IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

BARBY EARL WILSON,

Plaintiff,

v. **CIVIL ACTION NO. 2:19-cv-515**

SECRETARY OF THE NAVY, *et al.*,

Defendants.

MEMORANDUM OPINION AND ORDER

Before the Court is a Motion to Dismiss from the Secretary of the Navy, *et al.* ("Defendants") under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). ECF Nos. 5–6. Plaintiff Barby Earl Wilson ("CH Wilson") has also requested a hearing on Defendants' Motion to Dismiss. ECF No. 10. After reviewing the parties filings in this case, the Court finds that this matter is ripe for judicial determination and that a hearing on the Motion to Dismiss is not necessary. Accordingly, CH Wilson's request for oral argument is **DENIED**. For the reasons set forth below, Defendants' Motion to Dismiss is **GRANTED**.

I. FACTUAL AND PROCEDURAL HISTORY

At all times relevant to this case, the Navy divided its Chaplain Corps into four groups in order to serve the religious needs of servicemembers: liturgical Protestants, non-liturgical Protestants, Roman Catholics, and Special Worship. *See In re Navy Chaplaincy*, 323 F. Supp. 3d 25, 30 (D.D.C. 2018). CH Wilson was a member of the Navy Chaplain Corps from 1977 until his retirement in 1994. ECF No. 1 at ¶¶ 4, 18. The procedural history of the instant case is beyond dispute. It represents the culmination of CH Wilson's decades-long participation in a series of

cases that came to be called *In re Navy Chaplaincy* ("*Chaplaincy*"). The original *Chaplaincy* plaintiffs, (CH Wilson among them) filed their suit in D.C. District Court on November 5, 1999, alleging that the Navy discriminated against chaplains endorsed by the Chaplaincy of Full Gospel Churches ("CFCG"), a subgroup within the non-liturgical Protestant faith group category. ECF No. 1 at ¶ 2a. The *Chaplaincy* plaintiffs contended the procedures of the Navy's chaplain selection boards violated the First Amendment's Establishment Clause, the Fifth Amendment's Equal Protection Clause, and the Religious Freedom Restoration Act ("RFRA"). *Chaplaincy*, 323 F. Supp. 3d at 38.

After decades of litigation and procedural maneuvering, the D.C. District Court severed the *Chaplaincy* plaintiffs' fact-specific ad hoc claims of individual chaplains from their broad constitutional and statutory claims on the Navy's procedures for promoting chaplains. *Id.* at ¶ 2.d.ii. On August 30, 2018, the D.C. District Court granted summary judgment to the Navy on the *Chaplaincy* plaintiffs' constitutional and statutory claims regarding the Navy's staffing and procedure of chaplain selection boards. *See generally Chaplaincy*, 323 F. Supp. 3d 25 (granting the Navy summary judgment against claims of unconstitutional discrimination against non-liturgical Protestants, denying the constitutional challenge to 10 U.S.C. § 613(a), and denying plaintiffs' requests for additional discovery). However, individual chaplains were still permitted to bring their ad hoc claims in the appropriate jurisdiction.

CH Wilson filed his Complaint in the instant matter on September 27, 2019. ECF No. 1. On December 2, 2019, the Defendants filed their Motion to Dismiss. ECF Nos. 5–6. CH Wilson filed his Response Memorandum in Opposition to Defendants' Motion to Dismiss on December 16, 2019. ECF No. 7. On December 23, 2019, Defendants' filed their Reply to CH Wilson's Response. ECF No. 8. On January 6, 2019, CH Wilson requested a hearing on Defendants' Motion

to Dismiss. ECF No. 10. However, the Court has determined that a hearing on the Motion to Dismiss is not necessary and will dispose of it in this Order.

