UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DONALD W. TENNANT, Plaintiff,	:	
v.	:	Civil No. 3:02CV00558(AWT)
UNITED STATES BUREAU OF PRISONS, et al., Defendants.	:	

RULING ON MOTION TO DISMISS

Plaintiff Donald Tennant brings this action against the United States Bureau of Prisons ("Bureau"), the Federal Correctional Institution at Danbury, Connecticut ("FCI Danbury"), Warden Kuma J. Deboo ("Deboo"), and Assistant or Associate Warden Harry Sanchez ("Sanchez"). The complaint sets forth what the court construes to be Bivens claims based on allegations that the defendants maintained a hostile working environment and policies that violated the plaintiff's rights, a claim under the Age Discrimination in Employment Act pursuant to 29 U.S.C. § 633a, a claim for intentional infliction of emotional distress, and a claim under the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* (which the court construes as a claim under the

Rehabilitation Act, 29 U.S.C. § 794). The defendants have filed a motion to dismiss the complaint or, in the alternative, for summary judgment. For the reasons set forth below, the defendants' motion to dismiss is being granted.

I. FACTUAL BACKGROUND

The plaintiff was employed by the Bureau at FCI Danbury as the Hospital Administrator from May 30, 1993 to November 26, 2001. The plaintiff is 53 years old and has had heart surgery and one previous heart attack. The plaintiff alleges that the defendants' harassment and humiliation created a hostile work environment, which contributed to the plaintiff's illness and forced him to leave his job in November 2001; the plaintiff took a disability retirement on December 12, 2001. The plaintiff claims that the defendants' behavior started in September 2001 and continued until the plaintiff's departure.

In July 2001, defendant Sanchez began working at FCI Danbury as an assistant or associate warden. In September 2001, defendant Deboo began working at FCI Danbury as the warden. The plaintiff claims that the defendants knew, or should have known, that the plaintiff had a history of heart complications, including quadruple bypass surgery in 1990 and a heart attack in 1990. The plaintiff claims that the

defendants' harassment and humiliation, including making derogatory, pejorative, and obscene remarks about the plaintiff, caused the plaintiff to become apprehensive about the prospects for his continued employment with the Bureau. The plaintiff contends that, by their improper behavior, the defendants caused the plaintiff to become ill and forced the plaintiff to leave his employment and to retire on disability.

II. LEGAL STANDARD

"[T]he standards for reviewing dismissals granted under 12(b)(1) and 12(b)(6) are identical." Moore v. PaineWebber Inc., 189 F.3d 165, 169 n.3 (2d Cir. 1999). "[T]he court must accept all factual allegations in the complaint as true and draw inferences from those allegations in the light most favorable to the plaintiff. The court may not dismiss a complaint unless it appears beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts which would entitle him to relief." Jaghory v. New York State Dept. of Educ., 131 F.3d 326, 329 (2d Cir. 1997)(internal citations omitted). The task of the court in ruling on a Rule 12(b)(6) motion "is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support

thereof." Ryder Energy Distribution Corp. v. Merrill Lynch Commodities Inc., 748 F.2d 774, 779 (2d Cir. 1984) (internal quotes and citation omitted). However, "[w]hile the pleading standard is a liberal one, bald assertions and conclusions of law will not suffice." Leeds v. Meltz, 85 F.3d 51, 53 (2d Cir. 1996).

III. DISCUSSION

A. Counts One and Four - Civil Rights Claims

In his opposition to the instant motion, the plaintiff appears to recognize that he cannot bring an action against federal actors pursuant to 42 U.S.C. § 1983, and he states that he seeks in Counts One and Four to allege Bivens claims. The court construes the complaint accordingly. The plaintiff seeks to bring such claims against defendants Sanchez and Deboo in their official and individual capacities and against the Bureau.

Any Bivens claims against Deboo and Sanchez acting in their official capacities and the Bureau must be dismissed for a lack of subject matter jurisdiction. The Supreme Court has recognized that federal courts possess the authority to fashion a private cause of action for money damages against a federal official who, under color of his or her authority,

violates an individual's established constitutional rights. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971). However, a Bivens claim, when available, may not be brought against federal agencies or federal employees acting in their official capacity. F.D.I.C. v. Meyer, 510 U.S. 471, 486 (1994); Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 510 (2d Cir. 1994). The United States has not given its consent to be sued for damages arising from constitutional violations. United States v. Testan, 424 U.S. 392 (1976).

