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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CHERYL THORNTON,
Plaintiff,
v.
CITY & COUNTY OF SAN FRANCISCO,
Defendant.

Case No. [21-cv-02938-SI](#)

**ORDER GRANTING IN PART
DEFENDANT'S MOTION TO DISMISS
AND/OR STRIKE**

Re: Dkt. No. 21

Before the Court is a Motion for Judgment on the Pleadings and /or Motion to Strike filed by defendant City and County of San Francisco (“CCSF”) against plaintiff Cheryl Thornton pursuant to Rules 12(c) and 12(f) of the Federal Rule of Civil Procure. Dkt. No. 21. The matter is now fully briefed and ripe for resolution. Based on the papers submitted, the Court finds the matter appropriate for resolution without oral argument and hereby VACATES the hearing set for December 10, 2021 pursuant to Local Rule 7-1(b). The Court GRANTS IN PART defendant’s motion.

BACKGROUND

I. Prior Settlement and Present Suit

Cheryl Thornton’s employment with CCSF began nearly thirty years ago when she was hired by the Department of Public Health (“DPH”) as a temporary unit clerk. Dkt. No. 5 ¶ 19 (First Amended Complaint, filed May 14, 2021) (“FAC”). She worked her way up through the Department and now serves as a Hospital Eligibility Supervisor. *Id.* In 2018, Thornton sued CCSF in state court for violations of California’s Labor Code, California’s Fair Employment and Housing Act, and unlawful employment practices under 42 U.S.C § 2000e–3. Dkt. No. 22-1, Ex. A (State

1 Court Comp.). CCSF removed the case to federal court and the parties later settled. *Denson-*
2 *Thornton v. City and County of San Francisco*, 18-cv-07291-DMR, Dkt. No. 32 (N.D. Cal Jan. 9,
3 2018). See Dkt. No. 22-3, Ex. 3 (Settlement Agreement).

4 The Settlement Agreement, signed on February 24, 2020, provides that Thornton would
5 release, in exchange for the settlement amount, “any and all liabilities, claims, demands, contracts,
6 debts, damages, acts or omissions...” that “do or may exist, in any way arising out of, connected
7 with or related to Plaintiff’s employment” with CCSF “up to and including the date that Plaintiff
8 signs this Agreement.” Dkt. No. 22-3, Ex. 3 ¶ 2a. The “Released claims include, but are not limited
9 to, any matter, cause or thing in any way arising out of, connected with, or related to the” action
10 being settled. *Id.* The agreement also provided Thornton would not be prevented from “initiating
11 or participating in proceedings about matters other than the Released Claims.” *Id.* ¶ 2b. Further, the
12 agreement states it would “not become effective or enforceable until the [seven-day] revocation
13 period has expired.” *Id.* ¶ 15¹

14 In 2021, Thornton again sued CCSF, this time in an eleven-claim federal-court complaint
15 alleging, among other things, retaliation and racial and age-based discrimination and harassment.
16 Dkt. No. 5 (FAC). On October 20, 2021, CCSF filed a Motion for Judgment on the Pleadings and
17 /or Motion to Strike paragraphs 20 through 30 and paragraph 33 of the FAC. Dkt. No. 21 (Motion).
18 In CCSF’s view, the release in the settlement agreement bars Thornton from including potential
19 claims or allegations that could have accrued through March 3, 2020.

20
21 **II. FAC’s Pre-Settlement Factual Allegations**

22 Thornton’s FAC includes extensive factual content, including events and incidents that
23 occurred prior to March 3, 2020. The FAC states in February 2019, Thornton interviewed for and
24 was denied a promotion to Practicing Manager position at Potrero Hill Health Center, “which would
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26
27 ¹ Plaintiff’s Opposition Brief refers to February 24, 2020 as the “operative date of the
28 settlement.” Dkt. No. 26 at 7. Defendant initially refers to March 3, 2020 as the effective date, Dkt.
No. 21 at 6, and later observes that plaintiff “admits” “the Agreement provide[s] a complete legal
release through at least February 24, 2020.” Dkt. No. 27 at 2. Based on the plain text of the
Agreement, Dkt. No. 22-3, Ex. 3 ¶ 15, the Court concludes March 3, 2020 is the operative date.

