

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

PETER J. McFARLAND,)
)
 Plaintiff)
)
 v.)
)
 UNITED STATES OF AMERICA,)
 DEPARTMENT OF STATE, et al.,)
)
 Defendants)

Docket No. 96-292-P-H

**RECOMMENDED DECISION ON DEFENDANTS’ MOTIONS
TO DISMISS AND FOR SUMMARY JUDGMENT**

Defendants Beta Analytics International, Inc. (“BAI”) and USATREX International, Inc. (“USATREX”) move to dismiss this action. Defendant United States Department of State (“the United States”) moves for dismissal or summary judgment on all counts asserted against it. The amended complaint raises several claims arising out of an alleged discriminatory termination of the plaintiff’s employment or failure to hire the plaintiff, who appears *pro se*. I recommend that the court grant the motions to dismiss.

I. Standards of Review

The United States and BAI have moved to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(6). “When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in

his favor.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendants are entitled to dismissal for failure to state a claim “only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory.” *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

BAI and USATREX seek dismissal pursuant to Fed. R. Civ. P. 12(b)(2) and (3). A motion to dismiss for lack of personal jurisdiction raises the question whether the controversy or the defendant has sufficient contact with the forum to give the court the right to exercise judicial power over the defendant. *See, e.g., Hancock v. Delta Air Lines, Inc.*, 793 F. Supp. 366, 367 (D. Me. 1992). The burden is on the plaintiff to establish jurisdiction, *Talus Corp. v. Browne*, 775 F. Supp. 23, 25 (D. Me. 1991), but where, as here, the court rules on the Rule 12(b)(2) motion without holding an evidentiary hearing, a *prima facie* showing is sufficient, *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 712 (1st Cir. 1996) (*prima facie* standard preferred where jurisdictional facts are undisputed); *Archibald v. Archibald*, 826 F. Supp. 26, 28 (D. Me. 1993). For the purposes of such a review, the allegations of the nonmoving party are taken as true. *Archibald*, 826 F. Supp. at 28.

A motion to dismiss for lack of venue under Rule 12(b)(3) puts the burden on the plaintiff to demonstrate that he has met his obligation to institute his action in a permissible forum. 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1352 at 264-65 (1990). USATREX also seeks dismissal pursuant to Fed. R. Civ. P. 12(b)(5), alleging insufficient service of process. A motion for dismissal on this basis properly deals with the manner in which service has been made, specifically a failure to comply with the procedural requirements of the applicable service provisions. *Id.* § 1353 at 277-78. If the record before the court does not reveal any deficiency in the process or

in its service, a motion to dismiss made under Rule 12(b)(5) must be denied. *Id.* at 282.

The United States also seeks, in the alternative, summary judgment on all counts of the complaint. In the circumstances, it is not necessary for the court to reach that alternative, and I therefore do not set forth here the legal standard applicable to such a motion.

II. Analysis

The plaintiff's amended complaint contains seven counts, each asserted against all of the defendants. Counts I and II allege discrimination under the Rehabilitation Act, 29 U. S. C. § 791 *et seq.*, due to unspecified physical impairments. Count III alleges discrimination due to a disability and unlawful employment practices with respect to termination of the plaintiff's employment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*¹ Count IV raises a claim under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* Count V asserts a claim of discrimination in violation of Executive Order 11246. Count VI alleges discrimination in violation of 38 U.S.C. § 4212, which is section 503 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974. Count VII asserts a claim for damages without mention of the statutory or legal basis for the claim. The amended complaint seeks lost wages and benefits, unspecified additional compensatory damages, punitive damages, attorney fees, and injunctive relief.

USATREX's motion to dismiss (Docket No. 8) was filed on May 12, 1997. BAI's motion

¹ The amended complaint also alleges in Count III that the defendants discriminated against the plaintiff in violation of 42 U.S.C. § 1984a. There is no such statute. Portions of 42 U.S.C. § 1984 were declared unconstitutional in *United States v. Singleton*, 109 U.S. 3, 19 (1883). The remaining sections were repealed by Act of June 25, 1948, ch. 645, § 21, 62 Stat. 862. To the extent that any of the plaintiff's claims are based on this statute, dismissal under Rule 12(b)(6) is appropriate.

to dismiss (Docket No. 10) was filed on May 14, 1997. On June 3, 1997, some ten days after the deadline for filing an opposition to the second of those motions set by this court's Local Rule 7(b), the plaintiff filed a letter motion (Docket No. 13) seeking an unspecified extension of time in which to object to both motions. This request was denied. Docket No. 13 (endorsement). The United States' motion (Docket No. 16) was filed on June 13, 1997. The plaintiff's only response to this motion is a letter motion (Docket No. 20), entitled "Request to Amend Complaint," filed on June 30, 1997, again not within the time limits established by the local rule for filing opposition to a motion, seeking leave to amend his complaint a second time and arguing against the positions taken by the defendants in their motions. The motion does not include a proposed second amended complaint, nor does it specify how the complaint is to be further amended. It does contain a recitation that "there are fundamental error [sic] in my complaint . . . they are as much a clerical error, as a lack of knowledge on my part." Request to Amend Complaint at 1. Defendant USATREX has filed a timely opposition to the request to amend. Docket No. 21.

