

1 THE HONORABLE RICHARD A. JONES

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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 HERMAN CHARLES TELLIS,

11 Plaintiff,

Case No. 17-00901-RAJ

12 v.

13 ALASKA AIRLINES, INC.,

14 Defendant.

ORDER

15 This matter comes before the Court on Defendant's Motion to Dismiss Plaintiff's
16 Fourth Amended Complaint. Dkt. # 47. Plaintiff opposes the Motion. Dkt. # 50. For
17 the reasons that follow, the Court **GRANTS** Defendant's Motion. Dkt. # 47.

18 **I. BACKGROUND**

19 The facts of this case are set forth in greater detail in a previous Order issued by
20 the Court. Dkt. # 44. Those facts will not be repeated and are incorporated in this
21 Order. Plaintiff Herman Charles Tellis was hired by Defendant Alaska Airlines, Inc. as
22 a Maintenance and Engineering Mechanic in 1990. Dkt. # 1-3. Prior to his resignation,
23 Plaintiff made several complaints regarding Defendant to the U.S. Equal Employment
24 Opportunity Commission ("EEOC"). *Id.* On February 8, 2013, Defendant notified
25 Plaintiff that he could sign a resignation agreement and a settlement and release
26 agreement in lieu of an involuntary termination. *Id.* at ¶ 5.8. Plaintiff signed both
27 agreements. *Id.* Between February 8, 2013, and May 13, 2014, Plaintiff executed and

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1 revoked several settlement and release agreements with Defendant. Dkt. # 1-3 Ex. 1, 3;
2 Dkt. # 41 Exs. 1-3. After Plaintiff's resignation, he filed at least four more complaints
3 against Defendant with the EEOC, most recently on June 15, 2018. Dkt. # 1-3 Ex 3;
4 Dkt. # 25; Dkt. # 45 at ¶¶ 5.13, 5.14.

5 In January of 2017, Plaintiff found employment as an airframe and powerplant
6 technician at Compass Airlines through Aero Tech Technical Employee Services.
7 Dkt. # 45 at ¶ 7A. On or about April 15, 2017, Plaintiff learned that he would be
8 "assigned access Alaska Air in search of a special tool." Plaintiff was under the
9 impression that he was not allowed to handle Alaska Airlines equipment and was afraid
10 that he would be spotted by Alaska Airlines personnel, so he left his job. *Id.* In
11 September of 2017, Plaintiff began working as a contractor with Launch Group, and his
12 services were leased to Aviation Technical Services ("ATS"). Dkt. # 45 at ¶ 7B. On or
13 about December 15, 2017, two Alaska Airlines jets pulled into the ATS facility where
14 Plaintiff worked. As Plaintiff did not feel that he was allowed to perform work on
15 Alaska Airlines equipment, and he felt that "being exposed to a lawsuit by Alaska for
16 servicing their products" was "not worth it," he left his employment at ATS. *Id.*
17 Plaintiff also alleges that he has been unable to update his training and certification
18 necessary to maintain his status as a FAA certified technician because he did not believe
19 he could participate in training offered by Virgin America, because it is owned and
20 operated by Alaska Airlines. Dkt. # 45 at ¶ 7C. On January 16, 2018, Plaintiff applied
21 for a Supervisor Line Maintenance position with Defendant but "heard nothing
22 favorable from Alaska Airlines with regard to the position." *Id.* at ¶ 5.13.

23 Plaintiff, proceeding *pro se*, filed his original Complaint in King County
24 Superior Court on May 22, 2017. Dkt. # 1. On May 31, 2018, the Court granted in part
25 and denied in part Plaintiff's Motion for Leave to Amend his Complaint. The Order
26 also granted Defendant's Motion for Judgment on the Pleadings to the extent that
27 Plaintiff's Complaint alleged age discrimination or retaliation claims based on three of
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1 the settlement and release agreements between the parties. Dkt. # 44. Plaintiff then
2 filed a Fourth Amended Complaint. Dkt. # 45. On July 5, 2018, Defendant filed this
3 Motion to Dismiss Plaintiff's Fourth Amended Complaint pursuant to Federal Rule of
4 Civil Procedure 12(b)(6).