1 have entitled her to higher pay, additional training,” more leadership opportunities, and
2 telecommuting privileges. Dkt. No. 5, FAC ¶ 21. Thornton attempted to challenge the denial to no
3 avail—ultimately, the “person who got the job [was] an outside hire, male, and non Black” thirty-
4 year old. *Id.* ¶¶ 22, 25. That summer, Thornton participated in a protest rally to shed light on
5 CCSF’s allegedly unequal treatment of Black employees. *Id.* ¶ 24. In fall 2019, the FAC alleges
6 Thornton was once again passed over for a promotional opportunity, “in favor of a younger male,
7 Robert Pineda, who is also not Black...[and] does not have a BA in Industrial organizational
8 psychology degree and plaintiff Thornton does.” Pineda would then serve as Thornton’s direct
9 supervisor. *Id.* ¶ 28.

10 Later that fall in 2019, Thornton alleges Pineda denied her request to participate in leadership
11 training, and CCSF assigned her a disfavored role as a “floater” in various clinics, which denied her
12 “stability in her work, the opportunity for training, and the opportunity to manage and supervise
13 employees at a single clinic.” *Id.* ¶¶ 29, 30. “Up to this day,” the FAC alleges, Thornton has been
14 assigned “lesser duties” than her colleagues. *Id.* ¶ 30. The FAC then describes an incident in
15 February 2020 (the start of COVID’s global surge) when Thornton was reprimanded for wearing a
16 mask at work. *Id.* ¶ 33.

17

18 **III. FAC’s Post-Settlement Factual Allegations**

19 The FAC then describes various events and incidents occurring after March 3, 2020—the
20 operative date of the settlement agreement. As lockdowns began to spread around the United States
21 in mid-March and April, the FAC alleges that Thornton was asked to screen patients from inside a
22 lobby but was later asked to move outside for screening. *Id.* ¶ 32. Only Black employees, according
23 to the FAC, were told to screen patients outside and were not provided adequate masks to wear when
24 screening. *Id.* ¶ 35. This led to Thornton filing a complaint with CAL-OSHA, *id.* ¶ 37, and the City
25 of San Francisco’s Human Resources Director. *Id.* ¶ 38. Due to complaining to CAL-OSHA,
26 Thornton alleges she was transferred to a new clinic in San Francisco’s Tenderloin neighborhood,
27 depriving her of potential overtime and supervisory experience and subjecting her to the
28 “humiliation of being transferred against her will.” *Id.* ¶ 42.

1 be made “before responding to the pleading or, if a response is not allowed, within 21 days after
2 being served with the pleading.” Fed. R. Civ. P. 12(f).

3 Settlement releases may provide a basis for striking allegations based on released claims.
4 See *Brown v. United States*, 271 F. Supp. 2d 225, 228 (D.D.C. 2003). However, the scope of a
5 release is not absolute: “[a]bsent an express contrary term in the agreement, [an employer-defendant
6 does not buy] the right to have its continuing relations with [a plaintiff-employee] analyzed in an
7 ahistorical vacuum.” *Douglass v. Nat’l Fed’n of Indep. Bus.*, 1995 WL 579640 at *2 (9th Cir. 1995).
8 Accordingly, legal claims are properly included in a post-settlement complaint as long as the
9 released allegations do not form the sole basis for relief. See *id.* (“All rights to sue for certain acts
10 might well be barred without concomitantly barring testimony about those acts for the purpose of
11 demonstrating that discriminatory activity was continuing.”).

12
13 **DISCUSSION**

14 CCSF argues paragraphs 20 through 30 and paragraph 33 of the FAC—which reference
15 events prior to March 3, 2020—should be stricken because Thornton “executed a voluntary and
16 complete general legal release of all known or unknown claims that could relate in any way to her
17 employment with the City.” Dkt. No. 21 at 8 (Motion). Thornton responds that “[a]t issue in this
18 case are acts of discrimination occurring after the date of the settlement agreement became
19 effective.” Dkt. No. 26 (Opposition).

