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2
3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT SEATTLE

6 LISA R. MAURICE,

7 Plaintiff,

8 v.

9 PETER O'ROURKE, Acting Secretary
10 of Veterans Affairs; and
11 UNITED STATES DEPARTMENT
OF VETERANS AFFAIRS,

Defendants.

C18-1 TSZ

ORDER

12 THIS MATTER comes before the Court on defendants' motion for summary
13 judgment, docket no. 21, as amended, docket no. 25-1. Having reviewed all papers filed
14 in support of, and in opposition to,¹ the motion, the Court enters the following order.

15 **Background**

16 From April 2005 until December 2015, plaintiff Lisa R. Maurice worked for the
17 United States Department of Veterans Affairs ("VA") as a dental hygienist. *See* Order
18 at 1 (docket no. 16). During the period 2014 – 2015, plaintiff was supervised by Gregg
19 Hyde, DDS, Chief of the Dental Service at the VA Puget Sound Healthcare System, and
20 Brock Satoris, DDS, MS, Associate Director of Dental Services. *See* Hyde Decl. at ¶¶ 1
21

22 ¹ Defendants' motion, docket no. 29, to strike certain materials attached to plaintiff's counsel's
23 declaration is DENIED.

1 & 2 (docket no. 23). On December 22, 2015, after being interviewed by VA police,²
2 plaintiff left the worksite early and never returned. *Id.* at ¶ 12. On January 7, 2016,
3 plaintiff applied for workers' compensation, claiming that she had been injured on the
4 job. Fedderly Decl. at ¶ 4 & Ex. A (docket no. 24). In her application, plaintiff indicated
5 that, as a result of her interaction with VA police, "[e]very time [she] think[s] about
6 going back to work [she] can't breath and start[s] to hyperventilate," and that her "hands
7 tremble and shake uncontrollably at the thought of the VA dental where [she] treat[s]
8 patients with fine instruments in their bodies." *Id.* at Ex. A (docket no. 24-1 at 3).

9 On January 8, 2016, plaintiff faxed a handwritten note to Drs. Hyde and Satoris
10 that read:

11 Per my doctors [sic] orders, due to my medical condition stemming from
12 the Dec. 22, 2015[,] police incident, I will not be returning to work, until
further notice from my physicians.

13 Ex. C to Hyde Decl. (docket no. 23-3); see also Hyde Decl. at ¶ 14 (docket no. 23). In
14 February 2016, plaintiff unsuccessfully sought a dental hygienist position in the VA's
15 Seattle dental clinic; plaintiff had previously been working at the VA's American Lake

17 ² Prior to this interaction with VA police, plaintiff had unsuccessfully demanded a paygrade
18 increase and sought a transfer. See Hyde Decl. at ¶¶ 4 & 7 (docket no. 23). On July 23, 2015,
19 she received from Dr. Satoris written counseling on inappropriate, "confrontational and
20 disrespectful" conduct. Ex. A to Hyde Decl. (docket no. 23-1). On December 17, 2015, plaintiff
21 wrote on the white board in the staff breakroom a movie suggestion, namely "Horrible Bosses,"
22 a film about three friends who conspire to murder their respective bosses, one of whom is a
23 dentist. See Hyde Decl. at ¶¶ 10 & 11 (docket no. 23); see also Maurice Dep. at 27:15-25 &
30:11-31:4, Ex. B to Morehead Decl. (docket no. 25-4). On December 18, 2015, Dr. Satoris
received emails from two of his colleagues expressing concern about this behavior, having
viewed it as a veiled threat; one of these emails was copied to Dr. Hyde. See Ex. B to Hyde
Decl. (docket no. 23-2). After consulting with his superior (the Chief of Surgery), as well as
"Employee Labor Relations," Dr. Hyde concluded that he was not qualified to determine
whether plaintiff posed any threat, and he contacted VA police. Hyde Decl. at ¶ 11 (docket
no. 23).