5 **II. LEGAL STANDARD**

6 Fed. R. Civ. P. 12(b)(6) permits a court to dismiss a complaint for failure to state
7 a claim. The rule requires the court to assume the truth of the complaint's factual
8 allegations and credit all reasonable inferences arising from those allegations. *Sanders*
9 *v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007). A court "need not accept as true
10 conclusory allegations that are contradicted by documents referred to in the complaint."
11 *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). The
12 plaintiff must point to factual allegations that "state a claim to relief that is plausible on
13 its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 568 (2007). If the plaintiff
14 succeeds, the complaint avoids dismissal if there is "any set of facts consistent with the
15 allegations in the complaint" that would entitle the plaintiff to relief. *Id.* at 563;
16 *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

17 A court typically cannot consider evidence beyond the four corners of the
18 complaint, although it may rely on a document to which the complaint refers if the
19 document is central to the party's claims and its authenticity is not in question. *Marder*
20 *v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). A court may also consider evidence
21 subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

22 **III. DISCUSSION**

23 As a preliminary matter, Plaintiff filed two "praecipes" after Defendant filed
24 their Motion to Dismiss. Dkt. ## 48, 49. It appears that these documents are additions
25 and edits to his Fourth Amended Complaint. These praecipes add new claims against
26 Defendant and reintroduce several allegations from prior versions of his Complaint.
27 These are not the type of corrections or errors contemplated by Local Rule 7(m) and

1 Plaintiff did not seek leave to amend his Fourth Amended Complaint. While *pro se*
2 litigants are treated more liberally than litigants with counsel, they must still follow the
3 same rules of procedure that govern other litigants. *King v. Atiyeh*, 814 F.2d 565, 567
4 (9th Cir. 1987) *overruled on other grounds by Lacey v. Maricopa Cty.*, 693 F.3d 896
5 (9th Cir. 2012). As Plaintiff did not seek leave to amend and filed these documents
6 after Defendant filed their Motion to Dismiss, to the extent that the praecipes make
7 substantive changes to the Fourth Amended Complaint, the Court will not consider
8 them here.

9 A. The No Reemployment Provision

10 The Court's May 31, 2018 Order granted Defendant's Motion for Judgment on
11 the pleadings to the extent that Plaintiff's Complaint alleged age discrimination or
12 retaliation claims (Age Discrimination in Employment Act or "ADEA" claims) based
13 on three of the settlement and release agreements between the parties: a general release
14 of claims with a "No Reemployment" provision, signed in February of 2013 (the
15 "February 2013 Agreement"); an "Amendment to Confidential Settlement and Release
16 Agreement," signed in November of 2013 (the "Amended Agreement"); and a
17 settlement and release agreement covering any ADEA claims, signed in May of 2014
18 (the "May 2014 Agreement"). Dkt. # 44. The No Reemployment provision in the
19 February 2013 Agreement states:

20 [Plaintiff] understands and agrees that he waives any right that he may have
21 to reinstatement and/or reemployment by [Defendant] or its affiliates and/or
22 subsidiaries . . . and that [Plaintiff] has not and will not apply for or seek
23 future employment with [Defendant], its affiliates and/or subsidiaries.
24 [Plaintiff] agrees that [Defendant], including its affiliates and subsidiaries,
25 has no obligation to consider [Plaintiff] for future employment or
26 assignment. [Defendant], its affiliates, and/or subsidiaries may reject any
27 future applications by [Plaintiff] without recourse.

1 Dkt. # 41 Ex. 1. The February 2013 Agreement was revoked by Plaintiff, however,
2 Defendant contends that this No Reemployment provision was revived by the
3 subsequent Amended Agreement. *Id.*

4 Plaintiff's Fourth Amended Complaint makes many of the same allegations as
5 his previous Complaint. Plaintiff again contends that the February 2013 Agreement, the
6 Amended Agreement, and the May 2014 Agreement are "unlawful," and that Defendant
7 engaged in age discrimination and retaliation in violation of the ADEA. Dkt. # 50 at 5.
8 The Court reiterates that to the extent that Plaintiff alleges any ADEA discrimination or
9 retaliation claims based on the February 2013, Agreement, the Amended Agreement
10 (this includes the No Reemployment provision), or the May 2014 Agreement, in his
11 Fourth Amended Complaint, those claims are untimely and are **DISMISSED**.

