



Karpe v. Chao et al

2020 | Cited 0 times | S.D. California | January 23, 2020

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA

KEVIN KARPE,

Plaintiff, v. ELAINE CHAO, Secretary of Transportation, and DEPARTMENT OF
TRANSPORTATION (FAA), Agency,

Defendants.

Case No.: 18-cv-2521 DMS (NLS)

ORDER DENYING MOTION FOR JUDGMENT ON THE PLEADINGS AND MOTION TO
DISMISS

Pending before the Court is Defendants Elaine Chao and United States Department Complaint.
Plaintiff filed an opposition,

s are denied.

I. BACKGROUND Plaintiff Kevin Karpe worked as an air traffic controller for the Federal Aviation
31 years and is now retired. (Compl. ¶ 17). Plaintiff served in various positions during his tenure with
the FAA, including his most recent positions as Operations Supervisor and Air Traffic Manager.
(Compl. ¶ 20). Plaintiff was informed that these two positions credits toward early retirement.
(Compl. ¶¶ 5, 20 21). The more good time credits an

employee earns, the earlier he or she can retire. (Compl. ¶ 5). Approximately two years before his
retirement, Plaintiff discovered that these positions did not qualify for good . (Compl. ¶¶ 22 23). As a
result, Plaintiff was unable to retire early and instead worked until age 56, the mandatory retirement
age. (Compl. ¶¶ 13 14).

(Compl. ¶ 24). After losing his appeal, Plaintiff filed an EEOC complaint against the

of its retirement benefits policy discriminates based on age. (Compl. ¶ 25; Defs. 1

. claim. (Compl. ¶ 26). misrepresentation of its retirement benefits policy constitutes age



Karpe v. Chao et al

2020 | Cited 0 times | S.D. California | January 23, 2020

discrimination in

violation of the Age Discrimination in Employment Act. Specifically, Plaintiff asserts a disparate impact claim, alleging that air traffic controllers' representations regarding good time positions. (Compl. ¶ retirement or Good Time retirement benefits program had a significant adverse disparate

impact on plaintiff and other qualified employees over the age of 40 in violation of the .

1 Van Buskirk v. Cable News Network, Inc., 284 F.3d 977, 980 (9th Cir. 2002). However, under the doctrine of incorporation by reference, the court may consider documents that are necessarily relied on by the complaint and whose authenticity is not contested. Id.

(1) disparate impact claims under the ADEA are unavailable against the federal

government because Congress did not waive sovereign immunity for such claims, (2) Plaintiff failed to provide administrative notice of his disparate impact claim, and (3) Plaintiff failed to adequately plead a disparate impact claim. (ECF No. 8). On June 27, 2019, the court stated claim. . On July 11, 2019, Defendants filed an answer to the complaint. (ECF No. 13). On September 13, 2019, Defendants filed the present motion for judgment on the pleadings and motion to dismiss for lack of jurisdiction. (ECF No. 17., a).

II. LEGAL STANDARD A. Rule 12(c)

but early enough not to delay trial a party may a motion for as true and construe them in the light most favorable to the non- Fleming

v. Pickard, 581 F.3d 922, 925 (9th Cir. 2009) (citing Turner v. Cook, 362 F.3d 1219, 1225 Id. (citing Heliotrope Gen., Inc. v. Ford Motor Co., 189 F.3d 971, 978 (9th Cir. 1999)).

Motions made pursuant to rule 12(c) are subject to the same standard of review as those made under Rule 12(b). Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1192 (9th Cir. 1989). ce between motions filed pursuant to Rule 12(b) Id. A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. Fed. R. Civ. P. 12(b)(6); Navarro v. Block, 250 F.3d 729, 731 (9th Cir. 2001). In deciding a motion to dismiss, all material factual allegations of the complaint are accepted as true, as well as all reasonable inferences to be drawn from them. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 338 (9th Cir. 1996).

B. Rule 12(b)(1)

Federal courts are courts of limited jurisdiction. Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994). A defendant may raise the defense of lack of subject matter jurisdiction pursuant



Karpe v. Chao et al

2020 | Cited 0 times | S.D. California | January 23, 2020

to Federal Rule of Civil Procedure 12(b)(1). The plaintiff bears the burden of establishing jurisdiction. Kokkonen determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the

cannot be waived, and the court is under a continuing duty to dismiss an action whenever

Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983).

III. DISCUSSION Here, Defendants assert they are entitled to judgment as a matter of law because Plaintiff fails to adequately plead an ADEA disparate impact claim. Further, Defendants actually arises out of the tort of misrepresentation or breach of implied contract a disparate impact claim under the ADEA.

A. 12(c) Motion for Judgment on the Pleadings

To state a prima facie disparate impact claim the occurrence of certain outwardly neutral employment practices, and (2) a significantly

adverse or disproportionate impact on persons of a particular age produced by the employer Katz v. Regents of the University of California, 229 F.3d 831, 835 (9th Cir. 2000) (citing Palmer v. United States, 794 F.2d 534, 538 (9th Cir. 1986)). Palmer, 794 F.2d at 536.

Defendants made a simi complaint for failure to state a claim under Rule 12(b)(6). At that time, Defendants alleged

Plaintiff did not sufficiently plead his disparate impact claim because he (1) did not provide statistical evidence showing disparities across the agency; and (2) failed to sufficiently establish how the retirement policy caused a disproportionate impact on workers over the age of forty. The Court disagreed, finding Plaintiff had sufficiently alleged a disparate impact claim. (Order Denying Mot. to Dis., 11 12).