A *pro se* litigant is required to comply with the procedural rules of this court. This point has been made clear by the First Circuit.

We have consistently held that a litigant's "pro se status [does not] absolve him from compliance with the Federal Rules of Civil Procedure." *United States v. Heller*, 957 F.2d 26, 31 (1st Cir. 1992) (quoting *Feinstein v. Moses*, 951 F.2d 16, 21 (1st Cir. 1991)). This applies with equal force to a district court's procedural rules.

FDIC v. Anchor Properties, 13 F.3d 27, 31 (1st Cir. 1994). Under Local Rule 7(b), a party who fails to respond to a motion to dismiss "shall be deemed to have waived objection," and, in effect, has consented to the motion to dismiss. *Dougherty v. NYNEX Corp.*, 835 F. Supp. 22, 23 (D. Me. 1993). This court may thus grant all three pending motions on the basis of the plaintiff's procedural defaults

alone. *See, e.g., Bouchard v. Magnusson*, 715 F. Supp. 1146, 1148 (D. Me. 1989) (applying identical term from predecessor to Local Rule 7(b)).

Even if this were not the case, the defendants are entitled to dismissal on the merits of their motions. First, two of the counts of the amended complaint assert claims under authority which does not provide for a private cause of action. Count V is based on Executive Order 11246. That order does not provide a private judicial remedy. *Utley v. Varian Assoc., Inc.*, 811 F.2d 1279, 1286 (9th Cir. 1987). Count V must therefore be dismissed, as it fails to state a claim upon which relief may be granted. Count VI asserts a claim under 38 U.S.C. § 4212, which provides for “veterans’ employment emphasis” in contracts between private contractors and the United States. The First Circuit has held that this statute, previously located at 38 U.S.C. § 2012, does not provide a private cause of action. *Barron v. Nightingale Roofing, Inc.*, 842 F.2d 20, 22 (1st Cir. 1988). Accordingly, Count VI must be dismissed for failure to state a claim upon which relief may be granted.

Next, Counts I and II, brought under the Rehabilitation Act, 29 U.S.C. § 791 *et seq.*, suffer from a similar infirmity. There is no private right of action under the Act against an employer contracting with the federal government for alleged discrimination on the basis of physical handicap. *Davis v. United Air Lines, Inc.*, 662 F.2d 120, 121 (2d Cir. 1981). Thus, the plaintiff has no right of action against defendants BAI and USATREX under the terms of his amended complaint, in which he alleges that these defendants are his employers and that they employed him, or refused to employ him, to work under contracts with the federal government. The amended complaint does not allege that the plaintiff was employed by the United States. Since the Rehabilitation Act is available only for claims against an employer, 29 U.S.C. § 794a(a)(1), the government is also entitled to dismissal of Counts I and II.

The government is also entitled to dismissal of Counts III and IV, the remaining substantive counts. Count III raises a claim under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.* Exhaustion of administrative remedies is a prerequisite to suit under this statute as well. *Brown v. General Servs. Admin.*, 425 U.S. 820, 832 (1976). The amended complaint does not specifically allege that the plaintiff has complied with this requirement. The exclusive remedy for complaints of discrimination against federal agencies under Title VII is found at 42 U.S.C. § 2000e-16. *Id.* at 835. Failure to comply with the administrative procedures that have been established to carry out this remedy bars any action on such a claim against the agency in federal court. *Cano v. United States Postal Serv.*, 755 F.2d 221, 223 (1st Cir. 1985). Accordingly, the government is entitled to dismissal of Count III.²

Count IV raises a claim under the Americans with Disabilities Act (“ADA”), specifically citing only 42 U.S.C. § 12101. The ADA prohibits discrimination by a “covered entity” against a qualified individual based on a disability. 42 U.S.C. § 12112(a). The United States is not an employer, nor is it a covered entity, within the meaning of the ADA. 42 U.S.C. § 12111(5)(B)(i). Therefore, claims may not be made against it under the ADA. *See, e.g., Kemer v. Johnson*, 900 F. Supp. 677, 681 (S.D.N.Y. 1995), *aff’d* 101 F.3d 683 (2d Cir. 1996).

