.3d 1111, 1119 (Fed. Cir. 2013) (discussing *Kloeckner*).

2 The first amended complaint describes itself as a petition for review of the MSPB’s
3 decisions, and the first amended complaint requests only that this court vacate and reverse the
4 MSPB’s decisions. This court has no jurisdiction to review the MSPB’s decisions in this case and,
5 likewise, no jurisdiction to provide the relief Plaintiff requests. Plaintiff appealed to the wrong
6 court.

7 Still, the court does not dismiss the case in its entirety and with prejudice as requested by
8 Defendants. Rather, the court shall discuss whether Plaintiff’s proposed second amended
9 complaint contains non-futile claims that would cure the court’s lack of subject-matter jurisdiction
10 if the court granted Plaintiff’s motion for leave to file it.

11 **Plaintiff’s Motion for Leave to File Second Amended Complaint**

12 Plaintiff has filed two documents labeled as motions for leave to file a second amended
13 complaint. Dkt. Nos. 21, 26. The second document is substantially similar to the first document,
14 but it includes additional factual allegations and concludes with a list of seven specific claims.
15 The court construes the first document as a motion for leave to file a second amended complaint
16 and the court construes the second document as the proposed second amended complaint. The
17 court shall deny the request for leave to file the second amended complaint if amendment would
18 be futile. *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir.
19 2004).

20 The proposed second amended complaint is substantially similar to the first amended
21 complaint, except that the second amended complaint now asserts repeatedly that this court has
22 jurisdiction to review the MSPB’s decisions. For instance, the second amended complaint has a
23 slightly altered caption: “Petition For Review From the Merit Systems Protection Board Pursuant
24 to 5 U.S.C. §§ 7703(b)(2) and 7702(a)(1)[.]” Dkt. No. 26 at 1. Plaintiff requests that this court
25 vacate the MSPB’s final decision, award the Title VII benefits that Plaintiff initially requested
26 from the MSPB, and award additional compensatory and punitive damages to Plaintiff. The
27 underlying claims are essentially the same as those in the first amended complaint, except that the
28 proposed second amended complaint would add a new tort claim under California law for

1 intentional infliction of emotional distress. Dkt. No. 26 at 43-44. As discussed, the court lacks
2 jurisdiction to review or vacate the MSPB's final decision in this case.

3 The second amended complaint also adds, however, an invocation of federal-question
4 jurisdiction under 28 U.S.C. § 1331 alongside an assertion that Title VII provides a valid cause of
5 action. Dkt. No. 26 at 45. The question of whether this court should review the merits of
6 Plaintiff's claims on the basis of federal-question jurisdiction is distinct from the question of
7 whether this court has jurisdiction to review the MSPB's decisions. The court, mindful of
8 Plaintiff's pro se status, construes the proposed second amended complaint to request the
9 independent review of Plaintiff's claims on the basis of federal-question jurisdiction. The court
10 shall therefore determine whether the proposed second amended complaint contains any non-futile
11 claim that this court has jurisdiction to review.

12 The first three claims are for workplace discrimination in violation of Title VII. Dkt. No.
13 26 at 31. The fourth claim is for retaliation in violation of the Whistleblower Protection Act. *Id.*
14 at 36. The fifth claim is for violation of the right to free exercise of religion under the First
15 Amendment. *Id.* at 38-39. The sixth claim is for violation of Plaintiff's due process rights under
16 the Fifth and Fourteenth Amendments. *Id.* at 42. The seventh claim is for intentional infliction of
17 emotional distress under California law. *Id.* at 43. The court also construes discussions about 42
18 U.S.C. § 1983 in the proposed second amended complaint as an eighth claim under § 1983 for
19 assault and inadequate training. *Id.* at 19-20, 26-27.

20 Judicial review of the first three claims is precluded because the second amended
21 complaint does not allege any facts that tend to show Plaintiff exhausted his administrative
22 remedies as required by Title VII. The MSPB's jurisdictional dismissal of Plaintiff's mixed-case
23 complaint tolled the Title VII statute of limitations so that Plaintiff could exhaust his
24 administrative remedies and then file in the Federal Circuit. *Sloan*, 140 F.3d at 1262. Title VII
25 divests federal courts of jurisdiction to hear Title VII workplace discrimination claims when the
26 claimant has yet to exhaust his administrative remedies, and the invocation of federal-question
27 jurisdiction under 28 U.S.C. § 1331 does not provide the subject-matter jurisdiction that Title VII
28 denies. *Vinieratos v. U.S., Dept. of Air Force Through Aldridge*, 939 F.2d 762, 774 (9th Cir.

1 1991). The court lacks jurisdiction to consider the Title VII claims in the proposed second
2 amended complaint.