20 As a preliminary matter, the Court notes the 12(f) motion was not timely filed. CCSF filed
21 its answer to the FAC on June 3, 2021, Dkt. No. 9, and its 12(f) motion on October 20, 2021. Dkt.
22 No. 21. A timely motion to strike must be submitted “either before responding to the pleading or,
23 if a response is not allowed, within 21 days after being served with the pleading.” Fed. R. Civ. P.
24 12(f)(2). Here, a response was “allowed,” rendering the timing of the motion improper. However,
25 the Court may nonetheless grant a motion to strike “on its own,” rendering the default immaterial.
26 Fed. R. Civ. P. 12(f)(1).

27 Defendant CCSF presents an expansive interpretation of the settlement release provision.
28 The Court adopts a more limited reading: the release only applies to legal claims that find their

1 factual foundations in pre-settlement events or incidents. The Court identifies three such claims
2 included throughout Thornton’s complaint: “a. Denial of necessary training; b. Denial of training
3 opportunities; c. Denial of promotions.” FAC ¶ 58. The FAC includes these three claims within
4 the First Claim for “Racial Discrimination – Disparate Impact.” *Id.* The FAC also includes these
5 three factual claims again in the Fifth Claim for “Employment Discrimination,” *id.* ¶ 96, as well as
6 the Sixth Claim for “Age Discrimination.” *Id.* ¶ 106 (a. Denial of training opportunities necessary
7 to advance; b. Denial of Promotion in favor of younger, less qualified employees”). The FAC also
8 includes “Denial of training” under the Fourth Claim for “Racial Discrimination – Retaliation,” *id.*
9 ¶ 86, and the Tenth Claim for Retaliation under FEHA. *Id.* ¶ 145n.

10 To the extent the FAC predicates its claims for relief on the denial of training and the denial
11 of promotions, such claims are barred by the settlement agreement. The sole factual bases for the
12 denial of training and promotions are all located in 2019. *See* FAC ¶¶ 21, 22, 24, 25, 28, 29, 30.
13 While the FAC’s allegation that the assignment of “lesser duties” is “happening to this day” might
14 support a claim for continuing discrimination based on such assigned duties, *id.* ¶ 30, there is no
15 conceivable basis for concluding that the denial of training and promotion is part of an ongoing or
16 “continuing” pattern. *See Douglass*, 1995 WL 579640 at *2 (“While it is true that the pre-agreement
17 evidence could not be used as a basis for the underlying action, the evidence could be admitted to
18 show, as Douglass claimed, a pattern of discrimination by NFIB against him and a reason for NFIB
19 to retaliate against him.”). Importantly, the Court’s present Order does not strike or dismiss the
20 FAC’s First, Fourth, Sixth, or Tenth Claims *in whole*; rather, the Court will grant judgment on the
21 pleadings on the components of claims One, Four, Six, and Ten that rely solely on the pre-settlement
22 denials of training and promotion as their factual basis.

23 However, the Court declines to strike paragraphs 20 through 30 and paragraph 33, which
24 contain the factual allegations themselves. An order to strike is generally improper unless the
25 challenged paragraphs “have no possible bearing on the subject matter of the litigation” or will
26 unduly prejudice the defendant. *LeDuc*, 814 F. Supp. at 830. As long as Thornton uses the factual
27 allegations in paragraphs 20 through 30 and paragraph 33 to support actionable claims, the factual
28 allegations could conceivably serve as “background or historical material or other matter of an

1 evidentiary nature” as to render their inclusion appropriate. *Id.*; See also, *Douglass*, 1995 WL
2 579640 at *2 (“Evidence of discrimination occurring outside an actionable time period may
3 constitute relevant background evidence in determining present discriminatory action.”). Because
4 CCSF has neither demonstrated undue prejudice nor the lack of a conceivable evidentiary basis for
5 paragraphs 20 through 30 and paragraph 33, the Court denies the order to strike. This Order is
6 without prejudice to CCSF’s ability to challenge or limit the inclusion of the factual allegations in
7 paragraphs 20 through 30 and paragraph 33 as evidence in future proceedings.

8
9 **CONCLUSION**

10 For the foregoing reasons, the Court will GRANT IN PART defendant CCSF’s Motion for
11 Judgment on the Pleadings and /or Motion to Strike.

12
13 **IT IS SO ORDERED.**

14 Dated: December 6, 2021



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SUSAN ILLSTON
United States District Judge