II. LEGAL STANDARDS

A. Dismissal Under Rule 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) provides for dismissal of actions that fail to state a claim upon which relief can be granted. The United States Supreme Court ("Supreme Court") has stated that in order "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Specifically, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. Moreover, at the motion to dismiss stage, the court is bound to accept all of the factual allegations in the complaint as true. *Id.* However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Assessing the claim is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

B. Res Judicata

The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as res judicata. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). Under the doctrine of claim preclusion, a final judgment forecloses successive litigation of the very same claim, whether or not the successive litigation raises the same issues as the earlier suit. *Id. quoting New Hampshire v. Maine*, 532 U.S. 742, 748 (2001). Issue preclusion bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination

essential to the prior judgment, even if the issue recurs in the context of a different claim. *Id.* The purpose of res judicata is to protect against "the expense and vexation of multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibility of inconsistent decisions. *Taylor*, 553 U.S. at 892 *quoting Montana v. United States*, 440 U.S. 147, 153–54 (1979).

Res judicata is an affirmative defense that may be raised under in a 12(b)(6) motion if grounds for the motion clearly appear on the face of the complaint. *Andrews v. Daw*, 201 F.3d 521, 524 n.1 (4th Cir. 2000) *citing Richmond, Fredericksburg & Potomac R.R. Co. v. Forst*, 4 F.3d 244, 250 (4th Cir. 1993). To establish res judicata as a defense, a party must establish the following: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of parties or their privies in the two suits. *Andrews*, 201 F.3d at 524 *citing Jones v. Sec. & Exch. Comm'n*, 115 F.3d 1173, 1178 (4th Cir. 1997), *cert. denied*, 523 U.S. 1072 (1998).

III. DISCUSSION

The Complaint proports to allege five grounds for relief by CH Wilson against Defendants. For the following reasons, the Court makes the following findings: (1) there are no grounds for relief on Count 1 due to the doctrine of issue preclusion; (2) there are no grounds for relief on Counts 2, 3, and 5 due to the doctrine of claim preclusion; and (3) there are no grounds for relief on Count 4 due to the doctrine of issue preclusion.

A. Count 1, Retaliation

Count 1 proports to allege an ad hoc claim of retaliation stemming from CH Wilson's 1983 internal naval complaint about the "religious prejudice, suppression, and hostility by his Lutheran command chaplain, CDR John Spreier ("CDR Spreier")." ECF No. 1 at ¶ 12. In essence, CH

Wilson alleges that religious animus motivated CDR Spreier's evaluations of him before and after his internal complaint in 1983 and that institutionalized discrimination flowing from that animus prevented him from being promoted until his retirement from the Navy in 1994. *Id.* at ¶ 13–19. CH Wilson further alleges that the Navy's "pro-liturgical culture" allowed CDR Spreier and others to illegally retaliate, punish, and harm him as "payback" for exposing wrongdoing over the course of his 17½ year career. *Id.* at ¶ 23, 24. Finally, CH Wilson alleges that because the *Chaplaincy* court did not outline the elements of retaliatory discharge in its order granting summary judgment to the Navy, the *Chaplaincy* litigation did not address CH Wilson's present claim of retaliation. ECF No. 7 at 5–7.

Notwithstanding CH Wilson's sharp contentions that Count 1 was not resolved in the previous litigation, it is abundantly clear that this claim represents an attempt to relitigate the constitutional issues previously decided in *Chaplaincy*. Despite the fact that CH Wilson's Complaint does allege individualized factual contentions in an attempt to support an ad hoc retaliation claim, these allegations are overwhelmed by claims of systemic abuse that were the subject of the *Chaplaincy* litigation. Most tellingly, CH Wilson's prayer for relief on Count 1 requests a declaration that "the challenged promotion procedures are improper and unconstitutional" and would require the Navy to retroactively modify CH Wilson's personnel file after issuing new promotions board decisions without "undue religious influence." *See* ECF No. 1 at 23. This reveals the true nature of CH Wilson's purported retaliation claim—an attempt to individualize the *Chaplaincy* plaintiffs' grievances with the promotional decisions of the Navy Chaplain Corps so they may be understood as retaliation specific to CH Wilson and take a second shot at the relief that was denied in the *Chaplaincy* litigation. *See Chaplaincy*, 323 F. Supp. 3d at 38 ("[The *Chaplaincy* plaintiffs] seek, among other things, a declaration that....the Navy must

reconsider any adverse action taken against any plaintiff by [chaplain selection boards]"). In order to view CH Wilson's retaliation claims as distinct from the claims of the *Chaplaincy* plaintiffs, the Court would have to assume that Wilson's 1983 complaint about CDR Spreier was the basis for the Navy's alleged discrimination against him until his retirement in 1994 *and* that individualized discrimination is distinct from the issues decided in *Chaplaincy*. This interpretation of the Complaint is patently implausible.