1 clinic. See Fedderly Decl. at ¶ 5 (docket no. 24); Hyde Decl. at ¶ 7 (docket no. 23). On
2 March 7, 2016, plaintiff sent an email to Drs. Hyde and Satoris that stated:

3 Good Morning, I am writing to let you know that I am still on medical
4 leave due to my condition and under medical provider(s) care, it will be
5 unfair for my patients not to be able to have the required treatment at the
6 utmost quality care that I had always provided prior to the police incident
7 December 22, 2015[,] at American Lake Dental Clinic.

8 I hope and pray that I can cope with this and heal. VA support is important
9 at this time. I will keep you up to date.

10 Ex. D to Hyde Decl. (docket no. 23-4).

11 On June 15, 2016, in response to a letter from Dr. Satoris directing plaintiff to
12 report for duty, see Ex. C to Fedderly Decl. (docket no. 24-3), plaintiff indicated in
13 writing that she was “not cleared medically to return to American Lake Dental Clinic
14 where [she] was a victim of trauma” in December 2015. See Ex. D to Fedderly Decl.
15 (docket no. 24-4). In September 2016, plaintiff applied for disability retirement, stating
16 that the onset date of her disability was December 2015. See Ex. B to Fedderly Decl.
17 (docket no. 24-2). In May 2018, plaintiff was deemed by the United States Office of
18 Personnel Management to be “disabled from [her] position as a Dental Hygienist due to
19 Panic Disorder without Agoraphobia,” and plaintiff’s request for disability retirement
20 under the Federal Employees Retirement System was approved. See Ex. B to Stockwell
21 Decl. (docket no. 26-1 at 39-41; docket no. 27 at 36-38).

22 On January 1, 2018, plaintiff commenced this action. See Compl. (docket no. 1).
23 On a motion brought by defendants Peter O’Rourke, Acting Secretary of Veterans
24 Affairs, and the United States Department of Veterans Affairs, the Court dismissed
25 certain claims with prejudice and other claims without prejudice, and granted plaintiff

1 leave to amend to allege a claim under the Rehabilitation Act against solely Acting
2 Secretary O'Rourke. See Order (docket no. 16). Instead of complying with the Court's
3 ruling, plaintiff asserted in her Amended Complaint a single claim under the Civil
4 Service Reform Act ("CSRA") against both Acting Secretary O'Rourke and the VA.
5 Defendants now seek summary judgment.

6 **Discussion**

7 **A. Summary Judgment Standard**

8 The Court shall grant summary judgment if no genuine issue of material fact exists
9 and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

10 The moving party bears the initial burden of demonstrating the absence of a genuine issue
11 of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). A fact is material if
12 it might affect the outcome of the suit under the governing law. See Anderson v. Liberty
13 Lobby, Inc., 477 U.S. 242, 248 (1986). To survive a motion for summary judgment, the
14 adverse party must present affirmative evidence, which "is to be believed" and from
15 which all "justifiable inferences" are to be favorably drawn. Id. at 255, 257. When the
16 record, however, taken as a whole, could not lead a rational trier of fact to find for the
17 non-moving party, summary judgment is warranted. See Matsushita Elec. Indus. Co. v.
18 Zenith Radio Corp., 475 U.S. 574, 587 (1986); see also Celotex, 477 U.S. at 322.

19 **B. Civil Service Reform Act**

20 Plaintiff's CSRA claim appears to encompass matters over which the Court does
21 not have jurisdiction, and seems to contain an imbedded claim under the Rehabilitation
22 Act. See Am. Compl. at ¶ 4.3 (docket no. 17) (citing § 501 of the Rehabilitation Act,
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1 29 U.S.C. § 791); *see also* 5 U.S.C. § 2302(d)(4) (indicating that the CSRA “shall not be
2 construed to extinguish or lessen . . . any right or remedy available to any employee . . .
3 in the civil service under . . . section 501 of the Rehabilitation Act of 1973”). The
4 portions of plaintiff’s CSRA claim seeking relief for injury and raising paygrade disputes
5 are not within the scope of the Court’s earlier grant of leave to amend and cannot be
6 pursued in this litigation. The Rehabilitation Act component of plaintiff’s CSRA claim
7 simply lacks merit.

