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**United States District Court
Central District of California**

CLIFFORD MERLO,
Plaintiff,

v.
ROBERT L. WILKIE,
Defendant.

Case No. 2:19-cv-05078-ODW (JCx)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT’S: MOTION TO DISMISS [18] AND MOTION FOR RECONSIDERATION [20]

I. INTRODUCTION

Defendant Robert L. Wilkie, Secretary of Veteran Affairs of the United States Department of Veteran Affairs (“VA” or “Defendant”), moves to partially dismiss Plaintiff Dr. Clifford Merlo’s (“Dr. Merlo”) First Amended Complaint (“FAC”) alleging claims for age discrimination and retaliation. (Mot. Dismiss (“MTD”), ECF No. 18.) Defendant also asks the Court to reconsider certain aspects of its Order dated February 13, 2020, which granted in part Defendant’s first motion to dismiss and denied Defendant’s motion to strike (“February Order”). (Mot. Recons. (“MFR”), ECF No. 20.) For the reasons that follow, the Court **GRANTS in part and DENIES in part** Defendant’s motions.¹

¹ After carefully considering the papers filed in connection with the motions, the Court deemed the matters appropriate for decision without oral argument. Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15.

II. BACKGROUND

1
2 Dr. Merlo is a board-certified radiation oncologist whom Defendant employed
3 from December 2011 to May 31, 2015. (FAC ¶¶ 4, 7, ECF No. 17.) Dr. Merlo was
4 age fifty-eight when first hired, serving in a fee-for-service capacity rather than a
5 temporary or permanent appointment. (FAC ¶¶ 7, 10.) Dr. Ahmed Sadeghi was Dr.
6 Merlo's immediate supervisor. (FAC ¶ 12.)

7 In July 2012, Dr. Merlo applied and was selected for a full-time permanent
8 position. (FAC ¶ 14.) However, Defendant secretly changed Dr. Merlo's permanent
9 appointment to a temporary appointment and hid the temporary status from him.
10 (FAC ¶¶ 14, 18.) In 2013 and 2014, Defendant hired two other doctors who were less
11 than forty years old, one of them into a permanent position. (FAC ¶¶ 15–16.)

12 In November 2014, Dr. Sadeghi told Dr. Merlo “that he was getting older and
13 needed to retire to make room for two UCLA residents” who were then doing their
14 residency at the VA. (FAC ¶ 17.) Dr. Merlo was shocked by Dr. Sadeghi's comment
15 and approached the Human Resources (“HR”) Department, where he discovered that
16 he held a temporary appointment. (FAC ¶ 18.) In February 2015, Dr. Merlo reported
17 Dr. Sadeghi's comment to the Chief of Staff, Dr. Dean Norman, and complained that
18 Dr. Sadeghi was discriminating against him because of his age; Dr. Norman took no
19 action. (FAC ¶ 19.)

20 On March 13, 2015, Dr. Merlo emailed Dr. Norman, Dr. Sadeghi, and other
21 higher-level supervisors to report Dr. Sadeghi's comment and request a permanent
22 position. (FAC ¶ 20.) No one investigated Dr. Merlo's complaint of age
23 discrimination. (FAC ¶ 21.) Instead, on March 16, 2015, Dr. Sadeghi informed Dr.
24 Merlo that his employment would terminate as of May 1, 2015. (FAC ¶¶ 22, 24.)

25 In early April 2015, Dr. Merlo requested mediation of the VA's decision to
26 terminate his position through the HR Department and the EEO Program Office.
27 (FAC ¶ 23; *see* Decl. Clifford Merlo (“Merlo Decl.”) Ex. 1 (“April 15, 2015 Email”),
28 ECF No. 22.) On April 15, 2015, EEO Specialist Gary P. Sugg confirmed a

1 workplace mediation was scheduled for April 30. (April 15, 2015 Email.) At that
2 mediation, Defendant agreed to extend Dr. Merlo’s temporary appointment to May 31,
3 2015. (Decl. Sophia Eaves (“Eaves Decl.”) Ex. A, ECF No. 18-2; FAC ¶ 25.) Twice
4 in the months to come, Dr. Merlo applied for permanent positions that became
5 available but was not selected; the VA hired a younger applicant for one position and
6 did not fill the other. (FAC ¶¶ 30–31.)