The Court has no doubt about the authenticity of CH Wilson's religious convictions, his personal grievances with CDR Spreier, or his general frustration with his rank in the Navy—these dynamics are abundantly clear from the allegations in the Complaint. However, CH Wilson's Complaint repeatedly alleges that the retaliation he suffered because of his issues with CDR Spreier was rooted in a systemic pro-liturgical preference and afflicted the Navy's promotional decisions throughout his career—even though the *Chaplaincy* court has already ruled that the Navy's method of promoting chaplains was *not* unconstitutionally discriminatory. *See* ECF No. 1 at ¶¶ 9a, 9b, 10–13, 18, 19, 21–28 (alleging *systemic* pro-liturgical bias or non-liturgical discrimination). In sum, the Complaint fails to divorce CH Wilson's claims of retaliatory mistreatment from the *Chaplaincy* court's final judgment denying relief on the *Chaplaincy* plaintiffs' systemic religious discrimination claims. Based on the Complaint itself, the Court would be unable to reach a judgment on the substance of CH Wilson's retaliation claims or provide his requested relief without revisiting the constitutionality of the Navy's method of promoting chaplains based on denominational affiliation. This is a textbook case of issue preclusion. Therefore, Defendants' Motion to Dismiss on Count 1 is granted.

B. Counts 2, 3 and 5 (the Resolved Constitutional and Statutory Claims)

The Complaint concedes that the *Chaplaincy* litigation resolved a longstanding discovery dispute regarding documents from commander promotion boards, a statute of limitations tolling issue under 28 U.S.C. § 2401, and constitutional claims under the First and Fifth Amendments. *See* ECF No. 1 at ¶¶ 2.d, 2.d.i, 2.d.iii. A review of the *Chaplaincy* summary judgment order reveals the following: (1) the court rejected the *Chaplaincy* plaintiffs' constitutional challenge to 10 U.S.C. § 613a regarding the disclosure of chaplaincy selection board proceedings for at least the third time;[1] (2) the court applied previous rulings from the D.C. District Court on the application of the statute of limitations found in § 2401;[2] and (3) the court rejected the *Chaplaincy* plaintiffs' constitutional challenges and associated RFRA challenges to the Navy's selection board policies and procedures.[3]

CH Wilson now argues the *Chaplaincy* litigation does not address Counts 2, 3, and 5 of his Complaint because the retaliation claim in Count 1 creates a new context for the constitutional and statutory arguments previously disposed of by the D.C. District Court. ECF No. 7 at 16–25. CH Wilson correctly notes that his claims in Counts 2, 3, and 5 "are directly related to his retaliation claim." *Id.* at 16. However, instead of providing new context that forms the basis for properly

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[1] *In re Navy Chaplaincy*, 323 F. Supp. 3d 25, 50–55 (D.D.C. 2018). The *Chaplaincy* plaintiffs were repeatedly warned about the frivolous nature of their § 613a arguments.

> "Whatever wisdom may be associated with the adage 'the third time's the charm,' the plaintiffs are advised to accept this second ruling as conclusive and refrain from testing their luck a third time before this court."
>
> Plaintiffs have not heeded this admonition, offering no new authority to buttress their third attempt to assert a constitutional right to evidence in support of their constitutional claims.

Id. at 51 *quoting In re Navy Chaplaincy*, 512 F. Supp. 2d 58, 62 (D.D.C. 2007).

[2] *In re Navy Chaplaincy*, 323 F. Supp. 3d at 35–37. The court had previously ruled that the statute of limitations precluded the *Chaplaincy* plaintiffs from bringing claims arising before November 5, 1993. *Id.* The Court recognizes that CH Wilson seeks to circumvent the rulings of the D.C District Court on the statute of limitations issue because most of the factual assertions supporting his retaliation claim in Count 1 occurred before November 5, 1993.

