

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

ANGELA L. THOMAS)	
)	
Plaintiff,)	
)	
v.)	CV417-127
)	
DAVID J. SHULKIN, Secretary,)	
United States Department of Veteran's)	
Affairs,)	
)	
Defendant.)	

ORDER

Pro se plaintiff Angela L. Thomas, a former employee of the United States Department of Veteran's Affairs (VA), sues on the grounds that that the VA discriminated against her on the basis of her race and disability. Doc. 1. She also seeks leave to pursue her case *in forma pauperis* (IFP). Doc. 2. Since it appears that she is indigent, the Court **GRANTS** her request. The Court, therefore, proceeds to screen her Complaint. *See* 28 U.S.C. § 1915(e)(2)(B).¹

¹ The Court applies the familiar Fed. R. Civ. P. 12(b)(6) standard to evaluate plaintiff's claim under § 1915(e)(2). *See Thompson v. Rundle*, 393 F. App'x 675, 678 (11th Cir. 2010) (citing *Mitchell v. Farcass*, 112 F.3d 1483, 1490 (11th Cir. 1997)). Under that standard, the Court takes well-pleaded factual allegations as true and, given Thomas' *pro se* status, liberally construes her Complaint. *See id.* (citations omitted). "Dismissal for failure to state a claim is appropriate when the facts as pleaded do not state a claim for relief that is 'plausible on its face.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)).

Thomas alleges that the VA discriminated against her by failing to select her for a promotion. *See* doc. 1 at 5. She was employed as a Program Support Assistant at the VA's Mid-Atlantic Consolidated Patient Account Center, in Ashville, North Carolina from 2011 until her retirement in 2013. *Id.* In 2011, she applied for one of four positions as a Financial Administrative Assistant. *Id.* On March 30, 2012, she was not selected, despite being given "one of the three highest evaluation ratings" *Id.*

Plaintiff filed a charge of discrimination with the United States Equal Employment Opportunity Commission (EEOC) on April 9, 2012. Doc. 1 at 6. The EEOC issued to her a Notice of Right to Sue on May 20, 2017. *Id.*; *see also* doc. 1-3 at 2-3 (EEOC determination on request for reconsideration, dated 06/18/2017, notifying plaintiff of her right to file a civil action "within ninety (90) calendar days from the date you receive this decision."). She filed her Complaint on July 12, 2017. *See* doc. 1. It appears, therefore, that her Complaint is timely and that she has exhausted her administrative remedies.²

² "For an EEOC charge to be timely[,] . . . [it] must be filed within 180 days of when the alleged violation occurred. 42 U.S.C. 200e-5(e)(1); *Wilkerson [v. Grinnell Corp.]* 270 F.3d [1314,] . . . 1317 [(11th Cir. 2001)]. Once the EEOC dismisses the charge and notifies the plaintiff of her right to sue, the plaintiff has 90 days in which to file

Thomas also alleges, in a purely summary fashion, that the VA retaliated against her and that it discriminated against her, not only based on her race, but also based on her disability. *See* doc. 1 at 4. These claims are insufficient. Her substantive allegations clearly allege that, although she is disabled, she “was subjected to discrimination *based on race*” *Id.* at 5 (emphasis added). She simply does not allege any discrimination based on disability.³ *See generally id.*

suit on her claims in district court. 42 U.S.C. § 2000e-5(f)(1); *Santini v. Cleveland Clinic Florida*, 232 F.3d 823, 825 (11th Cir. 2000).” *Abram v. Fulton Cty. Gov’t*, 598 F. App’x 672, 674 (11th Cir. 2015). In addition to timely filing, a prospective Title VII plaintiff must exhaust her available administrative remedies, specifically by filing a complaint with the EEOC. *See, e.g., Burnett v. City of Jacksonville, Fla.*, 376 F. App’x 905, 906 (11th Cir. 2010) (discussing exhaustion requirement and its purpose to give the EEOC “the first opportunity to investigate the alleged discriminatory practices to permit it to perform its role in obtaining compliance and promoting conciliation efforts.” (quoting *Gregory v. Ga. Dep’t of Human Res.*, 355 F.3d 1277, 1279 (11th Cir. 2004))). This Court has noted that there is disagreement among jurists about whether timeliness and exhaustion are pleading requirements. *See Dawkins v. J.C. Lewis Primary Health Care*, 2015 WL 1607989 at * 2 (S.D. Ga. April 8, 2015) (citing *Luckey v. Visalia Unified Sch. Dist.*, 2014 WL 730699 at * 2 (E.D. Cal. Feb. 24, 2014)). Even assuming that they are, however, Thomas has pled sufficient facts to support both.

