IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Richard M. Kennedy, III, Plaintiff, vs. Robert A. McDonald, in his official capacity as Secretary of the U.S. Department of Veterans Affairs, Defendant.	C/A No. 3:15-1844-MBS-KDW **OPINION AND ORDER**

Plaintiff Richard M. Kennedy, III, is a staff anesthesiologist employed at the William Jennings Bryan Dorn VA Medical Center ("Dorn Medical Center") in Columbia, South Carolina. He brings this action against Defendant Robert A. McDonald, in his official capacity as Secretary of the United States Department of Veterans Affairs (the "VA"), alleging discrimination under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 633a (First Cause of Action) and seeking relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202 (Second Cause of Action). Plaintiff asserts that the manner by which Dorn Medical Facility determines market pay, i.e., by simply determining an annual pay amount and then subtracting from that number the base pay, fails to take into consideration the factors set forth in 38 U.S.C. § 7431 of the Pay Act. Plaintiff contends that the methodology results in a disparate impact on him because of his age, in violation of the ADEA. In accordance with 28 U.S.C. § 636(b) and Local Rule 73.02, D.S.C., this matter was referred to United States Magistrate Judge Kaymani D. West for pretrial handling.

On July 1, 2016, Defendant filed a motion for summary judgment. The same day, Plaintiff

filed a motion for partial summary judgment. The Magistrate Judge issued a Report and Recommendation on December 28, 2017. On March 29, 2017, the court issued an order in which it granted Defendant's motion for summary judgment as to Plaintiff's claim for relief under the Declaratory Judgment Act (Second Cause of Action), and denied Defendant's motion as to Plaintiff's ADEA claim (First Cause of Action). The court denied Plaintiff's motion for partial summary judgment. This matter now is before the court on Plaintiff's motion for reconsideration, which motion was filed on April 26, 2017. Defendant filed a response in opposition to Plaintiff's motion on May 11, 2017, to which Plaintiff filed a response on May 18, 2017.

Also pending before the Magistrate Judge is motion for leave to file an amended and supplement complaint, which motion was filed by Plaintiff on March 14, 2017. Defendant filed a response in opposition on April 12, 2017, to which Plaintiff filed a reply on April 26 2017, and Defendant filed a surreply on May 4, 2017. Because the motions overlap, the court will, with the concurrence of the Magistrate Judge, address both motions.

DISCUSSION

A. Motion to Reconsider

Plaintiff moves the court pursuant to Fed. R. Civ. P. 54(b) to reconsider its decision to grant summary judgment as to Plaintiff's claim under the Declaratory Judgment Act. Rule 54(b) provides that any order or decision that does not end the action as to all of the claims or parties "may be revised at any time before the entry of a judgment adjudicating all of the claims and all the parties' rights and liabilities." "Motions for reconsideration of interlocutory orders are not subject to the strict standards applicable to motions for reconsideration of a final judgment." Am. Canoe Ass'n v. Murphy Farms, Inc., 326 F.3d 505, 514 (4th Cir. 2003). Such a distinction arises "because a

district court retains the power to reconsider and modify its interlocutory judgments . . . at any time prior to final judgment when such is warranted." Id. at 514-15.

The court granted summary judgment in favor of Defendant on the grounds that the United States has not waived jurisdiction under the Declaratory Judgment Act. As the court previously noted, the Declaratory Judgment Act does not operate as an express waiver of sovereign immunity "because it neither provides nor denies a jurisdictional basis for actions under federal law, but merely defines the scope of available declaratory relief." Worsham v. United States Dep't of the Treasury, Civil Action No. ELH-12-2635, 2013 WL 5274358, *7 (D. Md. Sept. 17, 2013) (quoting Muirhead v. Mechmam, 427 F.3d 14, 17 n.1 (1st Cir. 2005)); and citing Stogsdill v. Sebelius, C/A No. 3:12-0007-TMC, 2013 WL 521483, *3 (D.S.C. Feb. 11, 2013) (citing Ballstrieri v. United States, 303 F.2d 617, 619 (7th Cir. 1962) (holding that Declaratory Judgment Act is not the United States' consent to suit)).

Plaintiff agrees with this general proposition, but argues that exceptions exist for (1) actions in which the court already has jurisdiction under other statutes that waive sovereign immunity, and (2) suits seeking to enjoin a federal official from acting unconstitutionally. Plaintiff contends that the United States' waiver of sovereign immunity under the ADEA gives the court jurisdiction under the Declaratory Judgment Act. The court disagrees.

