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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TATYANA EVGENIEVNA DREVALEVA,

Plaintiff,

No. C 19-02665 WHA

v.

ROBERT WILKIE, United State Secretary of  
Veteran's Affairs,

**ORDER GRANTING  
MOTION TO DISMISS**

Defendant.

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**INTRODUCTION**

*Pro se* plaintiff brings this repetitive employment action against federal defendants. Defendants move to dismiss for failure to state a claim and lack of subject-matter jurisdiction. For the reasons stated herein, the motion to dismiss the complaint is **GRANTED**.

**STATEMENT**

This is the third of separate lawsuits arising from the same pattern of facts. In May 2017, after working for about six weeks at New Mexico Veterans Affairs Medical Center (VAMC), *pro se* plaintiff Tatyana Evgenievna Drevaleva suddenly went to Russia, evidently to undergo in-vitro fertilization (IVF). She did not return until August 2017. That July, plaintiff received a termination notice for being absent without leave (Dkt. No. 1 at 4).

In May 2018, plaintiff applied to work at the Minneapolis VAMC without disclosing details about her VAMC termination in 2017. She received a tentative job offer. The offer was

1 subsequently rescinded, however, once Minneapolis VAMC learned the details of her 2017  
2 VAMC termination (Dkt. No. 26 at 2).

3 In June 2018, plaintiff applied for a position at West Los Angeles VAMC and allegedly  
4 disclosed facts about the 2017 VAMC termination on the application. During the phone  
5 interview later that month, she explained that the termination resulted from her taking time off  
6 for a health-related trip to Russia.\* Plaintiff then told the interviewer that, if hired, she would  
7 need more time off to go to Russia for a medical follow-up. At this point, plaintiff never  
8 disclosed to West Los Angeles VAMC that these trips had to do with IVF or pregnancy. In the  
9 end, West Los Angeles VAMC decided not to offer plaintiff a position. Plaintiff asked for an  
10 explanation, but never received one (Dkt. No. 1 at 4-5).

11 Plaintiff believed that West Los Angeles VAMC chose not to hire her due to  
12 discrimination and sought to file an Equal Employment Opportunity complaint with the Office  
13 of Resolution Management. Because this process first requires alternative dispute resolution,  
14 plaintiff engaged in a phone mediation with West Los Angeles VAMC in the fall of 2018.  
15 Plaintiff alleges that this mediation was the first time she disclosed to the facility that she did  
16 not have children and that she had gone to Russia to get pregnant. After a second mediation,  
17 plaintiff requested to be reconsidered for hire, but West Los Angeles VAMC declined.  
18 Plaintiff subsequently filed a formal EEO complaint, but never received a determination  
19 (Dkt. No. 1 at 5).

20 As a result, plaintiff brings this current action against the United States Department  
21 of Veterans Affairs and Robert Wilkie pleading: (1) sex and pregnancy discrimination under  
22 Title VII of the Civil Rights Act; (2) age discrimination under the Age Discrimination in  
23 Employment Act; (3) disability discrimination under the ADA and failure to accommodate  
24 under the Rehabilitation Act of 1973; and (4) intentional infliction of emotional distress.  
25 Earlier, plaintiff brought these same claims against the same defendants in her first lawsuit in  
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27 \_\_\_\_\_  
28 \* The complaint dates the West Los Angeles VAMC interview in June 2017 (Dkt. No. 1 at 4), but plaintiff's Exhibit No. 1 and opposition brief both state that it happened in June 2018 (Dkt. Nos. 19-1, 26). This order presents the fact that agrees, chronologically, with the rest of the facts.

1 regard to her 2017 VAMC termination from New Mexico VAMC. Those claims were  
2 dismissed for failure to state a claim (Dkt. No. 1 at 6). So too here.

