

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals**For the Seventh Circuit****Chicago, Illinois 60604**

Submitted September 20, 2024*

Decided September 24, 2024

BeforeFRANK H. EASTERBROOK, *Circuit Judge*ILANA DIAMOND ROVNER, *Circuit Judge*JOSHUA P. KOLAR, *Circuit Judge*

No. 23-3147

KEVIN PAUL SANDGREN,
*Plaintiff-Appellant,**v.*DENIS R. MCDONOUGH,
*Defendant-Appellee.*Appeal from the United States District
Court for the Eastern District of
Wisconsin.

No. 23-CV-923

Nancy Joseph,
*Magistrate Judge.***ORDER**

Kevin Sandgren sued Denis McDonough, the Secretary of the United States Department of Veterans Affairs (VA), alleging that the Secretary violated federal law by failing to hire Sandgren. The Secretary moved to dismiss Sandgren's suit for failure to exhaust administrative remedies. After responding to the Secretary's motion, Sandgren

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

moved to strike the Secretary's reply brief or to file a surreply to it. A magistrate judge, presiding with the parties' consent, *see* 28 U.S.C. § 636(c), denied Sandgren's motion and dismissed the suit without prejudice. On appeal, Sandgren does not challenge the Secretary's stance on exhaustion and instead contests the denial of his motion to strike or to file a surreply. Because the magistrate judge did not abuse her discretion in denying Sandgren's motion and correctly dismissed his complaint, we affirm.

Sandgren unsuccessfully applied for several jobs with the VA. The VA told Sandgren that it was sending his most recent application to a hiring manager and he would receive an interview. But before any interview occurred, the VA told Sandgren that he did not get the job and that he was not interviewed because of a temporary policy it implemented during the COVID-19 pandemic. Concerned that the VA had not hired him because of a disability, his age, and his status as a veteran, Sandgren filed with the VA an administrative complaint for employment discrimination. An administrative judge ruled for the VA. The order implementing that decision explained how Sandgren could appeal the decision to the appropriate administrative agency. It also explained that after he appealed to that agency, he could file a civil action in district court (1) within 90 days after receipt of the agency's final decision or (2) after 180 days from the date he appealed to the agency if it had not yet issued a final decision.

Sandgren sued the Secretary in district court less than 180 days after he had appealed to the agency and before it had issued a final decision in his appeal. He maintained that the VA had discriminated against him because of a disability, his age, and his status as a veteran. *See* 29 U.S.C. §§ 621–634, 701–797; 5 U.S.C. § 2108; 5 CFR § 211.102 (2019). The Secretary moved to dismiss Sandgren's complaint because he had failed to exhaust his administrative remedies by filing his suit too early. Sandgren opposed the motion, and the Secretary filed a reply. Sandgren then sent to the court an email that the magistrate judge construed as a motion to strike the Secretary's reply or to allow Sandgren to file a surreply. The magistrate judge denied Sandgren's motion and dismissed Sandgren's suit without prejudice for failure to exhaust. (The judge also added that 5 U.S.C. § 2108 does not authorize a private remedy for an alleged failure to prefer veterans for hire). This appeal followed.

We pause briefly to consider our jurisdiction. The Secretary argues that we do not have appellate jurisdiction to the extent that the dismissal for failure to exhaust is without prejudice, because Sandgren can refile after he properly exhausts. But the dismissal for failure to exhaust administrative remedies here is an appealable final judgment because the test for finality “is not whether the suit is dismissed with

prejudice or without prejudice”; it “is whether the district court has finished with the case.” *Hill v. Potter*, 352 F.3d 1142, 1144–45 (7th Cir. 2003). Rather than suggest that Sandgren could amend his complaint or cure a defect and proceed, the magistrate judge definitively ended the case with a judgment under Rule 58 of the Federal Rules of Civil Procedure. Thus our jurisdiction is secure.

On appeal Sandgren unpersuasively argues that the magistrate judge should have granted his motion to strike the Secretary’s reply brief or allowed Sandgren to file a surreply. We review the denial of Sandgren’s motion for an abuse of discretion. *Heng v. Heavner, Beyers & Mihlar, LLC*, 849 F.3d 348, 353 (7th Cir. 2017) (motion to strike); *Johnny Blastoff, Inc. v. Los Angeles Rams Football Co.*, 188 F.3d 427, 439 (7th Cir. 1999) (surreply). Sandgren first contends that the magistrate judge ignored his request to strike the reply brief or to file a surreply. But the judge did not ignore his request—she explicitly denied it. Sandgren replies that the judge should have granted his request, insisting that in his opening brief the Secretary addressed only the disability claim and waited until the reply brief to contest the claims based on age and veteran status. We disagree. The Secretary’s opening brief addressed all of Sandgren’s allegations and asked the magistrate judge to dismiss his entire suit because Sandgren had failed to exhaust his administrative remedies with respect to *any* of his claims. And Sandgren had a chance in his response brief to respond to those contentions. Thus, the magistrate judge reasonably denied Sandgren’s motion.

Sandgren does not otherwise meaningfully engage with the merits of the magistrate judge’s dismissal of his complaint for failure to exhaust his administrative remedies. In any event, the ruling was correct. It is uncontested that Sandgren filed this suit while his administrative appeal was pending but before 180 days had elapsed. As a result, he had not exhausted his administrative appeal. *See* 42 U.S.C. § 2000e–16(c); *Hill*, 352 F.3d at 1145. Even though 180 days has *now* passed, dismissal was still proper. The purpose of exhaustion is to give an agency time to address a claim, and as the Supreme Court has said in analogous contexts, that purpose is thwarted if a plaintiff sues before exhausting. *Ross v. Blake*, 578 U.S. 632, 638–39 (2016) (prisoner suits); *Porter v. Nussle*, 534 U.S. 516, 524 (2002) (same); *McNeil v. United States*, 508 U.S. 106, 111–12 (1993) (Federal Torts Claims Act). And because the magistrate judge dismissed Sandgren’s suit without prejudice, the dismissal allowed Sandgren to file a timely suit after he exhausted. But the dismissal itself was proper. Finally, we note that Sandgren leaves unchallenged the magistrate judge’s ruling that 5 U.S.C. § 2108 does not create a private right of action; we therefore have no reason to address that ruling.

AFFIRMED