

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE**

MARTIN AKERMAN,
Appellant,

DOCKET NUMBER
DC-0752-23-0457-I-1

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: May 18, 2023

**ORDER ON THE APPELLANT'S FINAL MOTION FOR EXTENSION OF
TIME, REQUEST FOR STATUS CONFERENCE AND ASSISTANCE IN
OBTAINING COUNSEL**

On May 18, 2023, the appellant filed a motion wherein he requested a 40-day extension of time to respond to the orders to show cause; a status conference; assistance in obtaining counsel; and discovery. *See* Appeal File (AF), Tab 35. This motion is his sixteenth submission filed in this appeal since it was filed on May 3, 2023 – or 15 days ago. Moreover, this appeal is the appellant’s seventh Board appeal related to his employment with the agency. *See Akerman v. Department of the Army*, DC-1221-22-0257-W-1; *Akerman v. Department of the Army*, DC-0752-22-0376-I-1 (Indefinite Suspension); *Akerman v. Department of the Army*, DC-1221-22-0445-W-1; *Akerman v. Department of the Army*, DC-1221-22-0459-W-1; *Akerman v. Department of the Army*, DC-3443-22-0340-I-1; *Akerman v. Department of the Army*, DC-3443-22-0639-I-1; *Akerman v. Office of Special Counsel*, DC-344-22-0296-I-1. In each of these appeals, he was required to respond to Board orders and comply with the Board’s processes and procedures. *Id.*

Extension of Time

In his motion, the appellant states he needs a 40-day extension because of the complexity of this appeal, his disability, and his status as a pro se litigant. *See* AF, Tab 35 at 2. Additionally, he avers that he filed a complaint with the Department of Labor in regard to allegations that the agency violated a third-party's Uniformed Services Employment and Reemployment Rights Act (USERRA) rights. *Id.*

The appellant has identified three issues in his appeal: (1) an involuntary retirement; (2) a retirement claim; and (3) a USERRA retaliation claim. *See* AF, Tabs 19 and 21. At this stage, the appellant must make a nonfrivolous allegation of Board jurisdiction and establish the Board's jurisdiction by preponderant evidence. *See Yusuf v. U.S. Postal Service*, 112 M.S.P.R. 465, ¶ 15 (2009); *Liu v. Department of Agriculture*, 106 M.S.P.R. 178, ¶ 8 (2007). I have advised the appellant of his jurisdictional burden for each issue. *See* AF, Tabs 3, 14, and 26. As the appellant elected to pursue an involuntary resignation (i.e., constructive discharge) claim through the Equal Employment Opportunity process (i.e., Title VII) and the United States District Court for the Eastern District of Virginia issued a decision on that claim, I advised the appellant of collateral estoppel and res judicata.¹ *See* AF, Tab 20. Based on my review of the current record, I find these issues are not complex.

As to the appellant's statement that he needs additional time due to his disability, on May 3, 2023, he requested an extension of time to respond to the jurisdictional issue(s) because of his disability. *See* AF, Tab 5. On the same

¹ Because the appellant has argued that his involuntary retirement is a separate and distinct action from his involuntary resignation, I advised the appellant to maintain a Chapter 75 action for an involuntary retirement after the date of his resignation from federal service, he must establish he was an "employee" at the time of his retirement. *See* AF, Tab 26 at 6-8. Thus far, the appellant has failed to submit or argue that he is in fact retired or that the agency or the Office of Personnel Management denied his request for retirement under any federal retirement program.

date, I granted, in part, his request and allowed him 36 days (i.e., from May 3, 2023 to June 8, 2023) to nonfrivolously allege and establish Board jurisdiction – instead of the usual 7 to 10 days to respond. *See* AF, Tab 6. Moreover, the appellant filed his jurisdictional response early on May 15, 2023. *See* AF, Tab 19. He then stated, “Concerning the upcoming stage, I stand ready to advance to the subsequent phase of proceedings, which entails the agency's response. The commencement of this period should be marked from today's date” AF, Tab 21 at 15. Nevertheless, I informed him that he may supplement this response no later than June 8, 2023 – three weeks from the date of this Order. *See* AF, Tab 26.

Turning to the appellant’s third-party USERRA complaint that he filed with the Department of Labor on May 5, 2023, *see* AF, Tab 18 at 35-37, I have reviewed the complaint and it appears it offers little to no insight into the three issues identified above – nor does it affect his ability to raise a nonfrivolous allegation of Board jurisdiction. Specifically, his third-party USERRA complaint does not address any of the issues presented here (i.e., involuntary retirement, retirement-related claim (e.g., disability, Voluntary Early Retirement Authority, etc.), or USERRA). Additionally, it was filed two days after this appeal and over two years after his resignation from the agency. *See* AF, Tab 1; AF, Tab 18 at 35-37. Thus, his third-party USERRA complaint filed on May 5, 2023, cannot form the basis for his USERRA retaliation claim.

Based on the foregoing and after consideration of the appellant’s pro se status, I find he has failed to establish good cause for an additional extension of time.²

² Additionally, the appellant has been in litigation with the agency for over two years and has yet to obtain counsel to represent him. *See e.g.*, *Akerman v. Austin*, 2022 WL 16700382 (E.D.Va. Nov. 3, 2022); *Akerman v. Department of the Army*, DC-0752-22-0376-I-1, Initial Appeal (filed April 26, 2022).

Status Conference and Assistance with Obtaining Counsel

The appellant also requested again that I schedule a status conference and assist him with obtaining counsel. *See* AF, Tab 35. I have repeatedly denied his request for a status conference and he has added no new facts or arguments in this motion that would lead me to change or reconsider my prior rulings. *See e.g.*, AF, Tabs 30 and 32. Likewise, I have already informed the appellant that it is his responsibility to obtain counsel, the Board will not assist him in finding counsel, and it will not appoint counsel. *See* AF, Tab 6 at 2.

Discovery

As to the appellant's proposed discovery schedule and discovery request, I have not authorized the parties to conduct or initiate discovery. *See* AF, Tab 3 at 4; AF, Tab 14 at n. 1. Additionally, the mere filing of an appeal with the Board "does not unlock the doors of discovery" for an appellant "armed with nothing more than conclusions." *See cf. Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (citation omitted) (2009); *see also Nasuti v. Department of State*, 112 M.S.P.R. 587, ¶ 27 (2009) ("In the absence of nonfrivolous IRA jurisdictional allegations, . . . the AJ was not required to grant the discovery motions."); *Sobczak v. Environmental Protection Agency*, 64 M.S.P.R. 118, 122 (1994) ("The administrative judge properly denied discovery because the appellant failed to plead facts sufficient to establish jurisdiction"). Based on the current record, I find the appellant has not made nonfrivolous allegations of fact that show he is entitled to relief; thus, I decline to authorize discovery at this time.

For these reasons, the appellant's motion is **DENIED**.

FOR THE BOARD:

_____/S/
Joshua Henline
Administrative Judge

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant

Electronic Mail Martin Akerman
2001 North Adams Street
Unit 440
Arlington, VA 22201

Agency Representative

Electronic Mail Jenny Lin Naylor
Department of the Army
111 S. George Mason Dr., Bldg 2
Arlington, VA 22204

May 18, 2023
(Date)

/s/
Joshua Henline
Administrative Judge