

1 THE HONORABLE JOHN C. COUGHENOUR
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 JON FLOWERS,
11 Plaintiff,
12 v.
13 FRED HUTCHINSON CANCER
14 RESEARCH CENTER,
15 Defendant.

CASE NO. C17-0989-JCC
ORDER

16 This matter comes before the Court on Defendant's motion for partial judgment on the
17 pleadings (Dkt. No. 12). Having thoroughly considered the parties' briefing and the relevant
18 record, the Court finds oral argument unnecessary and hereby GRANTS the motion for the
19 reasons explained herein.

20 **I. BACKGROUND**

21 This section is based on the facts alleged in the complaint and written in the light most
22 favorable to the Plaintiff.

23 In 2001, Plaintiff, Jon Flowers ("Flowers"), started working for Defendant, Fred
24 Hutchinson Cancer Research Center ("Fred Hutch"). (Dkt. No. 1-1 at 3.) In 2012, Flowers
25 applied for a management position but was not selected. (*Id.*) The person Fred Hutch hired for
26 the position was less qualified than Flowers. (*Id.*) The person was Caucasian while Flowers is

1 African American. (*Id.*)

2 Flowers later learned that his manager had never even considered his application when
3 hiring for the management position. (*Id.* at 4.) Flowers filed a discrimination claim with the
4 Equal Employment Opportunity Council (EEOC). (*Id.*) After conducting an internal
5 investigation of the discrimination claim, Fred Hutch decided to terminate Flowers. (*Id.*) Flowers
6 was asked to sign a severance agreement before being officially terminated. (*Id.*) Flowers asked
7 for 21 days to review the severance agreement but Fred Hutch would only allow him two and
8 half days to review the document. (*Id.*)

9 After reviewing the severance agreement, Flowers decided he would not agree to its
10 terms. (*Id.*) Fred Hutch subsequently terminated Flowers for “poor performance.” (*Id.*) After
11 filing a retaliation complaint with the EEOC, Flowers was subsequently provided with a right-to-
12 sue letter against Fred Hutch. (*Id.*) Flowers brought this lawsuit charging Fred Hutch with
13 disparate treatment and retaliation under Title VII of the Civil Rights Act, as well as violation of
14 The Older Workers Benefit Protection Act (OWBPA). (*Id.* at 5–6.)

15 Flowers states that “as a result of Defendant’s failure to comply with the Older Workers
16 Benefit Protection Act, Plaintiff has suffered damages in an amount to be determined at trial.”
17 Fred Hutch’s motion for partial judgment on the pleadings only deals with Flowers’ OWBPA
18 claim. (Dkt. No. 12 at 1.) (Dkt. No. 1-1 at 6.)

19 **II. DISCUSSION**

20 **A. Legal Standard**

21 A motion for judgment on the pleadings may be brought “after the pleadings are closed—
22 but early enough not to delay trial.” Fed. R. Civ. P. 12(c). “A Rule 12(c) motion challenges the
23 sufficiency of the opposing party’s pleadings and operates in much the same manner as a motion
24 to dismiss under 12(b)(6).” *Morgan v. Yolo*, 436 F. Supp. 2d 1152, 1154–55 (E.D. Cal. 2006).
25 “Judgment on the pleadings is proper when the moving party clearly establishes on the face of
26 the pleadings that no material issue of fact remains to be resolved and that it is entitled to

1 judgment as a matter of law.” *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542,
2 1550 (9th Cir. 1989). The court construes all material allegations in the light most favorable to
3 the non-moving party. *Deveraturda v. Globe Aviation Sec. Servs.*, 454 F.3d 1043, 1046 (9th Cir.
4 2006). Thus, a “Motion for Judgment on the Pleadings may consequently be granted if, after
5 assessing both the complaint, plus matters for which judicial notice is proper, it appears ‘beyond
6 doubt that the [non-moving party] cannot prove any facts that would support his claim for
7 relief.’” *Morgan*, 436 F. Supp. 2d at 1155 (quoting *R.J. Corman Derailment Services, LLC v.*
8 *Int'l Union of Operating Engineers, Local 150*, 335 F.3d 643, 647 (7th Cir. 2003)).

9 **B. Flowers does not have a cognizable claim under OWBPA**

10 OWBPA is an amendment to the Age Discrimination in Employment Act (ADEA) that,
11 among other things, imposes restrictions on when an employee can validly waive her right to
12 bring an ADEA claim. *See* 29 U.S.C. § 626(f); *Oubre v. Entergy*, 522 U.S. 422, 427 (1998).
13 Relevant to Flowers’ lawsuit, an employee cannot waive an age discrimination claim as part of a
14 severance agreement unless the waiver is made in writing and “the individual is given a period of
15 at least 21 days within which to consider the agreement.” 29 U.S.C. § 626(f)(1)(F)(i).