Now, Defendants allege Plaintiff fails to plead as a matter of law how Defendants retirement policy has a disparate impact on people over 40 years old. Defendants contend is that the error is not discovered until a person is near their retirement (i.e., over 40 years

. for Dis. and Judg., 6). According to Defendants, before employees turn 40 years old. (Id.).

Defendants also argue employees are not disproportionately harmed over age 40 because Id.). Plaintiff, however, alleges not only that air traffic controllers discover the misrepresentations within five years of their mandatory retirement age of 56, (Compl. ¶¶ 13 14, 28), but also a series of continual unlawful acts that [Plaintiff] and all other retiring employees have no idea about until the eve of retirement. . Plaintiff claims Defendants misled employees by falsely failing to advise employees the



Karpe v. Chao et al

2020 | Cited 0 times | S.D. California | January 23, 2020

and waiting to

notify employees that they are not eligible for early retirement until they are near retirement age. (Id.). Plaintiff alleges Rebecca Baier, the agency's Manager of the Benefits Operation traffic controllers as to whether a temporary position qualifies or does not qualify for early

retirement benefits the agency in determining whether a position is a covered Good Time position is not made available to air traffic controllers even benefits calculations[,] id.) (original emphasis), and that Id.).

These allegations, accepted as true at this stage of the proceedings, sufficiently state a prima facie disparate impact claim. therefore denied.

B. Lack of Subject Matter Jurisdiction

Defendants move to dismiss the case for lack of subject matter jurisdiction based on sovereign immunity. Defendants argue Complaint actually states a claim not under the ADEA but for misrepresentation or breach of implied contract, and the Court lacks jurisdiction over those claims. (Mot. for Dis. and Judg., 8).

A. Absent a waiver of sovereign immunity, federal courts lack subject matter jurisdiction over claims against the United States. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). Congressional waiver of sovereign immunity may not be inferred, implied or assumed, and courts must resolve any perceived ambiguity regarding waiver of immunity *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992) e Government

is barred under the exceptions to the waiver of sovereign immunity in the Federal Tort Claims Act . Congress has waived sovereign immunity for certain common law torts in the FTCA, but included exceptions to the waiver malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or

DaVinci

Aircraft, Inc. v. United States governmental conduct underlying a claim falls within an exception outlined in section Id.

Although Defendants contend § 2680(h) applies to the present case, the applicable statute for disparate impact claim is 29 U.S.C. § 633a(a). As the Court decided in its Order Denying Motion to Dismiss, a disparate impact claim may be brought under this section. (Order Denying Mot. to Dis., 10) discrimination by federal employers whether resulting from intentional or unintentional



Karpe v. Chao et al

2020 | Cited 0 times | S.D. California | January 23, 2020

. Further, the Court found § 633a(c) waives sovereign immunity for disparate impact claims. (Id. at 510) immunity for conduct prohibited by § 633a(a), Plaintiff may bring a disparate impact

. Thus, the sovereign immunity exception under 28 U.S.C. § 2680(h) does not apply here.

Nonetheless, Defendants argue § 2680(h) tort, the court t. for Dis. and Judg., 8) (citing Thomas-Lazear v. Federal Bureau of

Investigations, 851 F.2d 1202 (9th Cir. 1988)). In Thomas-Lazear, the Ninth Circuit found a claim was barred because the plaintiff claim for negligent infliction of emotional Section 2680(h). Id. Section 2680(h) because it is actually a claim for the tort of misrepresentation, though

Plaintiff attempts to characterize it as an ADEA claim. (Mot. for Dis. and Judg., 8).

pleading. Plaintiff is not alleging a tort enumerated in the FTCA, so the claim does not

. Rather, Plaintiff alleges a distinct claim under the ADEA for disparate impact age discrimination and thus, the basis of subject matter jurisdiction is wholly unrelated to the FTCA. Though the facts underlying claim may lend themselves to a misrepresentation claim, Plaintiff elected not to allege such a claim nor did he attempt to camouflage one type of FTCA claim for another to avoid sovereign immunity. Plaintiff is the master of his Complaint. See The Fair v. Kohler Die & Specialty Co., 228 rely upon). Just as Plaintiff can choose whether to plead a claim under the FTCA, he

can also choose to plead his claim under a distinct statutory provision. He has done so here. Plaintiff states a claim under the ADEA, which has its own exception to sovereign immunity. T to

B. Similarly, Defendants contend the Court lacks subject matter jurisdiction because can be construed as one for breach of implied contract. The Tucker Act jurisdiction DaVinci Aircraft, 926 F.3d at 1127 28 (citing 28 U.S.C. § 1491(a)(1)).

in fact a claim for implied contract because Plaintiff relied on agency representations to his detriment. (Mot. for Dis. and Judg., 11). This argument is doomed for the same reasons that apply to jurisdictional under a distinct federal statute the ADEA which contains its own waiver of sovereign immunity.

In addition, the facts of this case have nothing to do with contract, implied or otherwise. The Tucker Act applies to contracts that are implied in fact, not to claims on contracts implied in law. See Hercules Inc. v. United States, 516 U.S. 417, 423 (1996). inds, which although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, Id. (citing Baltimore & Ohio R. Co. v. United States, 261 U.S. 592, 597 (1923)). Plaintiff alleges Defendants misrepresented his position, so there was no meeting of the minds. motion to dismiss for lack of subject matter



Karpe v. Chao et al

2020 | Cited 0 times | S.D. California | January 23, 2020

jurisdiction is therefore denied.

IV. CONCLUSION For the foregoing

IT IS SO ORDERED.

Dated: January 23, 2020

