IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Patricia Johnson, Plaintiff, v. Ray Mabus, *Secretary of the Navy*, Defendant.	)	Civil Action No. 2:16-2073-RMG **ORDER AND OPINION**

This matter is before the Court on the Report and Recommendation of the Magistrate Judge, recommending that Defendant's motion to dismiss be granted in part and denied in part. For the reasons set forth below, the Court adopts the Report and Recommendation.

I. Background

Plaintiff is a 58-year-old female employed as an administrative specialist at the Navy's Space and Naval Warfare Systems Center Atlantic ("SPAWAR"). Plaintiff has been employed with SPAWAR at the Southeast Regional Office in North Charleston, South Carolina since 1999. Plaintiff alleges that, during the course of her employment with SPAWAR, the she became aware of a large discrepancy in pay between herself and younger co-workers who were assigned to the same work. She filed a complaint with the SPAWAR Equal Employment Opportunity ("EEO") Office regarding this pay discrepancy in 2005, and later that year, SPAWAR remedied the issue through a settlement agreement.

Plaintiff alleges that in 2007, when SPAWAR changed its performance and pay systems, she again received a lower salary than younger co-workers did, despite her successful performance ratings. In addition to being denied equal pay, the plaintiff alleges that she has continually been denied the opportunity to advance within the Post Award Admin Branch of the Contract Division

at SPAWAR, and that, although the plaintiff is a military veteran with over 25 years of civil service, she has never been granted any of the promotions that she has applied for within the department. In October 2012, Plaintiff received a performance evaluation that reflected a lower performance award than similarly situated younger employees. She alleges that at that time she became aware of SPAWAR management actions that reflected an ongoing policy of hiring younger employees into the Contract Division at a higher salary than Plaintiff's for the performance of the same work, with the aim of lowering the average age of employees in the Division. On November 15, 2012, Plaintiff was reassigned to a lower-level position within the Task Order Branch. Although the plaintiff did not suffer a change in salary or benefits, she alleges that assignment was a demotion because of the loss of possibility of promotion and she alleges she was demoted in retaliation for her prior EEO complaint.

Plaintiff filed a formal complaint of discrimination with SPAWAR's EEO Office on May 8, 2013, which alleged age discrimination and retaliation. The agency thereafter conducted an investigation. On June 23, 2014, Plaintiff requested a hearing and decision from an Equal Employment Opportunity Commission ("EEOC") Administrative Judge. On June 10, 2015, the defending agency moved for summary, which the Administrative Judge granted on March 25, 2016. The Department of the Navy Office issued its final order on May 10, 2016, which implemented the Administrative Judge's decision to dismiss Plaintiff's discrimination complaint.

Plaintiff then filed the present action against Defendant on June 21, 2016, alleging violations of Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act. On September 13, 2016, Defendant moved to dismiss the complaint. On June 1, 2017, the Magistrate Judge recommending granting in part and denying in part the motion to dismiss. Plaintiff filed no objections to the Report and Recommendation.

II. Legal Standard

A. Report and Recommendation

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility for making a final determination remains with this Court. *Mathews v. Weber*, 423 U.S. 261, 270–71 (1976). This Court is charged with making a *de novo* determination of those portions of the Report and Recommendation to which specific objection is made. Additionally, the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). This Court may also "receive further evidence or recommit the matter to the magistrate judge with instructions." *Id.* Where the plaintiff fails to file any specific objections, "a district court need not conduct a de novo review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation," *see Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (internal quotation omitted), and this Court is not required to give any explanation for adopting the recommendation of the Magistrate Judge, *Camby v. Davis*, 718 F.2d 198 (4th Cir. 1983).

B. Motion to Dismiss Under Rule 12(b)(1)

A motion to dismiss for lack of subject-matter jurisdiction filed under Rule 12(b)(1) of the Federal Rules of Civil Procedure challenges the jurisdiction of a court to adjudicate the matter before it. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006). A challenge to subject-matter jurisdiction may contend either 1) that the complaint fails to allege facts sufficient to establish subject matter jurisdiction or 2) "that the jurisdictional allegations of the complaint [are] not true." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). Where the sufficiency of the jurisdictional allegations in the complaint is challenged facially, "the facts alleged in the complaint are taken as true, and the motion must be denied if the complaint alleges sufficient facts to invoke subject

matter jurisdiction." *Kerns v. United States*, 585 F.3d 187, 192 (2009). If, however the defendant contends "that the jurisdictional allegations of the complaint [are] not true," the plaintiff bears the burden to prove facts establishing jurisdiction and the district court may "decide disputed issues of fact." *Id.* In that case, because the plaintiff's allegations are not presumed true, "the court should resolve the relevant factual disputes only after appropriate discovery." *24th Senatorial Dist. Republican Comm. v. Alcorn*, 820 F.3d 624, 629 (4th Cir. 2016). And where "the jurisdictional facts and the facts central to a tort claim are inextricably intertwined," so that a challenge to the truth of the jurisdictional facts indirectly challenges the plaintiff's claims on the merits, "the trial court should ordinarily assume jurisdiction and proceed to the intertwined merits issues." *Kerns*, 585 F.3 at 193.