7 On May 29, 2015, Dr. Merlo reported a claim of age discrimination to the
8 Office of Resolution Management, specifically for “Termination (Term Appointment)”
9 based on his age. (Eaves Decl. Ex. B (“Winter Letter June 2, 2015”), ECF No. 18-3.)
10 EEO Counselor William Winter was assigned to the claim. (Winter Letter June 2,
11 2015.) At the conclusion of informal counseling, Winter invited Dr. Merlo to file a
12 formal complaint if he was still dissatisfied. (Eaves Decl. Ex. C, ECF No. 18-4.)

13 On June 26, 2015, Dr. Merlo filed a formal complaint with the VA. (FAC ¶ 6;
14 Eaves Decl. Ex. D (“Formal Complaint”) 2, ECF No. 18-5.) In his complaint, Dr.
15 Merlo asserted that he had been discriminated against based on age when he was
16 terminated from his position on May 30, 2015. (Formal Complaint 2.) He initially
17 requested a hearing before the EEOC Administrative Judge but ultimately withdrew
18 that request and sought a Final Agency Decision. (FAC ¶ 6.) On April 11, 2019, the
19 VA issued its Final Agency Decision finding that Dr. Merlo “failed to prove that he
20 was subjected to disparate treatment based on his age when he was terminated from
21 his temporary appointment as a physician.” (Eaves Decl. Ex. G (“Final Agency
22 Decision”) 6, ECF No. 18-8; FAC ¶ 6.) The VA advised Dr. Merlo that he had the
23 right to appeal to the EEOC within thirty days or to file a civil action in a United
24 States District Court within ninety days if he did not appeal to the EEOC. (Final
25 Agency Decision 7.)

26 On June 11, 2019, Dr. Merlo initiated this action, asserting three causes of
27 action pursuant to the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C.
28 § 621, *et seq.*: (1) Age Discrimination (2) Hostile Environment Harassment, and

1 (3) Retaliation. (Compl. ¶¶ 29–47, ECF No. 1.) On February 3, 2020, the Court
2 granted in part and denied in part Defendant’s motion to dismiss. (Feb. Order, ECF
3 No. 16.) Specifically, the Court denied Defendant’s motion to dismiss Dr. Merlo’s age
4 discrimination claim because it found that Dr. Merlo’s age discrimination allegations
5 were “like or reasonably related to” his EEOC charge and sufficiently pleaded. (Feb.
6 Order 8–9, 10.) The Court dismissed Dr. Merlo’s Hostile Environment and
7 Retaliation claims as insufficiently pleaded and granted leave to amend. (Feb.
8 Order 11–12.) The Court also denied Defendant’s motion to strike certain of Dr.
9 Merlo’s damages and jury request. (Feb. Order 13.)

10 On February 26, 2020, Dr. Merlo filed the operative FAC. He asserts claims for
11 age discrimination and retaliation but does not renew his claim for hostile
12 environment. (See FAC ¶¶ 33–47.) Defendant moves to partially dismiss Dr. Merlo’s
13 FAC and seeks reconsideration of certain aspects of the Court’s February Order. (See
14 MTD; MFR.)

15 III. REQUESTS FOR JUDICIAL NOTICE

16 A court is generally limited to the pleadings in ruling on a Federal Rule of Civil
17 Procedure (“Rule”) 12(b)(6) motion but may consider “attached exhibits, documents
18 incorporated by reference, and matters properly subject to judicial notice.” *In re*
19 *NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1051 (9th Cir. 2014); *see Lee v. City of Los*
20 *Angeles*, 250 F.3d 668, 688–89 (9th Cir. 2001). “[A] court may judicially notice a
21 fact that is not subject to reasonable dispute because it: (1) is generally known within
22 the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined
23 from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid.
24 201(b). “Judicial notice is appropriate for records and ‘reports of administrative
25 bodies.’” *United States v. 14.02 Acres of Land More or Less in Fresno Cty.*, 547 F.3d
26 943, 955 (9th Cir. 2008); *see also Adetuyi v. City & Cty. of San Francisco*, 63 F. Supp.
27 3d 1073, 1080 (N.D. Cal. 2014) (taking judicial notice of an EEOC Intake
28 Questionnaire, letters from the EEOC, and a Right to Sue letter). Further, a document

1 may be incorporated by reference where neither party disputes its authenticity and the
2 pleading necessarily relies on the document. *See Marder v. Lopez*, 450 F.3d 445, 448
3 (9th Cir. 2006); *Lee*, 250 F.3d at 688.