³ It is possible that Thomas misunderstood the form complaint she filed. In the section seeking the basis for the Court’s jurisdiction, she has identified only Title VII and not the Americans with Disabilities Act. The EEOC’s disposition of her administrative complaint lists only an allegation of race discrimination. *Id.* at 1. Her failure to consistently assert a disability discrimination claim suggests that she may only assert that she is disabled, but not discriminated against on that basis. Further the EEOC’s disposition suggests that, even if she intended to allege a disability-discrimination claim, she has not exhausted her administrative remedies. Since Thomas must submit an Amended Complaint to pursue even her race-discrimination claim, she is free to assert any additional disability-discrimination allegations or to

She also alleges no facts suggesting that the VA's decision not to hire her for the higher position she applied for was retaliatory. *Id.* "To establish a prima facie case of retaliation, the plaintiff must show that (1) she engaged in statutorily protected activity; (2) she suffered a materially adverse employment action; and (3) there was a causal link between the two." *Gowski v. Peake*, 682 F.3d 1299, 1311 (11th Cir. 2012) (citing *Dixon v. The Hallmark Companies, Inc.*, 627 F.3d 849, 856 (11th Cir. 2010)). At most, the decision not to hire her for her desired position is an adverse employment action. The lack of any allegation that she previously engaged in protected activity, and thus the lack of any alleged link between that activity and the adverse action, is fatal to a retaliation claim.

Thomas' race-discrimination claim is also insufficient.⁴ "To establish a prima facie case for disparate treatment in a race

omit them entirely. As discussed below, her Amended Complaint, if she chooses to submit one, will entirely supersede her original pleading.

⁴ It seems clear that Thomas asserts a "disparate treatment" claim, rather than a "disparate impact" claim. The distinction between these two theories of discrimination is significant because the former targets a particular employment decision, while a disparate impact claim "targets an employment practice that has an actual . . . adverse impact on protected groups." *Equal Employment Opportunity Comm'n v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1024 (11th Cir. 2016). "[C]ourts must be careful to distinguish between" the two theories because the elements are distinct: a disparate-treatment claim requires a plaintiff to "demonstrate than an

discrimination case, the plaintiff must show that: (1) she is a member of a protected class; (2) she was subject to an adverse employment action; (3) her employer treated similarly situated employees outside of her protected class more favorably than she was treated; and (4) she was qualified to do the job.” *Burke-Fowler v. Orange Cty., Fla.*, 447 F.3d 1319, 1323 (11th Cir. 2006) (citing *EEOC v. Joe’s Stone Crab, Inc.*, 220 F.3d 1263, 1286 (11th Cir. 2000)).

Thomas has alleged facts supporting three of those four elements: (1) she alleges that she is a member of a protected class, *see, e.g. Maddox-Jones v. Bd. of Regents of University Sys. of Ga.*, 448 F. App’x 17, 20 (11th Cir. 2011) (African-American is a protected class); (2) her allegation that the VA failed to promote her (or, alternatively, refused to hire her for a new position) is an “adverse employment action,” *see, e.g., Davis v. Town of Lake Park, Fla.*, 245 F.3d 1232, 1239 (11th Cir. 2001) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 760-61 (1998)) (explaining adverse employment action under Title VII is “a significant change in employment status, such as hiring, firing, [or] failing to

employer intentionally discriminated against her on the basis of a protected characteristic,” while a disparate-impact claim “does not require proof of discriminatory intent.” *Id.* (quotes and cites omitted). Since Thomas alleges only that she was discriminated against in the hiring process for her desired position, she is advancing a disparate treatment claim.

promote’”); and (3) that she was qualified for the job, *see* doc. 1 at 5 (alleging Thomas was not hired for “one of four positions although she . . . [received] one of the three highest evaluation ratings received by Human Resources when recommended for the position.”).

She has not, however, alleged any facts supporting the last element, that the VA treated an employee outside of her protected class more favorably. *See Hughley v. Upson Cnty. Bd. of Comm’rs*, 2017 WL 2274952 at * 2 (11th Cir. May 24, 2017) (quoting *Burke-Fowler v. Orange Cty., Fla.*, 447 F.3d 1319, 1323 (11th Cir. 2006) (affirming determination that plaintiff who failed to identify individual outside of plaintiff’s protected class treated more favourably failed to state a race-discrimination claim). Thomas does not allege anything about who was selected for the position she sought. *See* doc. 1 at 5-6. Thus, she fails to state a race-discrimination claim.

Despite her claims’ insufficiency, the Court will give Thomas the opportunity to amend her Complaint. *See Langlois v. Traveler’s Ins. Co.*, 401 F. App’x 425, 426-27 (11th Cir. 2010) (*pro se* plaintiff afforded an opportunity to amend Complaint before dismissal); *see also, Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007) (same). Accordingly within

21 days of the day this Order is served, plaintiff must file an Amended Complaint, clarifying the theories she asserts and the facts supporting them. That Amended Complaint will supersede the original, so it must be complete in itself. *See Malowney v. Fed. Collection Deposit Grp.*, 193 F.3d 1342, 1345 n. 1 (11th Cir. 1999) (“An amended complaint supersedes an original complaint”); *Varnes v. Local 91, Glass Bottle Blowers Ass’n of U.S. & Canada*, 674 F.2d 1365, 1370 n. 6 (11th Cir. 1982) (“As a general rule, an amended complaint supersedes and replaces the original complaint unless the amendment specifically refers to or adopts the earlier pleading”).

The Clerk is **DIRECTED** to provide Thomas a blank form Complaint for Employment Discrimination with this Order. Once she files an Amended Complaint, her original pleading will no longer serve any function in this case other than establishing the filing date. If Thomas fails to file an Amended Complaint within 21 days from the date this Order is served, or fails to cure the deficiencies identified above, the Court will recommend dismissal.

SO ORDERED, this 20th day of July, 2017.


UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF GEORGIA