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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DEANNA CARLSBERG,

Plaintiff,

v.

DENIS MCDONOUGH, Secretary, U.S.
Department of Veterans Affairs,

Defendant.

Case No.: 3:21-cv-01746-H-RBB

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS**

[Doc. No. 30.]

On March 17, 2021, Plaintiff Deanna Carlsberg filed a first amended complaint against Defendant Denis McDonough. (Doc. No. 15.) On December 27, 2021, Defendant filed a motion to dismiss Plaintiff's first amended complaint. (Doc. No. 30.) The Court granted Plaintiff two extensions of time to file an opposition to Defendant's motion to dismiss. (Doc. Nos. 31, 34.) On February 4, 2022, Defendant filed a reply. (Doc. No. 32.) On March 4, 2022, the Court submitted Defendant's motion on the parties' papers pursuant to Local Rule 7.1(d)(1) and vacated the hearing. (Doc. No. 35.) Plaintiff has yet to file an opposition to Defendant's motion. For the reasons that follow, the Court grants Defendant's motion to dismiss without prejudice.

1 **BACKGROUND**

2 The following factual background is taken from the allegations in Plaintiff’s first
3 amended complaint (“FAC”). Plaintiff was an employee of Defendant at the San Diego
4 Veteran Affairs Health Care System in San Diego, CA (“San Diego VA”). (FAC ¶ 4.) On
5 March 31, 2016, Plaintiff alleges she had a serious fall at work and was injured. (Id. ¶¶
6 14, 17.) Plaintiff alleges that after the fall, she was placed on light duty and was restricted
7 from seeing patients. (Id.) Plaintiff alleges she needed accommodations to work, but
8 “didn’t receive any accommodations.” (Id. ¶ 15.) In December 2018, Plaintiff alleges she
9 became “totally disabled” and went on disability leave. (Id. ¶¶ 14, 17.) Plaintiff alleges
10 that the San Diego VA Human Resources Department told her on multiple occasions that
11 her job was safe while she was on disability leave. (Id. ¶ 18.) However, Plaintiff alleges
12 that on July 20, 2019, she was terminated from her employment at the San Diego VA.
13 (Id. ¶¶ 19–21.) Plaintiff alleges that the San Diego VA sent the notice of termination to
14 her old address despite Plaintiff updating her address with the Human Resource
15 Department in February 2019. (Id. ¶ 6.) As a result, Plaintiff alleges she did not learn
16 about her termination until September 2019. (Id. ¶ 7.)

17 On October 18, 2019, Plaintiff contacted an Equal Employment Opportunity
18 (“EEO”) counselor. (Doc. No. 15-1 ¶ 1.) On November 15, 2019, Plaintiff’s counseling
19 concluded, and she was mailed the Notice of Right to File a Discrimination Complaint.
20 (Id.) On December 23, 2019, Plaintiff filed a formal complaint of discrimination with the
21 EEO. (Id.) On March 25, 2020, the U.S. Department of Veterans Affairs issued a Final
22 Agency Decision on Plaintiff’s complaint, dismissing the complaint “for failure to state a
23 claim, failure to raise matters with the EEO counselor, and failure to comply with
24 regulatory time limits.” (Id. ¶ 4.)

25 On July 1, 2020, Plaintiff, proceeding pro se, filed a complaint against Defendant
26 in the United States District Court for the District of Utah. (Doc. No. 4.) On July 27,
27 2020, Plaintiff obtained counsel. (Doc. No. 7.) On March 17, 2021, Plaintiff filed a first
28 amended complaint against Defendant alleging (1) failure to accommodate a disability

1 and (2) wrongful termination due to her disability, age, and national origin. (FAC §§ 13–
2 21.) On October 8, 2021, the case was transferred to this district and assigned to this
3 Court. (Doc. Nos. 27, 28, 29.)