8 **1. Injury and Wage Claims**

9 Plaintiff accuses Drs. Hyde and Satoris of causing her disability. *See* Am. Compl.
10 at ¶¶ 3.14, 4.14, & 4.16 (docket no. 17). Any claim for compensation with respect to any
11 injury plaintiff might have suffered during the course of her employment with the VA is
12 within the sole purview of the Secretary of Labor pursuant to the Federal Employees’
13 Compensation Act (“FECA”). *See* 5 U.S.C. §§ 8102, 8116(c), 8121, & 8128(b); *see also*
14 *Figueroa v. United States*, 7 F.3d 1405, 1407 (9th Cir. 1993) (“The remedies provided
15 under FECA are exclusive of all other remedies against the United States for job-related
16 injury or death.”).

17 Plaintiff also refers to the refusal to upgrade her on the General Schedule (“GS”)
18 Payscale from GS-9 to either GS-10 or GS-11. *See* Am. Compl. at ¶ 3.3-3.4 (docket
19 no. 17); *see also* Resp. at 1 (docket no. 26) (indicating that plaintiff alleges a “failure to
20 promote” under the CSRA). With regard to plaintiff’s paygrade and/or any allegation
21 that she suffered retaliation for challenging her designation as GS-9, any request for
22 corrective action is a matter within the discretion of the Office of Special Counsel and/or
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1 the Merit Systems Protection Board pursuant to the CSRA. *See* 5 U.S.C. §§ 1214(a)(3),
2 2302, & 7513(d); *see also Mangano v. United States*, 529 F.3d 1243, 1246 (9th Cir.
3 2008) (the CSRA’s remedial scheme is “exclusive and preemptive,” and thus, the
4 CSRA’s administrative procedures are a federal employee’s “only remedy” for conduct
5 falling within the scope of the CSRA’s “prohibited personnel practices”).

6 To the extent plaintiff is attempting to litigate in this action issues that must be
7 raised in the manner specified in FECA or the CSRA, defendants’ motion for summary
8 judgment is GRANTED and any such claims are DISMISSED without prejudice, and
9 without leave to amend, for lack of jurisdiction.

10 **2. Rehabilitation Act**

11 To present a prima facie disability discrimination claim, plaintiff must show that
12 (i) she is disabled, (ii) she is otherwise qualified, *i.e.*, able to perform the essential
13 functions of the job with or without reasonable accommodation, and (iii) she suffered
14 discrimination because of her disability. *See Walton v. U.S. Marshals Serv.*, 492 F.3d
15 998, 1005 (9th Cir. 2007), *superseded on other grounds by statute as recognized in*
16 *Nunies v. HIE Holdings, Inc.*, 908 F.3d 428, 434 (9th Cir. 2018); *see also Nunies*, 908
17 F.3d at 433. Plaintiff was not disabled prior to December 22, 2015, and thus, cannot
18 pursue a Rehabilitation Act claim for events occurring before that date.³ *See* Tr. at 12:13-
19 14, Ex. A to Morehead Decl. (docket no. 25-3) (plaintiff told an Equal Employment

21 ³ In her response to defendants’ motion for summary judgment, plaintiff alludes to a hostile work
22 environment, but the actions on which she bases such legal theory all predate her disability. *See*
23 Resp. at 3 & 10-11 (docket no. 26). To the extent plaintiff instead claims that her disability
resulted from any hostile work environment, her sole remedy is to pursue relief under FECA.

1 Opportunity investigator that she “was fine and perfectly healthy until after all of this
2 mess, December 22nd”).

3 The only adverse employment action transpiring after plaintiff became or might be
4 regarded as disabled was the decision not to transfer her to the Seattle Clinic. Plaintiff
5 cannot, however, establish that, in March 2016, when Devon Williams was selected as a
6 dental hygienist for the Seattle Clinic, *see* Hyde Decl. at ¶ 18 (docket no. 23), plaintiff
7 was qualified for the job. In January 2016, in March 2016, and again in June 2016,
8 plaintiff reported that she was unable to work because of the trauma and anxiety she
9 suffered as a result of her interaction with VA police in December 2015. Even after the
10 Seattle opening was filled, plaintiff continued to represent that she was “not cleared
11 medically to return to American Lake Dental Clinic.” Ex. D to Fedderly Decl. (docket
12 no. 24-4).