[3] *Id.* at 38–50.

presented ad hoc claims, the relationship between CH Wilson's purported retaliation claim and the remaining claims actually reinforces the conclusion that every claim presented by the Complaint is precluded by res judicata. The Court reiterates the conclusion that the doctrine of issue preclusion applies to Count 1 because the systemic issues with the Navy's selection board procedures that form the basis for that claim have been thoroughly addressed in the *Chaplaincy* litigation. *See Chaplaincy*, 323 F. Supp. 3d at 31 ("[o]ver its nearly twenty-year life span, plaintiffs' case has been before the D.C. Circuit at least five times, seen the retirement of two district judges, and generated over a thousand pages of briefing on dispositive motions").

The systemic issues alleged in support of Count 1 are indistinct from the issues raised in Counts 2, 3, and 5, which have been exhaustively litigated in *Chaplaincy*. The *Chaplaincy* plaintiffs may ultimately prevail on their constitutional and statutory issues, but their pending appeal to the D.C. Circuit is their sole recourse for relief from the unfavorable judgments of the D.C. District Court. CH Wilson will not obtain his desired relief before this Court by reframing the same claims and issues in an effort to circumvent the final judgment in *Chaplaincy*—a case to which he as been a party for over twenty years. In sum, Count 1 provides no new context to refresh the constitutional and statutory claims raised in Counts 2, 3, and 5, which are identical to the to the *Chaplaincy* plaintiffs' claims resolved by the D.C. District Court. Therefore, the doctrine of claim preclusion applies to Counts 2, 3, and 5.

C. Count 4, Constructive Discharge

In his Complaint, CH Wilson alleges that his "acceptance of [Temporary Early Retirement Authority] ("TERA") was a constructive discharge resulting from the [Navy Chaplain Corps] retaliation and creation of a hostile and intolerable environment to punish CH Wilson's exercise of his rights as a chaplain to accurately reflect and represent his faith group." ECF No. 1 at ¶ 39.

CH Wilson also admits that his constructive discharge claim cannot be decoupled from the purported retaliation claim rejected by this Court in its evaluation of Count 1. ECF No. 7 at 28 ("without a legal determination of the legality of his [failures of selection] and retaliation cause of action, [CH Wilson] has no constructive discharge claim"). CH Wilson is correct in the sense that the defects in his purported retaliation claim are also fatally injurious to his constructive discharge claim.

CH Wilson's allegations in Count 4 appear to qualify as an ad hoc claim on the surface because it uses the individualized claim of constructive discharge as its title. However, the title of the claim itself does not obscure his true objective: successive litigation of the same claims and issues that were resolved by the *Chaplaincy* court. The Court is not distracted from the duplicative nature of the constitutional and statutory arguments raised in Count 4 because the Complaint makes it impossible. In articulating his constructive discharge claim, CH Wilson reiterates that he "retired in 1994 with 17½ years of service, having seen that religious and racial discrimination would not let him be promoted" and alleging that the "intolerable atmosphere" created by the Navy Chaplain Corps' hostility to his religious practices and faith left him no choice but to retire. ECF No. 1 at ¶ 18; *See also id.* at ¶ 38–40 (reiterating generalized accusations of retaliation based in religious bias).

Tellingly, the Complaint does not allege any specific facts surrounding the circumstances of CH Wilson's voluntary acceptance of early retirement that could support an ad hoc claim of constructive discharge (other than the same broad allegations of religious bias). In CH Wilson's own words, the reason that he quit was because of the Navy's systemic bias against his religious beliefs and the accompanying hostility flowing from that bias. Once again, all roads lead back to the inescapable issue presented by every ground for relief Complaint: CH Wilson is still arguing

that his constructive discharge was a product of the Navy's institutionalized animosity for non-liturgical theologies. These issues of institutionalized religious discrimination have been exhaustively addressed in the *Chaplaincy* litigation. Therefore, Count 4 is also subject to issue preclusion.

IV. CONCLUSION

Based on the foregoing reasons, Defendants' Motion to Dismiss is **GRANTED**.

The Court **DIRECTS** the Clerk to provide a copy of this Order to the parties.

IT IS SO ORDERED.

Norfolk, Virginia
January 21, 2020

/s/
Raymond A. Jackson
United States District Judge