3 It would be futile for Plaintiff to proceed on the fourth claim because the federal
4 Whistleblower Protection Act does not provide a private right of action. That law provides some
5 additional protections to federal employees, but those protections are provided only in the course
6 of the procedures established by the Civil Service Reform Act of 1978. *Rivera v. U.S.*, 924 F.2d
7 948, 954 (9th Cir. 1991). Those procedures include requests to the MSPB for relief from
8 employer retaliation. *Id.* at 950. A federal court has jurisdiction to review an MSPB decision if
9 the Plaintiff appeals to the proper court, but the Whistleblower Protection Act does not provide a
10 private right of action separate from such an appeal. *Id.* at 954. As discussed, this court lacks
11 jurisdiction over Plaintiff’s appeal from the MSPB’s jurisdictional dismissal. The fourth claim
12 therefore, even if construed to present a substantive claim separate from Plaintiff’s appeal, is not
13 based on a cognizable legal theory.

14 The court lacks jurisdiction over the fifth claim—violation of Plaintiff’s right to the free
15 exercise of religion under the First Amendment—because the supporting allegations may only be
16 remedied with a Title VII claim. Dkt. No. 26 at 32-35. The title of the fifth claim cites the First
17 Amendment, Dkt. No. 26 at 39, but supporting allegations and arguments do not actually discuss
18 the First Amendment. Rather, the fifth claim repeatedly argues that the USPS made
19 discriminatory employment decisions on the basis of Plaintiff’s religion in violation of Title VII.
20 Dkt. No. 26 at 32-35. This is not a permissible claim because Title VII “provides the exclusive
21 judicial remedy for claims of discrimination in federal employment.” *Brown v. General Services*
22 *Administration*, 425 U.S. 820, 835 (1976). The Ninth Circuit has repeatedly held that this means a
23 federal employee’s allegations of employment discrimination usually must be treated as a Title
24 VII claim, even if the employee presents the discrimination as a constitutional claim. *See, e.g.,*
25 *Nolan v. Cleland*, 686 F.2d 806, 814 (9th Cir. 1982) (dismissing a constitutional claim when
26 identical facts also support a claim under Title VII for employment discrimination). This appears
27 to be a jurisdictional rule the Supreme Court read into Title VII because that statutory scheme
28 provides a superior set of remedies compared with constitutional claims. *Brown*, 425 U.S. at 826

1 (noting that Title VII was created to provide the backpay and other compensatory relief that
2 constitutional claims cannot provide).

3 The Ninth Circuit has recognized two exceptions to the usual rule that Title VII provides
4 the sole judicial remedy for allegations of discrimination in federal employment: (1) a claim that is
5 not based on Title VII may be brought in addition to a Title VII claim if the Plaintiff has suffered
6 highly personal harm, like defamation, harassment, or physical abuse, *Brock v. United States*, 64
7 F.3d 1421, 1423 (9th Cir. 1995) (citing *Otto v. Heckler*, 781 F.2d 754 (9th Cir. 1986)); and (2) a
8 constitutional claim may be brought on the basis of the same “core facts” that support a Title VII
9 claim so long as the alleged “unconstitutional action[]” is not employment discrimination, *Arnold*
10 *v. United States*, 816 F.2d 1306, 1311 (9th Cir. 1987). The pleadings in the proposed second
11 amended complaint would not justify the application of either exception. The allegations do not
12 include the degree of highly personal harm recognized by the Ninth Circuit as a justification for
13 applying remedies other than Title VII remedies, and the allegations rely explicitly and exclusively
14 upon employment discrimination in violation of Title VII. This court does not have jurisdiction
15 over the fifth claim because Title VII provides the sole judicial remedy for the allegations of
16 federal employment discrimination.

17 The sixth claim—violation of due process rights under the Fifth and Fourteenth
18 Amendments when the USPS violated Plaintiff’s *Weingarten* rights—does not state a cognizable
19 legal theory. The National Labor Relations Act provides *Weingarten* rights to employees in
20 unions: (1) an employee may request the presence of a union representative during an
21 investigatory interview; (2) an employee may choose to end the interview if such a request is
22 denied; and (3) if the employee chooses to end the interview and the employer continues to ask
23 questions, then the employee has the right to refuse to answer without reprisal. *N.L.R.B. v. J.*
24 *Weingarten, Inc.*, 420 U.S. 251, 257-61 (1975). *Weingarten* rights are “statutory” rather than
25 constitutional. *Id.* at 256; *Mt. Vernon Tanker Co. v. N.L.R.B.*, 549 F.2d 571, 575 (9th Cir. 1977)
26 (*Weingarten* rights are “not founded on any right to fair hearing procedures comparable to
27 constitutional due process.”). The proposed second amended complaint alleges Plaintiff duly
28 invoked *Weingarten* during an interview, but that Plaintiff “may have said some things out of

1 anger and frustration” instead of exercising his statutory right to remain silent. Dkt. No. 26 at 10.
2 The proposed second amended complaint also alleges Plaintiff invoked *Weingarten* during a
3 second interview and that the interview immediately ended. Plaintiff has not plausibly alleged his
4 *Weingarten* rights were violated during either interview and, moreover, violations of *Weingarten*
5 rights cannot support constitutional claims. It would be futile to permit Plaintiff to proceed with
6 this claim.