3 Plaintiff filed the current complaint in May 2019. Rather than amending her complaint,  
4 plaintiff makes new allegations in her opposition brief by referencing the EEO investigation  
5 results. Although new facts should not be considered in this posture, all allegations were still  
6 reviewed for the purposes of this order. Her brief includes information about: the job vacancies  
7 at the West Los Angeles VAMC at the time plaintiff sought employment, applicants' scores on  
8 interview questions, and demographic information about the applicants selected for the  
9 positions available. Even if these allegations are true, however, they do not raise the right to  
10 relief above a speculative level (Dkt. No. 26 at 4-11).

11 Defendants move to dismiss all of plaintiff's claims. This order follows full briefing  
12 (Dkt. Nos. 25, 26, 28) and oral argument.

### 13 ANALYSIS

#### 14 1. DISCRIMINATION CLAIMS.

15 Rule 12(b)(6) requires the dismissal of complaints that fail to state a claim for relief  
16 plausible on its face. Allegations that are merely conclusory need not be accepted as true.  
17 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2007).

18 To establish a *prima facie* discrimination case, plaintiff has the burden of showing  
19 disparate treatment. “. . . [P]laintiff must prove by a preponderance of the evidence that she  
20 applied for an available position for which she was qualified, but was rejected under  
21 circumstances which give rise to an inference of unlawful discrimination.” *Texas Dep't of*  
22 *Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

23 Though plaintiff need not establish a *prima facie* discrimination case at this point, this  
24 order uses the required elements to determine whether the facts alleged state plausible claims  
25 for relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This order finds that plaintiff  
26 offers no legal support for her conclusions. Instead, she points to various instances of alleged  
27 wrongful conduct to support her numerous claims.

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**A. Sex and Pregnancy Discrimination.**

Plaintiff’s complaint sufficiently alleges that she is a member of a protected class and that she was rejected from a job. The complaint, however, lacks any facts showing that plaintiff was qualified enough for the job to give rise to an inference of unlawful discrimination. Plaintiff herself states in the opposition that she scored substantially lower than the other applicants on the interview rubric (Dkt. No. 26 at 9). Similarly, plaintiff’s 2017 VAMC termination could be a plausible reason that interviewers found her to be unqualified compared to the other applicants. Although plaintiff shows that men were hired instead of her, this alone does not plausibly state a *prima facie* case for sex discrimination, or plausibly allege that West Los Angeles VAMC failed to hire her because of her sex.

Furthermore, plaintiff herself admits that West Los Angeles VAMC had no knowledge of her attempts to get pregnant nor her intention to request time off for the purpose of pregnancy when making the decision to hire her. Therefore, plaintiff cannot plausibly claim that she lost out due to pregnancy discrimination. The discrimination claim must be **DISMISSED**.

**B. Age Discrimination.**

To establish a *prima facie* case of age discrimination under ADEA, plaintiff must allege that: (1) she was at least forty years old; (2) she was performing her job satisfactorily; (3) she was discharged; and (4) she was either replaced by substantially younger employees with equal or inferior qualifications or discharged under circumstances otherwise giving rise to an “inference of age discrimination.” *Sheppard v. David Evans and Assoc.*, 694 F. 3d 1045, 1049 (9th Cir. 2012). Plaintiff does not attempt to allege any facts to meet the elements of this claim other than being 51 years old when she applied for a job. The men who filled the then open job vacancies were 31, 40, and 47 years of age. Although plaintiff believes the 31-year-old had inferior qualifications, according to her own evidence, he scored higher than her in the interview (Dkt. No. 26 at 6-8). Her allegations are conclusory and do not make her age discrimination claim plausible. Accordingly, plaintiff’s claim under the ADEA is **DISMISSED**.

1                                   **C.      Disability Discrimination and Failure to Accommodate.**

2                   In order for plaintiff to establish a *prima facie* case for disability discrimination under  
3 the ADA, she must show that: (1) she is a disabled person within the meaning of the ADA;  
4 (2) she was either excluded from participation in or denied the benefits of a public entity’s  
5 services, programs or activities, or was otherwise discriminated against by the public entity;  
6 and (3) such exclusion, denial of benefits, or discrimination was by reason of her disability.