13 Plaintiff appears to suggest that she could have worked in early 2016, but just not
14 at the American Lake site, citing evaluations by Anya Zimberoff, PsyD. In a letter dated
15 January 13, 2016, Dr. Zimberoff opined that “it will take about another month (30 days,
16 45 days total) . . . for Ms. Maurice to be able to return to work. It is recommended that
17 she be assigned to a different work location once she returns.” Ex. C to Stockwell Decl.
18 (docket no. 26-1 at 44; docket no. 27 at 41). On January 21, 2016, Dr. Zimberoff
19 indicated that plaintiff was not competent to work 8 hours a day, but that “a new work
20 site placement should be doable for her in 2-3 weeks.” *Id.* (docket no. 26-1 at 45; docket
21 no. 27 at 42). Plaintiff offers no evidence that this information was contemporaneously
22 provided to the VA or that she ever requested relocation to the Seattle Clinic as a
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1 reasonable accommodation. See Ex. B to Fedderly Decl. (docket no. 24-2) (listing
2 “medical retirement” as the only accommodation that plaintiff sought from the VA); see
3 also Lu v. Longs Drug Stores, 2013 WL 5607166 at *4-*5 (D. Haw. Oct. 11, 2013)
4 (observing that a transfer to provide an employee with a different supervisor is not a
5 required accommodation, and ruling that a recommended transfer to place the plaintiff at
6 a location closer to home and improve her mental well-being had not been communicated
7 to the employer and was therefore not actionable).

8 Moreover, Dr. Zimmeroff’s estimate of when plaintiff would be able to return to
9 work, whether at the American Lake Clinic or another location, never ripened into an
10 opinion that plaintiff was in fact competent to do so. To the contrary, over two years
11 later, on May 3, 2018, Mary Galaszewski, Ph.D., under whose professional care plaintiff
12 had been since December 22, 2015, wrote that plaintiff had been diagnosed with Panic
13 Disorder without Agoraphobia, that she did not believe plaintiff could return to work, and
14 that she recommended plaintiff be allowed to take a “medical retirement.” Ex. C to
15 Stockwell Decl. (docket no. 26-1 at 50; docket no. 27 at 47). Plaintiff will not be
16 permitted to assert, for purposes of this litigation, that she was capable in early 2016 of
17 working at a location other than American Lake when, for purposes of obtaining
18 disability retirement benefits, she has represented that, because of her disability, she has
19 been unable to work since December 22, 2015.

20 Plaintiff was allowed to remain on leave, was never terminated, received the
21 disability retirement for which she applied, and has no basis to assert a Rehabilitation Act
22 claim against the VA or its Acting Secretary. In light of the Court’s ruling that plaintiff
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1 was not qualified for the position she sought in early 2016, the Court need not address the
2 other grounds for summary judgment articulated by defendants.

3 **Conclusion**

4 For the foregoing reasons, the Court ORDERS:

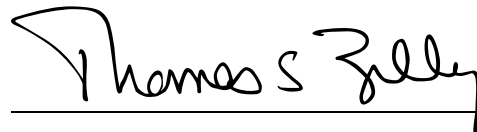
5 (1) Defendants' motion for summary judgment, docket no. 21, as amended,
6 docket no. 25-1, is GRANTED. Plaintiff's FECA and CSRA claims are DISMISSED
7 without prejudice for lack of jurisdiction, and plaintiff's Rehabilitation Act claim is
8 DISMISSED with prejudice.

9 (2) The trial date and all related deadlines are STRICKEN.

10 (3) The Clerk is DIRECTED to enter judgment consistent with this Order, to
11 send a copy of this Order and the Judgment to all counsel of record, and to CLOSE this
12 case.

13 IT IS SO ORDERED.

14 Dated this 25th day of June, 2019.

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17 Thomas S. Zilly
18 United States District Judge
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