4 On December 27, 2021, Defendant the present motion to dismiss pursuant to
5 Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), and, in the alternative, to strike
6 portions of Plaintiff’s complaint pursuant to Federal Rule of Civil Procedure 12(f). (Doc.
7 No. 30-1.) Plaintiff did not file an opposition to Defendant’s motion within the time
8 frame required by Local Rule 7.1(e)(2). As a result, on January 13, 2022, the Court
9 granted Plaintiff an extension of time to file an opposition and continued the hearing on
10 Defendant’s motion. (Doc. No. 31.) Plaintiff did not file an opposition within the time
11 frame set by the Court. (Doc. No. 34.) On February 4, 2022, Defendant filed a reply to its
12 motion to dismiss, noting that Plaintiff had yet to file an opposition to Defendant’s
13 motion and requesting the Court grant Defendant’s motion to dismiss. (Doc. No. 32.) On
14 February 7, 2022, the Court granted Plaintiff a second extension of time to file an
15 opposition. (Doc. No. 34.) On March 4, 2022, the Court submitted Defendant’s motion
16 on the parties’ papers pursuant to Local Rule 7.1(d)(1). (Doc. No. 35.) Plaintiff has yet to
17 file an opposition.

18 DISCUSSION

19 **I. Legal Standards**

20 **A. Rule 12(b)(1) Lack of Subject Matter Jurisdiction**

21 Under Federal Rule of Civil Procedure 12(b)(1), a district court must dismiss an
22 action if it lacks jurisdiction over the subject matter of the suit. Fed. R. Civ. P. 12(b)(1).
23 “A Rule 12(b)(1) jurisdictional challenge may be facial or factual.” Safe Air for
24 Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004) (citing White v. Lee, 227 F.3d
25 1214, 1242 (9th Cir. 2000)). In a facial challenge, “the challenger asserts that the
26 allegations contained in a complaint are insufficient on their face to invoke federal
27 jurisdiction.” Safe Air, 373 F.3d at 1039. In a factual attack, “the challenge disputes the
28 truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction.”

1 Id. “Once the moving party has converted the motion to dismiss into a factual motion by
2 presenting affidavits or other evidence properly brought before the court, the party
3 opposing the motion must furnish affidavits or other evidence necessary to satisfy the
4 burden of establishing subject matter jurisdiction.” Id. (quoting Savage v. Glendale Union
5 High Sch., 343 F.3d 1036, 1039 n.2 (9th Cir. 2003)). “[T]he plaintiff has the burden of
6 proving jurisdiction in order to survive the motion.” Kingman Reef Atoll Invs., LLC v.
7 United States, 541 F.3d 1189, 1197 (9th Cir. 2008) (citation omitted).

8 **B. Rule 12(b)(6) Failure to State a Claim**

9 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) “tests the legal
10 sufficiency of a claim” and allows a court to dismiss a complaint if “there is a ‘lack of a
11 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal
12 theory.’” Conservation Force v. Salazar, 646 F.3d 1240, 1241 (9th Cir. 2011) (citations
13 omitted). A complaint will survive a Rule 12(b)(6) motion to dismiss if it contains
14 “enough facts to state a claim to relief that is plausible on its face.” Bell Atl. Corp. v.
15 Twombly, 550 U.S. 544, 570 (2007). “A pleading that offers ‘labels and conclusions’ or
16 ‘a formulaic recitation of the elements of a cause of action will not do.’” Ashcroft v.
17 Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 555). In reviewing a
18 Rule 12(b)(6) motion to dismiss, a district court “must accept as true all facts alleged in
19 the complaint and draw all reasonable inferences in favor of the nonmoving party.” Retail
20 Prop. Trust v. United Bhd. of Carpenters & Joiners of Am., 768 F.3d 938, 945 (9th Cir.
21 2014) (citation omitted). A court does not need to accept “legal conclusions” as true.
22 Ashcroft, 556 U.S. at 678. It is improper for a court to assume the plaintiff “can prove
23 facts that it has not alleged or that the defendants have violated the . . . laws in ways that
24 have not been alleged.” Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of
25 Carpenters, 459 U.S. 519, 526 (1983).

