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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

CHERYL G. HARSHAW,
Plaintiff

v.

STEVEN T. MNUCHIN
Secretary of the Treasury,
Defendant

CASE NO. 1:16-CV-00963 AWI-SKO

**ORDER ON DEFENDANT’S MOTION
TO DISMISS**

(Doc. No. 11)

This case stems from an employment discrimination dispute brought by Plaintiff Cheryl G. Harshaw (“Plaintiff”) against her employer Steven T. Mnuchin, Secretary of the Treasury (“Defendant”). Plaintiff’s Amended Complaint for Employment Discrimination (the “Complaint”), which she filed pro se and in forma pauperis, alleged that while interacting with certain of Defendant’s employees (the “EEO Personnel”) concerning a prior employment discrimination suit, she was discriminated against by these employees. Before this Court is Defendant’s Motion to Dismiss.

As Plaintiff’s claim is barred by law, this Court grants the Motion to Dismiss.

GENERAL BACKGROUND

In July, 2014, Plaintiff filed a complaint with Defendant’s Equal Employment Office (the “EEO”), in which she alleged that her “annual appraisal on” June 23, 2014 “was lowered from an overall 5.0 (last year) to an overall 4.8 this year” (the “First EEO Action”). At some point, the First EEO Action was closed.

1 On May 12, 2015, Plaintiff filed a second complaint with the EEO (the “Second EEO
2 Action”). Plaintiff alleged that, while interacting with EEO Personnel concerning the First EEO
3 Action, these individuals “falsified documents, purposely excluded . . . allegations from a
4 counseling report, disclosed personal information among IRS employees outside the scope of her
5 case, provided false alternative dispute resolution, and included a closed allegation with the
6 knowledge that doing so could cause a dismissal.” The EEO denied Plaintiff’s Second EEO
7 Action, and Plaintiff appealed to the U.S. Equal Employment Opportunity Commission (the
8 “EEOC”). On December 15, 2015, the EEOC affirmed the EEO’s denial and notified Plaintiff that
9 she had the right to file an action in the appropriate United States District Court.

10 On August 10, 2016, Plaintiff filed her pro se Complaint in this Court alleging
11 employment discrimination in violation of Title VII, 42 U.S.C. § 2000e-2, Section 703(a)(1).
12 Specifically, the Complaint appears to allege seven instances of discrimination:

- 13 (1) Defendant “allowed and tolerated” its employees’ conduct in denying Plaintiff
14 “representation at every level of the complaint process” in the First EEO Action;
- 15 (2) Defendant “allowed and tolerated” its employees harming Plaintiff by “deceiv[ing her]
16 into involving [the] Chapter 97 union office” in First EEO Action;
- 17 (3) Defendant “allowed and tolerated its EEO Personnel to concoct [an] EEO Intake Form
18 [that] contain[ed] lies, misrepresentations, statement fabrications, and [personal]
19 information belonging to another federal employee”;
- 20 (4) Defendant “allowed and tolerated [its employees] collu[ding] to file” an intake form
21 related to the First EEO Action as well as documents related to the Second EEO Action;
- 22 (5) Defendant “allowed and tolerated its employees [sharing a] personal cellular phone
23 number [that] belonged to another IRS employee [with] tax examiners/specialists,” which
24 resulted in Plaintiff incurring “two erroneous tax debts”;
- 25 (6) Defendant “allowed and tolerated its . . . employees” to alter a document to make a
26 description in the First EEO Action “misleading and a misrepresentation of facts”; and
- 27 (7) Defendant’s employees “retaliate[ed]” against Plaintiff by “sen[ding] two copies” of a
28 dismissal notice to Plaintiff’s son, whom Plaintiff had not listed as her “representative.”

1 Plaintiff alleges that the EEO Personnel’s “unethical behavior and misconduct was because of
2 [Plaintiff’s] race,” which she describes as “Native American/African American.”

3 Defendant filed with this Court a Motion to Dismiss under Rules 12(b)(1) and 12(b)(6).

4 **DISCUSSION**

5 Defendants’ Argument

6 Defendant argues that Plaintiff’s claim concerning the alleged discriminatory actions taken
7 by EEO Personnel is barred as a matter of law because Congress has not authorized a plaintiff to
8 bring a claim based on dissatisfaction with, or the alleged mishandling of, an EEO claim under
9 Title VII. *Ward v. E.E.O.C.*, 719 F.2d 311, 313 (9th Cir. 1983) (“Congress did not expressly
10 create a cause of action against the EEOC by employees of third parties.”).

11 Plaintiff’s Opposition

12 Plaintiff maintains the events alleged in this Complaint occurred after she received her
13 desired resolution in this First EEO Action, and so her claims against the EEO Personnel are
14 separate and apart from those lodged in the First EEO Action and are otherwise “not about any
15 process in EEO.” Thus, Plaintiff contends her claim is not barred by *Ward*, but is cognizable
16 under general Title VII employment discrimination law.