Consideration of the claims raised against BAI and USATREX in Counts III and IV would first require evaluation of the personal jurisdiction and venue defenses raised by those defendants.

² The record contains undisputed evidence that the plaintiff did not present a claim against the government to the EEOC. Declaration of Silvio Fernandez, Exh. A to the United States’ Statement of Material Facts (Docket No. 17), and documents attached thereto (showing EEOC claim filed by plaintiff against BAI and USATREX); and Declaration of Thomas L. Williams, Exh. B to the United States’ Statement of Material Facts. Thus, the government would also be entitled to summary judgment on Count III, as this material fact is undisputed in the record, even including the plaintiff’s belated response to the pending motions. Docket No. 20.

Venue for Title VII claims is controlled by 42 U.S.C. § 2000e-5(f)(3), which also controls actions brought under the ADA. 42 U.S.C. § 12117(a). The governing statute provides:

[A]n action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office.

42 U.S.C. § 2000e-5(f)(3). By the terms of the amended complaint, neither BAI nor USATREX has its principal office in Maine, the alleged unlawful employment practice is not alleged to have been committed in Maine, and the plaintiff does not allege that he would have worked in Maine but for the alleged unlawful employment practice. The affidavit of Joseph Saul (“Saul Aff.”) (Docket No. 12) establishes that the employment records of BAI are located in Maryland. *Id.* ¶ 5. As to BAI, therefore, the District of Maine is not the appropriate venue for this action. It is highly unlikely that USATREX, alleged in the amended complaint to be located in Virginia, maintains its employment records in Maine. However, both the lack of specific information in the record on this point and the fact that a plaintiff may request transfer of an action when venue is inappropriate, even though the plaintiff in this case has not done so, lead me to consider briefly these defendants’ arguments concerning personal jurisdiction.

Matters outside the pleadings may be considered in connection with a motion to dismiss for lack of personal jurisdiction. *Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v. Medfit Int’l, Inc.*, 982 F.2d 686, 690 (1st Cir. 1993). BAI denies any contact with the plaintiff in Maine and states that it has no offices in Maine, directs no advertising to Maine, and conducts all work under the

contract with the government under which the plaintiff sought to be employed by BAI outside Maine. Saul Aff. ¶¶ 6-11. USATREX relies solely on the alleged insufficiency of the allegations in the amended complaint.

To defeat a motion to dismiss for lack of personal jurisdiction, the plaintiff must proffer evidence that, if credited, is sufficient to support findings of each and every fact required to satisfy both the forum's long-arm statute and the due process clause of the Constitution. *Boit v. Gar-Tec Prod., Inc.*, 967 F.2d 671, 675 (1st Cir. 1992). "The *prima facie* showing of personal jurisdiction must be based on evidence of specific facts set forth in the record. The plaintiff must go beyond the pleadings and make affirmative proof." *Id.* (internal quotation marks and citations omitted). Here, the plaintiff, by failing to make a timely objection to the motions to dismiss, has rested on his pleadings alone. This is insufficient, and dismissal under Rule 12(b)(2) is thus appropriate.

The result would not differ if the unsworn factual statements in the plaintiff's untimely Request to Amend Complaint were considered. The only allegation included there that might bear on the applicability of Maine's long-arm jurisdictional statute, 14 M.R.S.A. § 704-A, is an assertion that "USATREX and [BAI] both recruit nationwide." Request at 2. In addition to the fact that it is not of evidentiary quality, this statement is simply an insufficient basis for the assertion of personal jurisdiction. It does not show that either of these defendants "purposely established 'minimum contacts' with [Maine] such that [it] can reasonably anticipate being haled into [Maine's] court." *U.S.S. Yachts, Inc. v. Ocean Yachts, Inc.*, 894 F.2d 9, 11 (1st Cir. 1990). The plaintiff has not met his burden on the issue of personal jurisdiction, and dismissal of Counts III and IV against BAI and USATREX on this basis is therefore indicated.

Finally, Count VII of the amended complaint does not appear to allege an independent basis

for recovery and must therefore fail in light of the dismissal of all other counts. To the extent that Count VII may be construed to assert a claim under state law, the court has discretion to dismiss pendent state-law claims when federal claims are dismissed. 28 U.S.C. § 1367(c)(3); *see Mladen v. Gunty*, 655 F. Supp. 455, 460-61 (D. Me. 1987). In this case I can discern no compelling reason why this court should retain jurisdiction and decide the remaining state-law issue or issues, if indeed any are before the court. Accordingly, I recommend that any state-law claim that may be included in Count VII also be dismissed.

III. Conclusion

For the foregoing reasons, I recommend that the motions to dismiss of all of the defendants be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 5th day of August, 1997.

*David M. Cohen
United States Magistrate Judge*