4 Both parties request judicial notice of documents. (*See* Pl.’s Req. Judicial
5 Notice (“RJN”), ECF No. 24; Def.’s RJN, ECF No. 19.) The Court previously took
6 judicial notice of the documents Defendant submits and need not do so again. (*See*
7 Feb. Order 5.) On that basis, Defendant’s RJN is **DENIED** as moot. Dr. Merlo seeks
8 judicial notice of EEO Specialist Sugg’s email confirming workplace mediation as
9 well as excerpts from the VA’s Report of Investigation. (Pl.’s RJN 2; Merlo Decl.
10 ¶¶ 2–4, Exs. 1–3.) Defendant does not oppose Dr. Merlo’s RJN. The documents Dr.
11 Merlo submits are either records and reports of an administrative body or incorporated
12 by reference in Dr. Merlo’s FAC. Accordingly, the Court **GRANTS** Dr. Merlo’s RJN.
13 However, the Court takes judicial notice only of the existence of these documents, not
14 the truth of any facts asserted in them. *See Lee*, 250 F.3d at 688–89.

15 IV. LEGAL STANDARD

16 A court may dismiss a complaint under Rule 12(b)(6) for lack of a cognizable
17 legal theory or insufficient facts pleaded to support an otherwise cognizable legal
18 theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988). “To
19 survive a motion to dismiss . . . under Rule 12(b)(6), a complaint generally must
20 satisfy only the minimal notice pleading requirements of Rule 8(a)(2)”—a short and
21 plain statement of the claim. *Porter v. Jones*, 319 F.3d 483, 494 (9th Cir. 2003); *see*
22 *also* Fed. R. Civ. P. 8(a)(2). The “[f]actual allegations must be enough to raise a right
23 to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555
24 (2007). The “complaint must contain sufficient factual matter, accepted as true, to
25 state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662,
26 678 (2009) (internal quotation marks omitted). “A pleading that offers ‘labels and
27 conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not
28 do.’” *Id.* (citing *Twombly*, 550 U.S. at 555).

1 Whether a complaint satisfies the plausibility standard is a “context-specific
2 task that requires the reviewing court to draw on its judicial experience and common
3 sense.” *Id.* at 679. A court is generally limited to the pleadings and must construe all
4 “factual allegations set forth in the complaint . . . as true and . . . in the light most
5 favorable” to the plaintiff. *Lee*, 250 F.3d at 679. But a court need not blindly accept
6 conclusory allegations, unwarranted deductions of fact, and unreasonable inferences.
7 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Where a
8 district court grants a motion to dismiss, it should generally provide leave to amend
9 unless it is clear the complaint could not be saved by any amendment. *See Fed. R.*
10 *Civ. P. 15(a)*; *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th
11 Cir. 2008).

12 V. DISCUSSION

13 Defendant contends Dr. Merlo’s age discrimination and retaliation claims are
14 time-barred as to events occurring more than forty-five days before May 29, 2015, the
15 date Defendant asserts Dr. Merlo first sought EEO counseling. (MTD 1.) Defendant
16 also contends certain of Dr. Merlo’s requested damages and jury demand are legally
17 impermissible and asks the Court to dismiss them or reconsider those aspects of its
18 February Order. (MTD 1; *see* MFR.) As the motions overlap substantively, the Court
19 considers them together.

20 A. Timeliness

21 Federal employees who believe they have been discriminated against based on
22 age have two options. *Whitman v. Mineta*, 541 F.3d 929, 932 (9th Cir. 2008). First,
23 an employee may “bypass” administrative procedures by giving the EEOC “notice of
24 the alleged discriminatory act within 180 days, and g[iving] notice of his intent to sue
25 at least thirty days before commencing suit in a federal court.” *Id.* (citing 29 U.S.C.
26 §§ 633a(c), (d)). Alternatively, he may invoke the EEOC administrative process and
27 appeal any loss to the courts. *Id.* (citing 29 U.S.C. §§ 633a(b), (c)); *see also Lacayo v.*
28 *Donahoe*, No. 14-CV-04077-JSC, 2015 WL 993448, at *8 n.3 (N.D. Cal. Mar. 4,

1 2015) (discussing that the second path under the ADEA “functions just as it does in
2 the context of the Rehabilitation Act and Title VII claims”).