The plaintiff seeks to allege Bivens claims against Sanchez and Deboo in their individual capacities. Although Bivens provides a remedy for plaintiffs injured by federal employees, that remedy is limited in scope. Federal courts look to a Bivens remedy only in "limited circumstances," when a plaintiff lacks "any other remedy" for constitutional violations by a federal employee. Correctional Srvs. Corp. v. Malesko, 534 U.S. 61 (2001). In the context of federal employment, the Supreme Court has declined to imply a Bivens remedy because the Civil Service Reform Act ("CSRA") provides an effective avenue of redress. Bush v. Lucas, 462 U.S. 367, 368 (1983) (relief denied because the plaintiff's First Amendment claim for improper demotion was fully cognizable

under the CSRA). See also Hall v. Clinton, 235 F.3d 202 (4th Cir. 2000) (CSRA precluded a Bivens claim for alleged Fifth Amendment violations); McIntosh v. Turner, 861 F.2d 524 (8th Cir. 1988) (Bivens remedy not available for federal employee's due process claim). Thus any Bivens claims against Sanchez and Deboo in their individual capacities must also be dismissed.

B. Count Two - Claims under the ADEA

The plaintiff alleges in Count Two that defendants Sanchez and Deboo discriminated against him on the basis of age, in violation of 29 U.S.C. § 633a. This count should be dismissed for two reasons. First, Sanchez and Deboo are not proper defendants. The only proper defendant in an age discrimination suit against a federal employer is the head of the federal agency, and this case that would be the United States Attorney General. Honeycutt v. Long, 861 F.2d 1346, 1349 (5th Cir. 1988) (only proper defendant under the ADEA, as with Rehabilitation Act and Title VII, is the agency head); Romain v. Shear, 799 F.2d 1416, 1418 (9th Cir. 1986) (proper defendant in ADEA case is agency head); Ellis v. United States Postal Serv., 784 F.2d 835, 838 (7th Cir. 1986) (as with Title VII, only proper defendant under ADEA claim is the agency head).

In addition, when a federal employee brings a claim of age discrimination without first filing an administrative complaint, that plaintiff must give notice to the Equal Employment Opportunity Commission in advance of commencing the action. The controlling statute provides that "no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred." 29 U.S.C.A. § 633a(d) (West 1999). See Stevens v. Dept. of Treasury, 500 U.S. 1, 5 (1991); Economou v. Caldera, 286 F.3d 144, 149 n.8 (2d Cir. 2002).

Here, the plaintiff failed to provided the EEOC with the required notice. The plaintiff asserts that he is entitled to equitable relief from the notice requirement. However, the plaintiff has failed to make a showing that there exists any ground for equitable relief. "The burden of demonstrating the appropriateness of equitable" relief "lies with the plaintiff." Boos v. Runyon, 201 F.3d 178, 185 (2d Cir. 1999). Without a showing of "'extraordinary' circumstances," a plaintiff will be held to the administrative requirements. Id. Here, the plaintiff has

failed to even suggest a basis for a conclusion that this case involves "extraordinary" circumstances. Accordingly, the plaintiff's ADEA claim must be dismissed.

C. Count Three - Intentional Infliction of Emotional Distress

Count Three is a claim under Connecticut law against Sanchez and Deboo. "[A]lthough state law tort claims are often appended to [federal anti-discrimination] suits against private employers," that remedy is unavailable to federal employees. Mannion v. Attorney General, et al., 2000 WL 1610761 at *1 (D. Conn. Oct. 3, 2000). If a federal employee wishes to assert a tort claim against another federal employee acting within the scope of his employment, it must be "filed under the Federal Tort Claims Act, which requires [the] plaintiff to first exhaust [his] administrative remedies." Id. at *2. Thus, a jurisdictional prerequisite to suit is the filing of an administrative claim. 28 U.S.C.A. § 2675 (West 1994); Robinson v. Overseas Military Sales, 21 F.3d 502 (2d Cir. 1994).

Here, it is uncontroverted that the plaintiff failed to exhaust his administrative remedies by filing a tort claim with the Bureau. Accordingly, Count Three must be dismissed for lack of jurisdiction.

D. Count Five - Disability Discrimination Claim

In his opposition to the motion to dismiss, the plaintiff states that it his intention to allege a claim under the Rehabilitation Act, 29 U.S.C. § 794. The court construes the complaint accordingly. However, even so construed, this claim must be dismissed for failure to exhaust administrative remedies. It is uncontroverted that the plaintiff has failed to exhaust his administrative remedies, as required by 29 C.F.R. § 1614.105(a)(2).

As with Counts One and Four, the plaintiff argues for equitable relief, but has failed to even suggest a basis for a conclusion that this case involves "extraordinary" circumstances. Accordingly, the plaintiff's Rehabilitation Act claim must be dismissed.

It is so ordered.

Dated at Hartford, Connecticut this 29th of March, 2003, at Hartford, Connecticut.

Alvin W. Thompson
United States District Judge