7 *Weinreich v. L.A. Cty. Metro. Transp. Auth.*, 114 F. 3d 976, 978 (9th Cir. 1997).

8 The Rehabilitation Act, in turn, provides: “No otherwise qualified individual with a disability  
9 in the United States . . . shall, solely by reason of her or his disability, be excluded from the  
10 participation in, be denied the benefits of, or be subjected to discrimination under any program  
11 or activity receiving Federal financial assistance . . .” 29 U.S.C. § 794(a).

12                   Plaintiff has not pled that she is disabled within the meaning of the ADA. Plaintiff has  
13 not identified a cognizable disability in her complaint and fails to show that she is otherwise  
14 qualified for employment. And, plaintiff cannot claim that West Los Angeles VAMC chose  
15 not to hire her due to her inability to get pregnant or desire for IVF because she did not disclose  
16 these facts during the interview process (Dkt. No. 1 at 4-5). Additionally, disclosing to the  
17 West Los Angeles VAMC interviewer that she needed to return to Russia for a follow-up does  
18 not adequately suggest that West Los Angeles VAMC denied her a reasonable accommodation  
19 because of any disability (Dkt. No. 26 at 13). Accordingly, the claims for disability  
20 discrimination and failure to accommodate are **DISMISSED**.

21                                   **2.      INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.**

22                   Rule 12(b)(1) requires dismissal of claims when a court lacks subject-matter  
23 jurisdiction. The burden of establishing jurisdiction falls on the party asserting it. *Kokkonen v.*  
24 *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

25                   Plaintiff alleges that defendants knowingly caused her to suffer severe emotional distress  
26 for months by failing to hire her, depriving her a source of income, and depriving her an  
27 opportunity to undergo another IVF procedure (Dkt. No. 1 at 16). Because this tort claim  
28 arises from the same factual predicate as her discrimination claims, Title VII provides, if at all,

1 the exclusive remedy. *Brown v. GSA*, 425 U.S. 820, 835 (1976). Accordingly, this claim is  
2 preempted from district court review and is **DISMISSED**.

3 **3. PUNITIVE DAMAGES ARE UNAVAILABLE.**

4 Defendants seek to dismiss plaintiff's request for punitive damages for her claims  
5 under Title VII, the Rehabilitation Act, and the ADEA (Dkt. No. 25 at 15). This order agrees.  
6 Plaintiff has neither a claim for relief nor a predicate for punitive damages whatsoever.  
7 Her prayer for punitive damages, therefore, is **DENIED AS MOOT**.

8 **4. THE DEPARTMENT OF VETERANS AFFAIRS IS AN IMPROPER DEFENDANT.**


9 Defendants argue that the Department of Veterans Affairs is an improper defendant in  
10 this action. This order agrees. The proper defendant for a civil action based on each of the  
11 above noted anti-discrimination statutes is the head of the agency or department. *Mahoney v.*  
12 *United States Postal Serv.*, 884 F.2d 1194, 1196 (9th Cir. 1989) (Title VII & Rehabilitation  
13 Act); *Romain v. Shear*, 799 F.2d 1416, 1418 (9th Cir. 1986) (ADEA). Here, Robert Wilkie has  
14 been sued as the Secretary of Veterans Affairs, therefore, the United States Department of  
15 Veterans Affairs is improper and is hereby **DISMISSED** as a defendant. Going forward, all  
16 parties in this action shall use this order's caption.

17 **CONCLUSION**

18 For the reasons stated above, the motion to dismiss is **GRANTED** with prejudice.  
19 Further leave to amend is denied because plaintiff's additional facts, as set forth in her  
20 opposition brief, have been considered.

21  
22 **IT IS SO ORDERED.**

23  
24 Dated: November 7, 2019.

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27 WILLIAM ALSUP  
28 UNITED STATES DISTRICT JUDGE