In Johnson v. Sessions, Civil Action No.: RDB-15-3317, 2017 WL 1207537 (D. Md. April 3, 2017), the plaintiffs filed a complaint against the Attorney General of the United States, the Secretary of the United States Department of Homeland Security, the Director of the United States Citizen and Immigration Services (USCIS), and the Board of Immigration Appeals (BIA). The plaintiffs alleged that the USCIS and the BIA violated the Administrative Procedures Act (APA)

during the review of a petition for alien relative. The plaintiffs sought relief under the APA, the Declaratory Judgment Act, and the Mandamus Act. Citing Worsham, the Johnson court dismissed the plaintiffs' claim under the Declaratory Judgment Act on the grounds of sovereign immunity. 2017 WL 1207537, *6. The Johnson court further observed that, even if the plaintiffs' claims were not barred on the basis of sovereign immunity, the court would use its discretion to decline to exercise jurisdiction over the plaintiffs' declaratory claims. The Johnson court noted that declaratory judgment would be duplicative of the plaintiffs' claims under the APA and would serve no useful purpose. Id. at *6, n.6.

Similarly, in this case, the United States has waived sovereign immunity under the ADEA. The waiver of sovereign immunity under the ADEA does not, however, compel the conclusion that the United States has waived sovereign immunity under the Declaratory Judgment Act. In addition, the ADEA provides for injunctive and declaratory relief, rendering the Declaratory Judgment Act redundant. The court declines to revise its decision to grant summary judgment in favor of Defendant as to this issue.

B. Motion to Amend and Supplement

Plaintiff seeks to supplement his complaint with facts that were developed during discovery, specifically with information gleaned from supplemental discovery responses received from the United States on or about February 10, 2017. Plaintiff seeks to again include a cause of action for declaratory judgment (Second Cause of Action). ECF No. 79-1, 11. Plaintiff asks the court to construe the Pay Act, 38 U.S.C. § 7431, which governs pay for physicians paid at Dorn Medical Center, as violating governing statutory procedure and criteria and as unconstitutional. Plaintiff also seeks to include a cause of action under the APA (Third Cause of Action). Plaintiff alleges that the

decisions of the Dorn Medical Center in determining the market pay for anesthesiologists are unconstitutional and in violation of governing statutory procedure and criteria. ECF No. 79-1, 12. Plaintiff seeks declaratory and injunctive relief under the APA. Finally, Plaintiff seeks to add a claim under the Back Pay Act (Fourth Cause of Action). ECF No. 79-1, 13. Plaintiff contends that he is entitled to back pay with interest from 2007 to the present.

Defendant objects to Plaintiff's motion to supplement and amend on the grounds that the inclusion of the supplemental material and reopening of discovery will impose an undue burden on Defendant. However, Plaintiff states that he wishes to conduct discovery pertinent only to the newly discovered facts. The court grants Plaintiff's request to supplement the facts presented in the complaint.

Defendant further contends that Plaintiff's motion should be denied as futile with respect to his proposed amended causes of action. The court agrees.

Fed. R. Civ. P. 15(a)(2) provides that a party may amend his pleading at any time with leave of court, and that leave should be freely granted when justice requires. However, leave of court is not warranted where an amendment would be futile. Laber v. Harvey, 438 F.3d 404, 426 (4th Cir. 2006). An amendment is futile if it could not survive a motion to dismiss for failure to state a claim. Perkins v. United States, 55 F.3d 910, 917 (4th Cir. 1995).

1. Declaratory Judgment Act. The court denies Plaintiff's motion as futile as to the proposed Second Cause of Action for the reasons set forth above, i.e., that the United States has not waived sovereign immunity with respect to the Declaratory Judgment Act.

2. APA. The court finds Plaintiff's proposed cause of action under the APA to be barred under the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. §§ 7501 et seq. In Perry v. Merit

Systems Protection Board, 137 S. Ct. 1975 (2017), the United States Supreme Court explained:

> The CSRA "establishes a framework for evaluating personnel actions taken against federal employees." Kloeckner v. Solis, 568 U.S. 41, 44[] (2012). For "particularly serious" actions, "for example, a removal from employment or a reduction in grade or pay," "the affected employee has a right to appeal the agency's decision to the MSPB." Ibid. (citing §§ 1204, 7512, 7701). Such an appeal may present a civil-service claim only. Typically, the employee may allege that "the agency had insufficient cause for taking the action under the CSRA." Id., at 44[]. An appeal to the MSPB, however, may also complain of adverse action taken, in whole or in part, because of discrimination prohibited by another federal statute, for example, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., or the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq. See 5 U.S.C. § 7702(a)(1); Kloeckner, 568 U.S. at 44[].
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> In Kloeckner, we explained, "[w]hen an employee complains of a personnel action serious enough to appeal to the MSPB and alleges that the action was based on discrimination, she is said (by pertinent regulation) to have brought a 'mixed case.'" Ibid. (quoting 29 C.F.R. § 1614.302 (2012)). See also § 1614.302(a)(2) (2016) (defining "mixed case appeal" as one in which an employee "alleges that an appealable agency action was effected, in whole or in part, because of discrimination"). For mixed cases, "[t]he CSRA and regulations of the MSPB and Equal Employment Opportunity Commission (EEOC) set out special procedures . . . different from those used when the employee either challenges a serious personnel action under the CSRA alone or attacks a less serious action as discriminatory." Kloeckner, 568 U.S. at 44–45[].
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> As Kloeckner detailed, the CSRA provides diverse procedural routes for an employee's pursuit of a mixed case. The employee "may first file a discrimination complaint with the agency itself," in the agency's equal employment opportunity (EEO) office, "much as an employee challenging a personnel practice not appealable to the MSPB could do." Id. at 45[] (citing 5 C.F.R. § 1201.154(a) (2012); 29 C.F.R. § 1614.302(b) (2012)); see § 7702(a)(2). "If the agency [EEO office] decides against her, the employee may then either take the matter to the MSPB or bypass further administrative review by suing the agency in district court." Kloeckner, 568 U.S., at 45[] (citing 5 C.F.R. § 1201.154(b); 29 C.F.R. § 1614.302(d)(1)(i)); see § 7702(a)(2). "Alternatively, the employee may initiate the process by bringing her case directly to the MSPB, forgoing the agency's own system for evaluating discrimination charges." Kloeckner, 568 U.S. at 45 [] 596 (citing 5 C.F.R. § 1201.154(a); 29 C.F.R. § 1614.302(b)); see § 7702(a)(1).

Perry, 137 at 1980-81.

In this case, it appears that Plaintiff chose the CSRA procedural route of filing a discrimination complaint with the Equal Employment Opportunity Commission, and then proceeded directly to district court.[1] See Complaint, ECF No. 1, ¶ 5. Competitive service employees, who are given review rights by the CSRA, "cannot expand these rights by resort to judicial review outside of the CSRA scheme." Bolton v. Colvin, 674 F. App'x 282, 290 (4th Cir. 2017) (quoting Elgin v. Dep't of Treasury, 567 U.S. 1, 10 (2012), and citing Hall v. Clinton, 235 F.3d 202, 206 (4th Cir. 2000) ("[T]he comprehensive grievance procedures of the CSRA implicitly repealed all other then-existing statutory rights of federal employees regarding personnel decisions.")). Thus, as Defendant correctly argues, Plaintiff's cause of action under the APA is precluded by the CSRA.

3. Back Pay Act. Plaintiff's cause of action under the Back Pay Act also is futile. The Back Pay Act

> does not, in and of itself, authorize a suit in [district court]. . . . The Back Pay Act . . . is basically derivative in its application. For the Act to apply, an "appropriate authority" must first find an "unjustified or unwarranted personnel action," i.e., an action which is prohibited by statute, regulation, etc. So, before plaintiff can invoke the Back Pay Act, he must first demonstrate that the decision to fire him violated an applicable statute or regulation.

Montalvo v. United States, 231 Ct. Claims 980, 982 (1982)(quoting 5 U.S.C. § 5596).

Plaintiff must first demonstrate that the alleged wrongful personnel action, i.e., the method of computing his market pay, violated the Department of Veterans Affairs Health Care Personnel Enhancement Act of 2004, 3 U.S.C. § 7431.

CONCLUSION

For the reasons stated, Plaintiff's motion to reconsider (ECF No. 90) is **denied**. Plaintiff's

[1] If Plaintiff failed to follow the procedures available through the CSRA, the court may lack subject matter jurisdiction.

motion to supplement and amend (ECF No. 79) is **granted in part and denied in part**. Plaintiff is granted leave to supplement his complaint with additional facts gleaned during discovery. Plaintiff's motion to assert claims under the Declaratory Judgment Act (Second Cause of Action), APA (Third Cause of Action) and Back Pay Act (Fourth Cause of Action) is denied as futile.

The cause is recommitted to the Magistrate Judge for additional pretrial handling.

IT IS SO ORDERED.

/s/ Margaret B. Seymour
Senior United States District Judge

Columbia, South Carolina

July 18, 2017