7 The court does not have jurisdiction over the seventh claim. Title VII usually provides the
8 exclusive remedy for a federal employee’s claims of employment discrimination. *Brown*, 425
9 U.S. at 835. As discussed, the Ninth Circuit has recognized at least two exceptions to this general
10 rule. One of those exceptions may apply to a tort claim brought under the Federal Tort Claims Act
11 (“FTCA”), *Brock*, 64 F.3d at 1423, but the Plaintiff must first exhaust certain administrative
12 remedies or else jurisdiction does not exist to hear that FTCA claim. 28 U.S.C. § 2675(a); *Burns*
13 *v. United States*, 764 F.2d 722, 723 (9th Cir. 1985). Title VII precludes Plaintiff’s tort claim
14 unless jurisdiction exists under the FTCA, but Plaintiff has made no allegations that tend to show
15 he has created jurisdiction for the FTCA claim by exhausting his administrative remedies.

16 The final claim—assault and negligently inadequate training in violation of § 1983—has
17 not been brought against any proper defendant. Plaintiff claims a USPS manager assaulted him
18 “by violently stepping into [his path] causing him to alter his walking trajectory.” Title VII does
19 not preempt this claim because it is not based on allegations of employment discrimination.
20 *Arnold*, 816 F.2d at 1311. However, a claim brought under § 1983 must be brought against a
21 person who acts under color of state law, and such claims cannot be maintained against federal
22 agencies. *Jachetta v. U.S.*, 653 F.3d 898, 908 (9th Cir. 2011). A defendant has acted under color
23 of state law if that defendant acted in his capacity as a state official. *See, e.g., West v. Atkins*, 487
24 U.S. 42, 50 (1988). The proposed second amended complaint names only the USPS and the
25 Postmaster General in her official capacity as defendants. Dkt. No. 26 at 7. The USPS is a federal
26 agency that cannot be sued under § 1983, and Plaintiff has alleged only that the Postmaster
27 General acted under color of federal law. Dkt. No. 26 at 25-26. Defendants, as a matter of law,
28 may not be subjected to § 1983 liability on the basis of the facts alleged in the proposed second

1 amended complaint. It would be futile for Plaintiff to proceed with the § 1983 claim.

2 It would be futile to grant Plaintiff leave to file the proposed second amended complaint
3 because several of the proposed claims would be futile to litigate and the court has no jurisdiction
4 over the other proposed claims. The motion for leave to file the proposed second amended
5 complaint is denied.

6 **Transfer to the Federal Circuit**

7 The court must consider whether to transfer this appeal to the Federal Circuit to cure the
8 lack of jurisdiction. 28 U.S.C. § 1631; *Hays v. Postmaster General of United States*, 868 F.2d
9 328, 331 (9th Cir. 1989) (requiring consideration of transfer when a district court lacks
10 jurisdiction). The parties discussed the possible transfer of this case to the Federal Circuit at the
11 hearing on Defendants’ motion to dismiss. Plaintiff filed a brief in which he argues transfer is
12 inappropriate because this court has appellate jurisdiction to review the MSPB’s jurisdictional
13 dismissal. Dkt. No. 28. Plaintiff also argues no lack of personal jurisdiction would justify
14 transfer. *Id.* Defendants argue the court should decline to transfer the case, and should thereby
15 foreclose judicial review of the jurisdictional dismissal by the MSPB, because Plaintiff opposes
16 the transfer. Dkt. No. 32 at 2.

17 The court concludes it is in the interest of justice to transfer this case to the Federal Circuit.
18 Plaintiff has continuously requested judicial review of the jurisdictional dismissal by the MSPB.
19 Plaintiff opposes transfer because he believes this court has jurisdiction to provide the appellate
20 review he requests, not because he would prefer to forego that review. The court does not believe
21 it would be just to foreclose the appellate review timely requested by the pro se Plaintiff, even
22 though he filed that request in the wrong court.

23 **Conclusion**

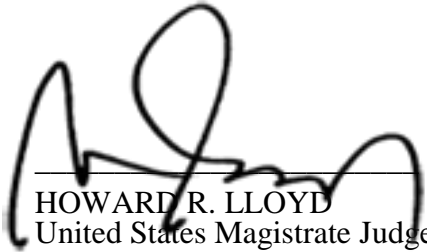
24 The court lacks subject-matter jurisdiction over this case. Plaintiff’s motion to file the
25 proposed second amended complaint is denied because it would be futile for Plaintiff to proceed
26 under that complaint. This case is transferred to the Federal Circuit to cure the lack of subject-
27 matter jurisdiction. The motion to dismiss for lack of subject-matter jurisdiction and the motion
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for an intra-district venue change are denied as moot.

IT IS SO ORDERED.

Dated: 10/30/15



HOWARD R. LLOYD
United States Magistrate Judge