C. Motion to Dismiss Under 12(b)(6)

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits the dismissal of an action if the complaint fails "to state a claim upon which relief can be granted." Such a motion tests the legal sufficiency of the complaint and "does not resolve contests surrounding the facts, the merits of the claim, or the applicability of defenses. . . . Our inquiry then is limited to whether the allegations constitute 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992) (quotation marks and citation omitted). In a Rule 12(b)(6) motion, the Court is obligated to "assume the truth of all facts alleged in the complaint and the existence of any fact that can be proved, consistent with the complaint's allegations." *E. Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000). However, while the Court must accept the facts in a light most favorable to the non-moving party, it "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Id.*

To survive a motion to dismiss, the complaint must state "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Although the requirement of plausibility does not impose a probability requirement at this stage, the complaint must show more than a "sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint has "facial plausibility" where the pleading "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

III. Discussion

Defendant's motion to dismiss raises three arguments. First, Defendant argues hostile work environment claims should be dismissed for failure to exhaust administrative remedies. The Court agrees with the Magistrate Judge that argument is moot because Plaintiff confirms in her opposition that she has not made a hostile work environment claim.

Second, Defendant argues Plaintiff failed to exhaust administrative remedies regarding her that she was assigned to a lower-level position within the Task Order Branch on November 15, 2012 in retaliation for her 2012 EEO complaint. The Magistrate Judge recommends granting Defendant's motion to dismiss for lack of subject-matter jurisdiction regarding that claim and the Court agrees. Plaintiff's EEO complaint, dated May 8, 2013, does not present that claim, and that claim is not mentioned in the notice of acceptance sent to Plaintiff's attorney on July 24, 2013. (Dkt. Nos. 1-2, 6-2.) Exhausting the administrative remedies is a statutory prerequisite to invoking the jurisdiction of this court in a Title VII action. *Jones v. Calvert Group, Ltd.*, 551 F.3d 297, 300–301 (4th Cir. 2009). In considering the exhaustion of administrative remedies, the allegations in the EEOC charge determine the scope of a plaintiff's right to file a federal lawsuit. *Id.* at 300. The Court therefore dismisses without prejudice Plaintiff's claim that she assigned to a lower-level position on November 15, 2012 in retaliation for her 2012 EEO complaint.

Third, Defendant argues he should be granted summary judgment on Plaintiff's remaining claims. The Magistrate Judge recommends denying Defendant's motion because discovery has not yet occurred in this matter. The Court agrees. Defendant does not argue the complaint fails to allege sufficient facts to state a claim; rather, he argues for summary judgment based on evidence from prior EEO proceedings. But those materials are outside the pleadings, and "the district court cannot go beyond these documents on a Rule 12(b)(6) motion; if it does, it converts the motion into one for summary judgment. Such conversion is not appropriate where the parties have not had an opportunity for reasonable discovery." *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 448 (4th Cir. 2011) (citation omitted). There has been no discovery in this case, and materials from the underlying administrative action cannot substitute for discovery because litigation of a matter in federal court following a federal agency's investigation and decision on the same matter is a *de novo* proceeding. *See Chandler v. Roudebush*, 425 U.S. 840 (1976). The Court therefore adopts the Report and Recommendation and denies Defendant's motion to dismiss for failure to state a claim or alternatively for summary judgment.

IV. Conclusion

For the foregoing reasons, the Court **ADOPTS** the Report and Recommendation of the Magistrate Judge as the Order of the Court (Dkt. No. 20) and **GRANTS IN PART AND DENIES IN PART** Defendant's motion to dismiss (Dkt. No. 6). Claims of retaliation based on Plaintiff's 2012 EEO complaint are **DISMISSED WITHOUT PREJUDICE**. The motion to dismiss or alternatively for summary judgment is otherwise **DENIED WITHOUT PREJUDICE**.

AND IT IS SO ORDERED.

Richard Mark Gergel
United States District Court Judge

July 18, 2017
Charleston, South Carolina