26 **II. Analysis**

27 In the FAC, Plaintiff’s contends Defendant (1) failed to accommodate her
28 disability and (2) wrongfully termination her due to her disability, age, and national

1 origin in violation of the Rehabilitation Act of 1973 (the “Rehabilitation Act”), 29 U.S.C.
2 § 701 et seq.; Age Discrimination and Employment Act of 1967 (“ADEA”), 29 U.S.C. §
3 621 et seq.; and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (FAC
4 ¶¶ 1, 13–21.) Defendant argues Plaintiff has failed to allege sufficient facts to support her
5 failure to accommodate and wrongful termination claims. (Doc. No. 30-1 at 4–6.)
6 Defendant also argues Plaintiff failed to exhaust administrative remedies for her age and
7 national origin discrimination claims. (Id. at 3–4.)

8 **A. Plaintiff’s Disability Discrimination Claims**

9 The Rehabilitation Act “creates a private right of action for individuals subjected
10 to disability discrimination by any program or activity receiving federal financial
11 assistance.” Fleming v. Yuma Reg’l Med. Ctr., 587 F.3d 938, 940 (9th Cir. 2009)
12 (citations omitted). To make a prima facie case of disability discrimination, the plaintiff
13 is required to produce evidence that the plaintiff “is ‘disabled.’” Wong v. Regents of
14 Univ. of Cal., 410 F.3d 1052, 1058 (9th Cir. 2005) (citation omitted). For purposes of the
15 Rehabilitation Act, disability is defined as “(A) a physical or mental impairment that
16 substantially limits one or more of the major life activities of such individual; (B) a
17 record of such impairment; or (C) being regarded as having such an impairment.” 29
18 U.S.C. § 12102(2); 29 U.S.C. § 705(2)(B). “The plaintiff bears the burden of proving that
19 he or she is disabled.” Wong, 410 F.3d at 1063 (citation omitted).

20 In the FAC, Plaintiff alleges that in March 2016 she suffered a “work related
21 injury,” that “she developed a disability,” and that in December 2018 “she became totally
22 disabled.” (FAC ¶¶ 14, 17.) However, Plaintiff has not alleged what her physical or
23 mental impairments are or how such impairments affect any of her major life activities.
24 See 29 U.S.C. § 12102(2). In evaluating the legal sufficiency of Plaintiff’s pleadings, the
25 Court cannot assume Plaintiff “can prove facts that [she] has not alleged.” Assoc. Gen.
26 Contractors, 459 U.S. at 526. Thus, even drawing all reasonable inferences in favor of
27 Plaintiff, Plaintiff has not sufficiently alleged that she is disabled under the Rehabilitation
28 Act. See Arden v. U.S. Sports Acad., No. 18-v-0007-JCS, 2018 WL 4378774, at *2 (N.D.

1 Cal. Feb. 6, 2018) (holding that the plaintiff’s allegations that he has “mental health
2 disabilities” were “too conclusory to establish that he is disabled under the Rehabilitation
3 Act”). As a result, the Court dismisses Plaintiff’s disability discrimination claims without
4 prejudice.

5 **B. Plaintiff’s Age and National Origin Discrimination Claims**

6 **1. Failure to Exhaust Administrative Remedies**

7 “To establish federal subject matter jurisdiction, [a plaintiff is] required to exhaust
8 her administrative remedies before seeking federal adjudication of her claims.” EEOC v.
9 Farmer Bros. Co., 31 F.3d 891, 899 (9th Cir. 1994) (citation omitted). “[S]ubstantial
10 compliance with the presentment of discrimination complaints to an appropriate
11 administrative agency is a jurisdictional prerequisite.” Sommatino v. United States, 255
12 F.3d 704, 709 (9th Cir. 2001). While “[t]he specific claims made in district court
13 ordinarily must be presented to the EEO[],” “the district court has jurisdiction over any
14 charges of discrimination that are ‘like or reasonably related to’ the allegations made
15 before the EEOC[], as well as charges that are within the scope of an EEO[] investigation
16 that reasonably could be expected to grow out of the allegations.” Leong v. Potter, 347
17 F.3d 1117, 1122 (9th Cir. 2003) (citation omitted).