12 Dkt. # 44.

13 B. Failure to Hire

14 Plaintiff claims that Defendant's failure to hire him as a Supervisor of Line
15 Maintenance in January of 2018 was age discrimination in violation of the ADEA. To
16 state a claim for age discrimination, Plaintiff must first establish a prima facie case. In a
17 "failure to hire" context, a prima facie case consists of a showing that: (1) Plaintiff was
18 in the protected class of persons, (2) Plaintiff applied for a position for which he was
19 qualified, and (3) a younger person with similar qualifications received the position.
20 *Cotton v. City of Alameda*, 812 F.2d 1245, 1248 (9th Cir. 1987). Plaintiff, who is over
21 the age of 40, alleges that he was qualified for the position he applied for because he
22 worked in Defendant's Line Maintenance department for over 15 years. Dkt. # 45 at
23 ¶ 5.13. While working in a Line Maintenance department for such an extended period
24 of time would provide Plaintiff relevant experience, Plaintiff does not make any
25 allegations regarding the requirements for a Supervisor of Line Maintenance at Alaska
26 Airlines or whether he meets those requirements¹. Even if the Court makes an inference

27 ¹ Plaintiff makes several allegations in his Response to Defendant's Motion that are not
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1 that the only requirement for a Supervisor of Line Maintenance is several years of
2 experience working in that department, Plaintiff does not allege that a younger applicant
3 with similar qualifications received the position. At most, it appears that Plaintiff
4 assumes that his failure to obtain an interview supports an inference that a younger
5 applicant was hired for the position. This not sufficient to establish the third element.
6 Even accepting Plaintiff's allegations as true, the Fourth Amended Complaint fails to
7 state a claim that Defendant engaged in age discrimination by failing to hire him.
8 Therefore, Defendant's Motion to Dismiss is **GRANTED** as to Plaintiff's ADEA
9 "failure to hire" claim.

10 C. Older Workers Benefit Protection Act

11 Plaintiff also claims that the No Reemployment provision, revived by the
12 Amended Agreement, violates the Older Workers Benefit Protection Act ("OWBPA").
13 29 U.S.C. § 626(f)(1). The OWBPA imposes restrictions on when an employee can
14 validly waive his right to bring an ADEA claim. Plaintiff appears to allege that the No
15 Reemployment provision is an ADEA waiver, that as an ADEA waiver the provision is
16 in violation of the OWBPA, and that this violation establishes that Defendant engaged
17 in age discrimination. Defendant argues that a violation of the OWBPA does not
18 provide an independent cause of action separate from an age discrimination claim under
19 the ADEA. While the Ninth Circuit has not yet ruled on this issue, other courts have
20 found that a violation of the OWBPA wavier provisions does not, by itself, establish age
21 discrimination. *See Whitehead v. Okla. Gas & Elec. Co.*, 187 F.3d 1184 (10th Cir.
22 1999). The "OWBPA governs the effect under federal law of waivers or releases on
23 ADEA claims." *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427, 118 S.Ct. 838,

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25 included in his Fourth Amended Complaint. This is Plaintiff's third attempt to bring his
26 claims, not including his attempt to further amend this version of his Complaint by filing two
27 praecipes after the filing of this Motion. As noted above, *pro se* litigants must still follow the
same rules of procedure as other litigants, and Plaintiff cannot be allowed to amend his
Complaint at will. To the extent that Plaintiff makes factual allegations in his Response that
are not in his Fourth Amended Complaint and cannot be inferred from the allegations in the
Fourth Amended Complaint, they will not be considered for the purposes of this Motion.

1 139 L.Ed.2d 849 (1998). It follows that the purpose of the OWBPA is to determine
2 whether an employee has waived the right to bring an ADEA claim and not to
3 determine whether age discrimination has actually occurred. Plaintiff does not cite to
4 any legal authority supporting that theory and offers no response to Defendant's
5 argument. Further, the Court notes that legislative history specifically states that the
6 waiver provisions of the OWBPA protect the rights of older workers by "ensur[ing] that
7 older workers are not coerced or manipulated into waiving their rights to seek legal
8 relief under the ADEA," establishing a clear distinction between an ADEA-based age
9 discrimination suit, and a violation of the OWBPA. 1990 U.S.C.C.A.N. 1509, 1510.
10 As noted above, to the extent that Plaintiff asserts that this provision is the basis for an
11 ADEA discrimination or retaliation claim, his claim is barred as untimely. Therefore, to
12 the extent that Plaintiff alleges that the No Reemployment provision constitutes age
13 discrimination due to an alleged violation of the OWBPA, Defendant's Motion is
14 **GRANTED.**

15 Plaintiff alleges that the No Reemployment provision violates the OWBPA
16 because he was not allowed 7 days to revoke the provision, in violation of 29 C.F.R. §
17 1625.22 (e)(2). Plaintiff makes no factual allegations to support this statement.
18 Plaintiff executed three settlement agreements in November of 2013, one of which was
19 the Amended Agreement. Shortly thereafter, Plaintiff revoked one of those settlement
20 agreements. Dkt. # 1-3 Ex. 1. Plaintiff makes no allegation that he was prevented from
21 revoking the Amended Agreement at the same time, or that he was led to believe that he
22 was unable to do so. The Court notes that Plaintiff exercised his right to revoke
23 settlement agreements on several occasions during the time period relevant to this
24 claim.

25 Plaintiff also contends that all ADEA waivers of future rights are prohibited by
26 the OWBPA, and that restrictions on Plaintiff's "future rights, including the right to
27 apply for and secure and maintain employment" are unlawful, and that Plaintiff believed

1 he had surrendered his right to “protest the enforcement of his ADEA waiver or assert
2 his ADEA claims” because he would be forced to pay back the money he received in
3 settlement from Defendant. None of these allegations support Plaintiff’s claim that the
4 No Reemployment provision violates the OWBPA. Plaintiff cites to no legal authority
5 that No Reemployment provisions constitute a per se violation of the OWBPA, or that
6 any waiver of rights and claims under the ADEA are unlawful. The OWBPA was
7 enacted to set out the minimum requirements for determining whether an ADEA waiver
8 is knowing and voluntary. If all ADEA waivers were unlawful, Congress would not
9 have amended the ADEA to better regulate them. Plaintiff also provides no explanation
10 as to how any tender-back provisions in his settlement agreements violate the OWBPA.
11 To the extent that Plaintiff alleges that the No Reemployment provision violates the
12 OWBPA, Defendant’s Motion is **GRANTED**.

13 **D. Resignation of Employment**

14 Plaintiff also claims that Defendant engaged in age discrimination and retaliation
15 when he was forced to resign his positions with Compass Airlines and ATS in 2017.
16 Dkt. # 45 at ¶¶ 7A, 7B. Plaintiff alleges that he resigned these positions due to the No
17 Reemployment provision because he was under the impression that he was unable to
18 work on Alaska Airlines equipment. The No Reemployment only applies to waive
19 Plaintiff’s right to reemployment, reinstatement, assignment as an independent
20 contractor, and future employment with Defendant or its affiliates and subsidiaries.
21 Dkt. # 41 Ex. 1. Plaintiff does not allege that either Compass Airlines or ATS is an
22 affiliate or subsidiary of Defendant, merely that while employed there, there was a
23 possibility that he may need to work on Alaska Airlines Equipment. Plaintiff does not
24 allege that either employer intended to assign him to or on behalf of Defendant as an
25 independent contractor. Plaintiff makes no allegations that support his claim that
26 Defendant is liable for Plaintiff’s voluntary resignations, or that they had any
27 involvement in the termination of his employment. Further, to the extent that Plaintiff

1 claims that the No Reemployment provision is in itself age discrimination in violation
2 of the ADEA, that claim is again untimely. To the extent that Plaintiff claims that
3 Defendant engaged in age discrimination and retaliation resulting in the termination of
4 his employment with Compass Airlines and ATS, Defendant's Motion is **GRANTED**.

5 E. Equitable Tolling

6 As with Plaintiff's previous Complaint, the Fourth Amended Complaint appears
7 to allege that Plaintiff is entitled to equitable tolling or equitable estoppel of the
8 limitations period for bringing this suit. Under federal law, equitable tolling is applied
9 "sparingly." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453, 112
10 L.Ed.2d 435 (1990). The equitable tolling doctrine focuses on whether there was
11 excusable delay by the plaintiff. *Lukovsky v. City & Cty. of San Francisco*, 535 F.3d
12 1044, 1051 (9th Cir. 2008). "Equitable estoppel, on the other hand, focuses primarily
13 on actions taken by the defendant to prevent a plaintiff from filing suit, sometimes
14 referred to as 'fraudulent concealment.'" *Id.*

15 For the same reasons stated in the Court's previous Order, equitable tolling and
16 equitable estoppel do not serve to excuse Plaintiff's failure to file his claim within the
17 limitations period. Plaintiff repeatedly asserts that Defendant acted to delay his
18 "discovery" that he had a right to bring these claims but makes no factual allegations to
19 support this assertion. Plaintiff alleges that the "ADEA waiver documents" were
20 misleading, coercive and threatening, but again, does not allege that Defendant acted to
21 prevent Plaintiff from filing suit. Plaintiff makes no argument that he diligently pursued
22 his claims or that the delay of over a year to file this lawsuit constitutes excusable delay.

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