3 If an employee chooses to invoke the EEOC administrative claims process, he
4 must comply with the regulations associated with that process. *Carver v. Holder*, 606
5 F.3d 690, 695 (9th Cir. 2010); *Lacayo*, 2015 WL 993448, at *8 n.3. This includes the
6 requirement to “consult an EEO counselor within forty-five days of the effective date
7 of the contested personnel action.” *Shelley v. Geren*, 666 F.3d 599, 605 (9th Cir.
8 2012) (citing 29 C.F.R. §§ 1614.103, 1614.105(a)(1)). “[A]bsent waiver, estoppel, or
9 equitable tolling, ‘failure to comply with this regulation [is] . . . fatal to a federal
10 employee’s discrimination claim’ in federal court.” *Id.* (quoting *Kraus v. Presidio Tr.*
11 *Facilities Div./Residential Mgmt. Branch*, 572 F.3d 1039, 1043 (9th Cir. 2009)).
12 Thus, the counseling requirement acts “like a statute of limitations” to bar claims
13 based on events occurring more than forty-five days before a plaintiff seeks EEO
14 counseling. *See Pena v. U.S. Postal Serv.*, No. 18-CV-03923-JCS, 2019 WL 634645,
15 at *7 (N.D. Cal. Feb. 14, 2019) (citing *Kraus*, 572 F.3d at 1043); *see also Nat’l R.R.*
16 *Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) (“[D]iscrete discriminatory
17 acts are not actionable if time barred, even when they are related to acts alleged in
18 timely filed charges . . . each discrete act starts a new clock . . .”)

19 Dr. Merlo contends the Court has already ruled that he may assert his claims
20 regardless of the forty-five-day EEO Counselor contact requirement. (Opp’n MTD 5,
21 ECF No. 21.) Dr. Merlo is incorrect. In the February Order, the Court found Dr.
22 Merlo’s age discrimination claim sufficiently like or reasonably related to his EEO
23 charge such that the Court has jurisdiction over the claim (Feb. Order 7–9); *Leong v.*
24 *Potter*, 347 F.3d 1117, 1122 (9th Cir. 2003) (“The jurisdictional scope of the
25 plaintiff’s court action depends on the scope of the EEOC charge and investigation.”).
26 But whether a claim is timely, including whether a claimant made a timely request for
27 EEO counseling, is distinct from that jurisdictional question. *See Hamm v. Nielsen*,
28 No. CV-18-5702-PSG (JPRx), 2019 WL 3000656, at *6 (C.D. Cal. Mar. 29, 2019)

1 (“In addition to timely initiating EEO counseling, a plaintiff alleging discrimination
2 must exhaust his administrative remedies by presenting his claim to the EEOC.”);
3 *Lacayo*, 2015 WL 993448, at *10 (“Once a plaintiff has demonstrated substantial
4 compliance with the presentment requirement, the court then considers whether the
5 plaintiff timely requested counseling within 45 days of any alleged adverse
6 employment action pursuant to 29 C.F.R. § 1615.105(a)(1).”). The Court did not
7 previously reach the question of whether Dr. Merlo’s claims are time-barred based on
8 the EEO counseling requirement. (*See generally* Order; Mot. 5–7.)

9 Defendant moves to dismiss Dr. Merlo’s age discrimination claim² to the extent
10 it is premised on events occurring more than forty-five days before May 29, 2015.
11 (Mot. 6–7.) Defendant asserts this is the date Dr. Merlo first contacted an EEO
12 counselor. (Mot. 6–7 (citing the EEO Counselor Winter’s June 2, 2015, letter, which
13 shows that Dr. Merlo reported his claim to the Office of Resolution Management on
14 May 29, 2015).) From Dr. Merlo’s allegations, the date of his first EEO counseling
15 contact is unclear. (*See* FAC.) However, he requested mediation of the VA’s
16 decision to terminate his position in April 2015. (FAC ¶ 23.) EEO specialist Sugg
17 confirmed the mediation via email on April 15, 2015, which indicates that EEO
18 specialist Sugg was party to Dr. Merlo’s mediation request at least by April 15, 2015.
19 (April 15, 2015 Email.) Construing the allegations in the light most favorable to Dr.
20 Merlo at this pleading stage, this is sufficient to establish that Dr. Merlo satisfied the
21 EEO Counselor contact requirement by April 15, 2015. *See Kraus*, 572 F.3d at 1044
22 (“[A] complainant may satisfy the criterion of EEO Counselor contact by initiating
23 contact with *any agency official logically connected with the EEO process*, even if
24 that official is not an EEO Counselor, and by exhibiting an intent to begin the EEO
25 process.”).