18 Plaintiff alleges Defendant wrongfully terminated her due to her age, national
19 origin, and disability. (FAC ¶¶ 12, 21.) In the FAC, Plaintiff alleges that on or about
20 October 18, 2019, she filed EEO complaints with the U.S. Department of Veteran Affairs
21 regarding “Defendant’s discriminatory conduct.” (Id. ¶ 8.) Plaintiff also alleges that on
22 March 30, 2020, she received a Final Agency Decision on her EEO complaints. (Id. ¶10.)
23 As a result, Plaintiff alleges “she exhausted all applicable administrative processes and
24 remedies.” (Id. ¶ 9.) However, the Notice of Final Agency Decision attached as an exhibit
25 to Plaintiff’s FAC is for a complaint of discrimination “based on [d]isability,” and does
26 not mention any complaints made to the EEO of discrimination based on age or national
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1 origin.¹ (Doc. No. 15-1, Ex. 1.) Furthermore, disability, age, and national origin represent
2 “separate theories of discrimination,” and so Plaintiff’s allegations of discrimination
3 based on age or national origin in the FAC are not “like or reasonably related to”
4 Plaintiff’s allegations of discrimination based on disability that were before the EEO.
5 See, e.g., Rodriguez v. Airborne Express, 265 F.3d 890, 897 (9th Cir. 2001) (holding that
6 the plaintiff’s disability discrimination claim raised for the first time before the district
7 court were not “like or reasonably related to” the plaintiff’s timely administrative
8 complaint based on racial discrimination); see also Gomez v. Serv. Emps. Intern. Union
9 Local 87, No. C 10-01888-RS, 2010 WL 4704407, at *3 (N.D. Cal. Nov. 12, 2010)
10 (collecting cases) (“Claims that rely on differing theories of discrimination...may be
11 unrelated.”). Based on the record before the Court, Plaintiff has not sufficiently alleged
12 that she exhausted administrative processes related to her age and national origin
13 discrimination claims necessary to establish jurisdiction. See Farmer Bros., 31 F.3d at
14 899. As a result, the Court dismisses Plaintiff’s wrongful termination claims based on age
15 and national origin without prejudice.

16 **2. Failure to State a Claim for Wrongful Termination**

17 Plaintiff also has not alleged sufficient facts for her wrongful termination due age
18 or national origin claims to survive a Rule 12(b)(6) motion to dismiss. The ADEA
19 prohibits discrimination against employees who are at least forty years of age. 29 U.S.C.
20 §§ 631(a)–(b), 633a(a). Further, Title VII of the Civil Rights Act makes it unlawful for an
21 employer to “discharge any individual... because of such individual’s race, color,
22 religion, sex, or national origin.” 20 U.S.C. § 2000e-2(a)(1). A plaintiff bringing a claim
23 under Title VII “must first establish a prima facie case of discrimination,” which requires
24 a showing that the plaintiff “belongs to a protected class.” Chuang v. Univ. of Cal. Davis,
25 Bd. of Trustees, 225 F.3d 1115, 1123 (9th Cir. 2000) (citation omitted). Plaintiff did not
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27 ¹ “In resolving a factual attack on jurisdiction, the district court may review evidence beyond the
28 complaint without converting the motion to dismiss into a motion for summary judgment.” Safe Air, 373
F.3d at 1039 (citation omitted).

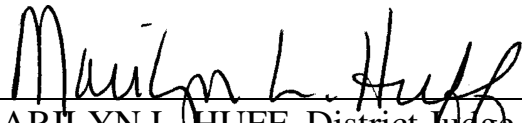
1 indicate her age or her national origin in the FAC, and so Plaintiff has not sufficiently
2 alleged that she is in the age range covered by ADEA or part of a protected class for
3 purposes of Title VII. As a result, Plaintiff's age and national origin discrimination
4 claims are also dismissed without prejudice for failure to state a claim.

5 **CONCLUSION**

6 For the foregoing reasons, the Court grants Defendant's motion to dismiss the case
7 without prejudice. Should Plaintiff file an opposition to Defendant's motion to dismiss
8 within thirty (30) days of the date of this Order, the Court will treat Plaintiff's opposition
9 as a motion for reconsideration pursuant to Federal Rule of Civil Procedure 60(b).

10 **IT IS SO ORDERED.**

11 DATED: July 6, 2022

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14 MARILYN L. HUFF, District Judge
15 UNITED STATES DISTRICT COURT
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