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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GRACIELA M. CONTRERAS,

Plaintiff,

v.

MARK T. ESPER, SECRETARY OF THE
UNITED STATES ARMY,

Defendant.

No. 2:14-CV-01282 KJM-KJN

ORDER

Plaintiff Graciela C. Contreras, a former federal civilian employee, sues Secretary of the Army, Mark Esper, for disability discrimination. Defendant moves to dismiss. Plaintiff opposes. For the following reasons the motion is GRANTED in part.¹

I. Family and Medical Leave Act & Americans with Disabilities Act Claims

Defendant argues the court’s prior order precludes Contreras from bringing a claim under the Family and Medical Leave Act (FMLA), and that in any event, the court lacks jurisdiction to hear such a claim. Mot., ECF No. 96 at 9-11. Defendant also contends the court lacks jurisdiction to hear Contreras’s Americans with Disabilities Act (ADA) claim. *Id.* at 11. As she conceded in her opposition and confirmed at hearing, Contreras agrees that the court lacks

¹ To streamline resolution of certain motions in cases where the parties have counsel, the court has adopted a shortened form of order.

1 jurisdiction to hear these claims and abandons them. *See* Opp'n, ECF No. 97 at 2. The FMLA
2 and ADA claims are therefore DISMISSED without leave to amend.

3 II. Rehabilitation Act Claim

4 Disability discrimination under the Rehabilitation Act of 1973, 29 U.S.C. § 791,
5 et seq., can take the form of disparate treatment, alleged denial of equal jobs or benefits because
6 of the employee's disability, or failure to reasonably accommodate a disability. *Walton v. U.S.*
7 *Marshals Serv.*, 492 F.3d 998, 1005 (9th Cir. 2007) (noting Rehabilitation Act incorporates ADA
8 standards of substantive liability); *Whelan v. Potter*, No. CIV S-09-3606 KJM, 2012 WL
9 3535869, at *11 (E.D. Cal. Aug. 15, 2012).

10 Contreras's operative complaint alleges she suffers from a mental impairment. *See*
11 Second Am. Compl. (SAC), ECF No. 94 ¶¶ 14, 17, 36, 41, 44 (alleging "mental disabilities"
12 causing loss of enjoyment of life, anxiety, insomnia and difficulty breathing and moving); *id.* Ex.
13 3, ECF No. 94-4 at 2 (physician's letter identifying Contreras as suffering from recurrent major
14 depression and bipolar disorder); SAC Ex. 4, ECF No. 94-5 at 2 (physician's letter referring to
15 Contreras's major depression); SAC Ex. 6, ECF No. 94-7 at 2 (letter from defendant's employee
16 referring to Contreras's requested accommodation for post-traumatic stress disorder). Although
17 her earlier complaints also alleged discrimination based on a hearing impairment, Contreras
18 conceded at hearing that her operative complaint does not allege a hearing impairment at all, let
19 alone discrimination based on a hearing impairment. She further confirmed she does not seek
20 leave to amend her complaint to add such a claim. Accordingly, Contreras's Rehabilitation Act
21 claim, insofar as that claim is based on a hearing impairment, is DISMISSED without leave to
22 amend.

23 Defendant also argues Contreras's operative complaint has not sufficiently alleged
24 disability discrimination by way of a disparate treatment claim and notes it is unclear whether
25 Contreras intends to bring such a claim. Mot. at 14. "Liability in a disparate treatment case
26 depends on whether the protected trait motivated the employer' to treat disabled employees less
27 favorably than non-disabled employees." *Whelan*, 2012 WL 3535869, at *11 (quoting *Raytheon*
28 *Co. v. Hernandez*, 540 U.S. 44, 52 (2003)). Contreras has not alleged she was treated

1 unfavorably because of her disability. *See* SAC ¶ 58 (alleging only “other qualified individuals
2 with disabilities receive benefits that [Contreras] requested” but omitting allegations that she was
3 denied such requests based on her disability). At hearing, Contreras suggested she is not pursuing
4 a disparate treatment claim, noting that the heart of her suit is her reasonable accommodation
5 claim. The court gathers Contreras does not seek leave to amend her complaint to allege
6 disparate treatment.

7 Finally, defendant initially moved to dismiss Contreras’s failure to accommodate
8 claim, Mot. at 11-13, but has withdrawn his motion in favor of bringing “an early motion for
9 summary judgment,” Reply at 3-4. At hearing, defendant’s counsel confirmed this position and
10 noted defendant also withdraws his argument that Contreras has not sufficiently alleged a
11 qualifying mental impairment. Accordingly, the court need not reach either argument here.

12 III. CONCLUSION

13 As explained above, Contreras’s FMLA and ADA claims are DISMISSED
14 without leave to amend, as is her Rehabilitation Act claim, insofar as it arises from any alleged
15 hearing impairment and insofar as it includes a disparate treatment claim. Defendant shall file an
16 answer within 21 days.

17 IT IS SO ORDERED.

18 DATED: September 24, 2018.

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UNITED STATES DISTRICT JUDGE