26
27 ² Defendant nominally moves to dismiss both Dr. Merlo’s age discrimination claim and his
28 retaliation claim on this basis; however, Defendant does not identify any allegations of retaliation
that it seeks to dismiss. (*See* Mot. 6–7.) Accordingly, Defendant’s motion to dismiss is **DENIED** to
the extent it seeks to partially dismiss Dr. Merlo’s retaliation claim.

1 Nevertheless, Dr. Merlo insists this date should be earlier because he gave
2 notice to Defendant in February 2015 when he complained to the Chief of Staff about
3 Dr. Sadeghi’s comment. (Opp’n MTD 7–8; FAC ¶ 19.) But complaints to
4 supervisors who are not “logically connected to the EEO process” are insufficient to
5 meet the EEO counselor contact requirement. *Kraus*, 572 F.3d at 1046 n.8 (citing
6 *Johnson v. Henderson*, 314 F.3d 409, 415 (9th Cir. 2002)). Dr. Merlo’s contact with
7 EEO specialist Sugg is the first asserted connection to the EEO process. Forty-five
8 days before April 15, 2015, is March 1, 2015. Accordingly, to the extent Dr. Merlo’s
9 age discrimination claim is premised on events occurring before March 1, 2015, it is
10 time-barred, absent some form of tolling. *See Lacayo*, 2015 WL 993448, at *10–12
11 (finding ADEA claims time-barred to the extent premised on events occurring more
12 than forty-five days before EEO counselor contact); *Harris v. Potter*, No. C00-4688
13 BZ, 2002 WL 31298852, at *2 (N.D. Cal. Oct. 8, 2002) (same).

14 Accordingly, the Court **DISMISSES** Dr. Merlo’s age discrimination claim
15 insofar as it is based on events before March 1, 2015.³ However, the Court is not
16 convinced that leave to amend would be futile. Dr. Merlo could conceivably allege
17 facts that give rise to a plausible inference that he sought EEO counseling within
18 forty-five days of events before March 1, 2015, or that grounds exist for an equitable
19 exception to the time-bar. As such, the Court grants Dr. Merlo leave to amend.

20 **B. Damages and Jury Trial**

21 Defendant also moves to dismiss Dr. Merlo’s claims for compensatory,
22 liquidated, and “emotional distress” damages, and his request for a jury trial, as legally
23 impermissible under the ADEA against a federal employer. (MTD 7–9.)
24 Alternatively, Defendant asks the Court to reconsider aspects of its February Order,
25 asserting the Court erred when it denied Defendant’s motion to strike these items.
26 (MTD 7 n.3; MFR 2–4.)

27
28 ³ Dr. Merlo may still use evidence of prior acts as background evidence in support of his timely claims. *Morgan*, 536 U.S. at 113.

1 Defendant moves for reconsideration under Rule 59(e) and Local Rule 7-18, but
2 neither provides a basis for reconsideration here. Rule 59(e) requires, as a
3 precondition, entry of a final judgment. *See* Fed. R. Civ. P. 59(e) (allowing a motion
4 to alter or amend a judgment). No judgment has issued in this action. Local Rule
5 7-18 provides for reconsideration on the basis of a material difference in fact or law,
6 the emergence of new facts or law, or a manifest failure to consider material facts.
7 C.D. Cal. L.R. 7-18. Defendant does not suggest any of these grounds apply. (*See*
8 MFR.) Nevertheless, as the February Order is not a final order, the Court has inherent
9 authority to modify it for sufficient cause. *City of Los Angeles, Harbor Div. v. Santa*
10 *Monica Baykeeper*, 254 F.3d 882, 889 (9th Cir. 2001) (“[A]s long as a district court
11 has jurisdiction over the case, then it possesses the inherent procedural power to
12 reconsider, rescind, or modify an interlocutory order for cause seen by it to be
13 sufficient.”). Therefore, the Court will consider whether either dismissal or
14 reconsideration is appropriate.