17 Analysis

18 “Title VII makes it unlawful for an employer to ‘discriminate against any individual with
19 respect to his compensation, terms, conditions, or privileges of employment, because of such
20 individual’s race’” *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1028 (9th Cir.
21 2006) (quoting 42 U.S.C. § 2000e-2(a)(1)). “A person suffers disparate treatment in his
22 employment when he or she is singled out and treated less favorably than others similarly situated
23 on account of race.” *Id.* (citation omitted). To establish a prima facie case under Title VII, a
24 plaintiff must assert that he/she (1) belongs to a class of persons protected by Title VII; (2)
25 performed his or her job satisfactorily; (3) suffered an adverse employment action; and (4) was
26 treated differently by his/her employer than a similarly situated employee who does not belong to
27 the same protected class as the plaintiff. *Id.* (citing *McDonnell Douglas Corp. v. Green*, 411 U.S.
28 792, 802 (1973)).

1 However, not every alleged discriminatory act or omission is actionable under Title VII.
2 Relevant to Plaintiff’s Complaint, no such action exists for a claim of discrimination under Title
3 VII for acts or omissions made by employees of the EEOC during the processing of employment
4 discrimination claims. Ward, 719 F.2d at 313; see also *Baba v. Japan Travel Bureau Int'l, Inc.*,
5 111 F.3d 2, 6 (2d Cir. 1997) (“[T]he legislative history of the 1972 amendments to Title VII
6 strongly indicates that Congress did not intend to imply a private cause of action against the
7 EEOC.” (emphasis in original)); *Gottschalk v. City & Cty. of San Francisco*, 964 F. Supp. 2d
8 1147, 1161 (N.D. Cal. 2013) (“Title VII does not create a private right of action against the EEOC
9 for that agency’s alleged misdeeds in investigating charges of discrimination.”).

10 In Ward, the Ninth Circuit explicitly held that Congress created neither an express or
11 implied cause of action against the EEOC by employees of third parties.¹ Id. at 313. Therein, the
12 plaintiff sued the EEOC under Title VII for negligently processing—failing to investigate—his
13 discrimination complaint against his employer. Id. at 312. The EEOC filed for summary
14 judgment under Rules 12(b)(1) and 12(b)(6), which the district court granted. Id. On appeal, the
15 Ninth Circuit thoroughly analyzed the framework of Title VII, and concluded “Congress neither
16 expressly or impliedly provided for an action against the EEOC for negligence” Id. In so
17 finding, the Ninth Circuit joined “with other circuits which have considered the question. Id. at
18 313. Thus, the Court concluded the plaintiff had not stated a claim upon which relief could be
19 granted, and affirmed the district court’s summary judgment in favor of the EEOC. Id.

20 This bar not only applies to cases involving allegations of negligence, but also to those
21 concerning intentional discrimination and retaliation. See *Smith v. Casellas*, 119 F.3d 33, 34 (D.C.
22 Cir. 1997) (affirming the dismissal of a Title VII case against the EEOC for the agency’s “alleged
23 negligence, fraud, and other impropriety in processing a discrimination charge” the plaintiff filed
24 against his employer); *Forbes v. Reno*, 893 F. Supp. 476, 481 (W.D. Pa. 1995), aff’d, 91 F.3d 123
25 (3d Cir. 1996) (dismissal on sovereign immunity grounds where the plaintiff contended the
26 defendant “conspired and fraudulently colluded” with his employer).

27 ¹ Ward recognized a limited exception to this rule, which would allow claims brought by an employee of the EEOC
28 itself, where the employee alleges a Title VII claim concerning another EEOC employee and based on an act or
omission made outside of the EEO process. See Ward, 719 F.2d at 313 (citing 42 U.S.C. Section 2000e-16(c)).

1 Additionally, in *Hill v. England*, 2005 WL 3031136, at *1 (E.D. Cal. Nov. 8, 2005), the
2 court applied *Ward* to claims against a department’s EEO investigators. Therein, the plaintiff
3 alleged a retaliation claim against his employer, the Secretary of the Navy, which were handled by
4 the EEO department housed within the Navy itself. *Id.* at *3 (“In cases involving claims against
5 federal agencies, the agency itself is required to conduct the EEO investigation in lieu of the
6 EEOC.”). Later, the plaintiff brought a Title VII claim against his employer for alleged
7 discriminatory acts made by the EEO employees handling his first set of complaints. *Id.* The
8 Secretary moved for dismissal, which this Court granted, concluding that “in failure to investigate
9 cases, the agency stands in the same position as the EEOC.” *Id.* That position required the Court
10 to dismiss the plaintiff’s actions pursuant to *Ward*. *Id.* at *2; see also *Douglas-Slade v. LaHood*,
11 793 F. Supp. 2d 82, 96 (D.D.C. 2011) (Claims against EEO not actionable under Title VII).

12 Taking Plaintiff’s allegations as true for purposes of the motion to dismiss, this Court finds
13 Plaintiff’s claims are barred by law under *Ward*. Plaintiff has alleged violations of Title VII
14 against her employer, the Secretary of the Treasury, for alleged discriminatory acts made by the
15 EEO Personnel charged with handling her First EEO Action. Plaintiff contends her Complaint “is
16 not about any process in EEO . . . [t]hereby making the EEO process of no point of contention.”
17 However, in examining Plaintiff’s claims, it is clear the facts alleged directly implicate the actions
18 of the EEO Personnel charged with handling Plaintiff’s First EEO Action:

- 19 (1) Defendant “allowed and tolerated” EEO Personnel’s conduct in denying Plaintiff
20 “representation at every level of the complaint process” in the First EEO Action;
- 21 (2) Defendant “allowed and tolerated” EEO Personnel harming Plaintiff by “deceiv[ing]
22 her] into involving [the] Chapter 97 union office” in First EEO Action;
- 23 (3) Defendant “allowed and tolerated [EEO Personnel] to concoct [an] EEO Intake Form
24 [that] contain[ed] lies, misrepresentations, statement fabrications, and [personal]
25 information belonging to another federal employee”;
- 26 (4) Defendant “allowed and tolerated [EEO Personnel] collu[ding] to file” an intake form
27 related to the First EEO Action as well as documents related to the Second EEO Action;
- 28 (5) Defendant “allowed and tolerated [EEO Personnel sharing a] personal cellular phone

1 number [that] belonged to another IRS employee [with] tax examiners/specialists,” which
2 resulted in Plaintiff incurring “two erroneous tax debts”;

3 (6) Defendant “allowed and tolerated” EEO Personnel to alter a document to make a
4 description the First EEO Action “misleading and a misrepresentation of facts”; and

5 (7) EEO Personnel “retaliate[ed]” against Plaintiff by “sen[ding] two copies” of a dismissal
6 notice to Plaintiff’s son, whom Plaintiff had not list as her “representative.”

7 Thus, the substance of Plaintiff’s allegations cannot be divorced from the EEO Personnel charged
8 with handling her First EEO Action.

9 Therefore, since the Defendant effectively stood in the same position as the EEOC when
10 its EEO Personnel handled Plaintiff’s complaints, and Congress has not authorized Title VII suits
11 against the EEOC for acts taken by its employees while handling discrimination claims, Plaintiff’s
12 Complaint must be dismissed pursuant to Rule 12(b)(6).² Ward, 719 F.2d at 313; Baba, 111 F.3d
13 at 6; Hill, 2005 WL 3031136, at *3; Douglas-Slade, 793 F. Supp. 2d at 96.

14 **ORDER**

15 Accordingly, IT IS HEREBY ORDERED that:

- 16 1. Defendants’ Motion to Dismiss (Doc. 11) is GRANTED; and
17 2. The Clerk shall CLOSE this case.

18
19 IT IS SO ORDERED.

20 Dated: December 1, 2017


21 _____
22 SENIOR DISTRICT JUDGE

22 ² In so holding, this Court grants the motion to dismiss on Rule 12(b)(6) grounds, as governed by the reasoning in
23 Ward. However, this Court recognizes that other districts have treated this issue as one of sovereign immunity, and
24 have dismissed under Rule 12(b)(1). See, e.g., Persik v. Tucci Learning Sols., Inc., 2007 WL 2298039, at *3 (N.D.
25 Cal. Aug. 8, 2007) (granting the defendant’s 12(b)(1) motion for a dismissal of the plaintiff’s Title VII suit against the
26 EEOC on sovereign immunity grounds). Further still, some district courts have reasoned that dismissal is warranted
27 under either (b)(1) or (b)(6). See, e.g., Uberoi v. E.E.O.C., 180 F. Supp. 2d 42, 46 (D.D.C. 2001) (dismissing under
28 Rule 12(b)(1) pursuant to Ward, but also reasoning that even assuming arguendo the court had subject-matter
jurisdiction, dismissal under Rule 12(b)(6) would be appropriate pursuant to Ward).
Here, Defendant expressly requests Plaintiff’s complaint be dismissed under Rule 12(b)(1), but then makes its
argument as if Defendant has not stated a claim on which relief may be granted. See Doc 11 at *1 (“This motion is
made pursuant to [Rule] 12(b)(1) and on the basis that Plaintiff’s Complaint fails to state a cognizable claim.”).
Defendant relies heavily on Ward, which this Court finds controlling. Whether this Court relies on 12(b)(1) or
12(b)(6), the result would be the same—a dismissal of Plaintiff’s Complaint. However, this Court chooses to follow
the language and reasoning expressed in Ward—that Plaintiff has failed to state a claim on which relief may be
granted—and will dismiss pursuant to Rule 12(b)(6).