16 Flowers alleges that Fred Hutch violated OWBPA when it asked Flowers to sign a
17 severance agreement containing a waiver of ADEA claims without providing him 21 days to
18 review the agreement. (Dkt. No. 18 at 2.) Fred Hutch counters that a violation of OWBPA does
19 not provide a cause of action separate from an age discrimination claim under ADEA, and,
20 alternatively, by refusing to sign the agreement Flowers did not suffer an injury under OWBPA.
21 (Dkt. No. 12 at 1.) The Court need not decide whether an OWBPA violation provides an
22 independent cause of action because the undisputed facts demonstrate that Flowers did not suffer
23 an injury based on Fred Hutch’s alleged failure to comply with OWBPA’s waiver provisions.¹

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25 ¹ While the Ninth Circuit has not decided whether a violation of OWBPA’s waiver provisions
26 represent an independent cause of action, almost every court that has addressed the issue has held
it does not. *See e.g. Whitehead v. Okla. Gas & Elec. Co.*, 187 F.3d 1184 (10th Cir. 1999).

1 To have standing in federal court, a plaintiff must have suffered an “injury in fact” which
2 is “an invasion of a legally protected interest which is...concrete and particularized.” *Lujan v.*
3 *Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citation omitted). The party invoking federal
4 jurisdiction has the burden of proving the standing requirement. *Id.* at 561.

5 There is no dispute that Flowers did not sign the severance agreement offered by Fred
6 Hutch. (Dkt. No. 1-1 at 4.) (“After reviewing the severance agreement, Plaintiff decided he did
7 not want to agree to its terms under the circumstances.”) By not signing the agreement, Flowers
8 never waived his right to bring an ADEA claim against Fred Hutch. Flowers did not suffer an
9 injury that is cognizable under OWBPA merely because Fred Hutch asked him to sign an
10 agreement that would have been unenforceable under that law. By not signing, Flowers avoided
11 the harm that the OWBPA waiver provisions are meant to protect against.

12 The Third Circuit has reached the same conclusion on this exact issue. *See Lawrence v.*
13 *National Westminster Bank*, 98 F.3d 61, 72 (3d Cir. 1996). In *Lawrence*, the court upheld the
14 dismissal of the plaintiff’s OWBPA claim where he refused to enter a severance agreement that
15 would have violated the law’s 21-day review period. *Id.* The court found that “The alleged effort
16 to induce [plaintiff] to sign the agreement could not result in a violation of OWBPA’s waiver
17 provisions.” *Id.* at 72. Therefore, the plaintiff did not have standing to sue under OWBPA. *Id.*

18 Flowers cites to a general provision of the ADEA which provides that “in any action
19 brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable
20 relief as may be appropriate to effectuate the purposes of this chapter. . .” 29 U.S.C. § 626(b).
21 Whether or not Flowers could bring a lawsuit under ADEA does not change the fact that he has
22 not demonstrated he suffered an injury as a result of Fred Hutch’s attempt to get him to sign the
23 severance agreement.

24 Flowers does not have standing to bring a claim against Fred Hutch under OWBPA
25 because he did not suffer an injury under that statute when he refused to sign the allegedly illegal
26 severance agreement. Since there is no genuine issue of material fact on this issue, Fred Hutch is

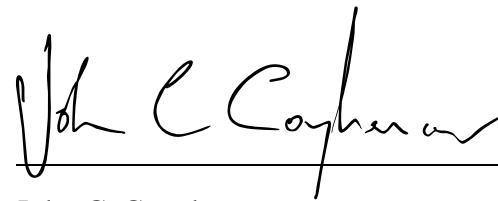
1 entitled to judgment on that claim as a matter of law.

2 **III. CONCLUSION**

3 For the foregoing reasons, Defendant's motion for partial judgment on the pleadings
4 (Dkt. No. 12) is GRANTED. Plaintiffs' claim under OWBPA is DISMISSED with prejudice.
5 The Court chooses to dismiss with prejudice because under the undisputed facts, the claim could
6 not be saved with further amendment. *See Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*,
7 368 F.3d 1053, 1061 (9th Cir. 2004). Therefore, Plaintiff's claim is DISMISSED with prejudice.

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9 DATED this 19th day of September, 2017.



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11 John C. Coughenour

12 UNITED STATES DISTRICT JUDGE

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