15 As to damages, Defendant correctly states that compensatory, liquidated, and
16 “emotional distress” damages are not available under the ADEA against a federal
17 employer. *See C.I.R. v. Schleier*, 515 U.S. 323, 326 and n.2 (1995) (“[T]he ADEA
18 does not permit a separate recovery of compensatory damages for pain and suffering
19 or emotional distress.”); *Ahlmeyer v. Nev. Sys. of Higher Educ.*, 555 F.3d 1051, 1059
20 (9th Cir. 2009) (“Compensatory damages for pain and suffering and punitive damages
21 are not available under the ADEA”); *Lindblom v. Sec’y of Army*, No. 2:06-CV-
22 2280-GEB (GGH), 2007 WL 1378019, at *2 (E.D. Cal. May 10, 2007) (striking
23 compensatory and liquidated damages as unavailable under the ADEA).

24 Nevertheless, Dr. Merlo argues that the Supreme Court recently “expanded
25 damages available to federal sector plaintiffs” in *Babb v. Wilkie*, 140 S. Ct. 1168
26 (2020). (Opp’n MTD 12; Opp’n MFR 2, ECF No. 23.) But the question before the
27 Court in *Babb* concerned whether age must be a “but-for cause” of a personnel action
28 to impose liability under the ADEA, not what damages are available to a federal

1 sector ADEA plaintiff. *See Babb*, 140 S. Ct. at 1171. Nothing in *Babb* controverts
2 existing authority that compensatory damages for pain and suffering, liquidated
3 damages, and “emotional distress” damages are unavailable. The Court will not apply
4 dicta from *Babb* to substantially expand available remedies. Accordingly, the Court
5 **GRANTS** Defendant’s motion to dismiss as to Dr. Merlo’s claims for compensatory
6 damages for pain and suffering, liquidated damages, and “emotional distress”
7 damages.

8 However, the Court does not find error in its denial of Defendant’s motion to
9 strike these damages. The Ninth Circuit has stated that “Rule 12(f) does not authorize
10 district courts to strike claims for damages on the ground that such claims are
11 precluded as a matter of law.” *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970,
12 974–75 (9th Cir. 2010). Thus, the motion for reconsideration is **DENIED** on the issue
13 of damages.

14 Regarding Dr. Merlo’s request for a jury trial, the Supreme Court has held there
15 is no right to a jury trial for ADEA claims against the federal government. *Lehman v.*
16 *Nakshian*, 453 U.S. 156, 165 (1981). The Court previously cited *Lutz v. Glendale*
17 *Union High School*, 403 F.3d 1061, 1068 (9th Cir. 2005), to conclude that striking the
18 jury demand would be improper, but that case did not address claims arising under the
19 ADEA or against a federal employer. As Dr. Merlo brings claims under only the
20 ADEA, which affords no right to a jury trial, the Court finds reconsideration as to this
21 issue appropriate. *See Lehman*, 453 U.S. at 165; *see also Prouty v. Berryhill*, No. CV
22 18-08567-PA (JPRx), 2019 WL 8164378, at *4 (C.D. Cal. Oct. 28, 2019) (citing
23 *Lehman* and striking demand for a jury trial on ADEA claims against federal
24 government defendant). Therefore, the Court **GRANTS** reconsideration on this issue
25 and **STRIKES** Dr. Merlo’s jury demand. The Court **DENIES** as moot Defendant’s
26 motion to dismiss Dr. Merlo’s jury demand.

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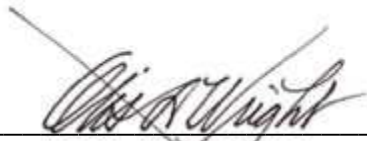
VI. CONCLUSION

For the foregoing reasons, the Court **DISMISSES** Dr. Merlo’s age discrimination claim to the extent it is premised on conduct occurring before March 1, 2015, with leave to amend. The Court **DISMISSES** Dr. Merlo’s claims for compensatory damages for pain and suffering, liquidated damages, and “emotional distress” damages. The Court **GRANTS, in part**, Defendant’s motion for reconsideration, and **STRIKES** Dr. Merlo’s request for a jury trial. Defendants motions are **DENIED** in all other respects. (ECF Nos. 18, 20.)

Dr. Merlo may file a Second Amended Complaint within fourteen (14) days of this Order insofar as he can allege facts that give rise to a plausible inference that he sought EEO counseling within forty-five days of events predating March 1, 2015, or that grounds exist for an equitable exception. If Dr. Merlo does not file a timely Second Amended Complaint, Defendant shall file an Answer to Dr. Merlo’s First Amended Complaint within twenty-one (21) days of this Order.

IT IS SO ORDERED.

August 25, 2020



OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE