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HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EDNA LASSAIR,

Plaintiff,

v.

PETER O’ROURKE, SECRETARY
DEPARTMENT OF VETERANS
AFFAIRS,

Defendant.

CASE NO. C17-1638 RAJ

ORDER

This matter comes before the Court on Defendant Robert Wilkie, Acting Secretary, Department of Veterans Affairs’ (“Defendant”) Motion for Summary Judgment. Dkt. # 10. Plaintiff opposes, and Defendant has filed a Reply. Dkt. ## 13, 15. Having considered the submissions of the parties, the relevant portions of the record, and the applicable law, the Court finds that oral argument is unnecessary. For the reasons that follow, Defendant’s Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART**. Dkt. # 10.

I. BACKGROUND

1 The parties do not dispute the basic facts of this case.¹ Plaintiff is a former
2 employee of the VA who began working in 2008 as a Rating Veterans Service
3 Representative. Dkt. # 12 at p. 2, ¶ 3. Her position entailed reviewing veterans' medical
4 and military records to make service connected disability decisions. *Id.*

5 In 2009, Plaintiff's work coach issued her a written counseling due to claimed
6 unacceptable performance. Complaint (Dkt. #1-2) at ¶ 6. In April 2010, the VA placed
7 Plaintiff on a Performance Improvement Plan ("PIP"). *Id.* at ¶ 12; *see also* Dkt. # 12-3 at
8 2. In May 2011, the VA issued Plaintiff a "Warning of Unacceptable Performance—
9 Performance Improvement Plan," which rescinded the prior PIP and issued a new one.
10 *Id.* After receiving the new PIP, Plaintiff contacted the EEOC in June 2011, alleging that
11 the issuance of the PIP created a hostile work environment based on her race, age, and
12 disability. *Id.* As a remedy, she sought to have the agency remove her from the PIP. *Id.*;
13 *see also* Dkt. # 12-1.

14 In August 2011, the parties participated in a mediation and reached a settlement
15 agreement. Dkt. # 12 at p. 2, ¶ 5. Plaintiff signed the agreement, and so did both her
16 Representative and Chief Union Steward. *Id.*; Dkt. # 12-2. The settlement agreement
17 stated that in exchange for certain undertakings by the VA, Plaintiff would "waive,"
18 among other rights, "all other civil or administrative proceedings of the Complaint or
19 issues related to it in whatever forum," and also "release VA and all of its officers,
20 agents, and employees from all claims that she has or may have against them arising out
21 of the events and circumstances related to the Complaint." Dkt. # 12-2 at 2.

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24 ¹ A large portion of Plaintiff's Statement of Facts, though mirroring Defendant's in many
25 respects, is a copy-pasted recitation of Plaintiff's allegations in her Complaint, and is not
26 accompanied by any declaration or other verifying evidence. Dkt. # 13 at 1-5. The Court does
27 not accept these unsupported facts on summary judgment; instead, it will accept Defendant's
28 supported factual averments as uncontested, except for the evidence attached as exhibits to the
Declaration of Harold Franklin (Dkt. # 14). Fed. R. Civ. P. 56(c)(1), (e).

1 Plaintiff filed a notice alleging breach of the settlement agreement in March 2012.
2 Dkt. # 12 at p. 3, ¶ 7. In adjudicating the claimed breach, the Acting Chief, Policy and
3 Compliance, of Office of Resolution Management (“ORM”) found that the agency did
4 not breach the settlement agreement. Dkt. # 14 at pp. 16-17, ¶¶ 5-6. However, ORM
5 also found that the settlement agreement was not enforceable because it did not contain a
6 waiver under the Older Workers Benefit Protection Act (“OWBPA”). *Id.* at p. 18, ¶ 9.

7 Plaintiff voluntarily resigned her position with the VA effective January 31, 2014.
8 Dkt. # 12 at p. 3, ¶ 10. She has not worked for the VA since her resignation. *Id.*

9 The VA appealed the decision of the ORM to the EEOC. Dkt. # 12 at p. 3, ¶ 8.
10 Later, in April 2017, the EEOC issued a Notice of Intent to Dismiss Plaintiff’s
11 discrimination claims based on the settlement agreement. Dkt. # 12-3. The EEOC
12 explained that plaintiff never claimed that the settlement agreement was void; instead,
13 she sought to have it enforced and claimed that the VA breached the agreement. *Id.* at p.
14 4. The EEOC found that the settlement agreement as a whole was not void. *Id.* at pp. 4-
15 5. The EEOC also concluded that the ORM lacked authority to void the settlement
16 agreement because plaintiff never appealed her claim to the EEOC’s Office of Federal
17 Operations (“OFO”), and because plaintiff requested that the EEOC enforce the
18 agreement. *Id.* The EEOC afforded Plaintiff the choice between two remedies: “either
19 (1) she can appeal the Agency’s determination of no breach to OFO, which may overturn
20 the Agency determination and order specific enforcement or (2) she can herself chose to
21 void the settlement agreement and proceed with the processing of her EEO complaint.”
22 *Id.* at p. 5.

23 Subsequently, Plaintiff requested to void the settlement agreement and proceed
24 with the processing of her EEO complaint. Dkt. # 12-4. The VA then submitted
25 supplemental briefing arguing that under United States Supreme Court authority, a failure
26 to include an OWBPA waiver did not void the entire settlement agreement. *Id.* On April
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1 26, 2017, the EEOC held that the failure to include an OWBPA waiver voided only
2 plaintiff's settlement of her claim under the ADEA, but did not void the settlement
3 agreement as to her other discrimination claims. *Id.*

4 Following that decision, the VA also moved to dismiss plaintiff's ADEA claim.
5 While that motion was pending, Plaintiff filed her lawsuit in state court; Defendant then
6 removed the case to this Court. Dkt. #1. On March 23, 2018, Defendant filed this
7 Motion for Summary Judgment; Plaintiff opposed, and Defendant filed a Reply. Dkt. ##
8 14, 15, 16.

9 **II. LEGAL STANDARD**

10 Summary judgment is appropriate if there is no genuine dispute as to any material
11 fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.
12 56(a). The moving party bears the initial burden of demonstrating the absence of a
13 genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).
14 Where the moving party will have the burden of proof at trial, it must affirmatively
15 demonstrate that no reasonable trier of fact could find other than for the moving party.
16 *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). On an issue where
17 the nonmoving party will bear the burden of proof at trial, the moving party can prevail
18 merely by pointing out to the district court that there is an absence of evidence to support
19 the non-moving party's case. *Celotex Corp.*, 477 U.S. at 325. If the moving party meets
20 the initial burden, the opposing party must set forth specific facts showing that there is a
21 genuine issue of fact for trial in order to defeat the motion. *Anderson v. Liberty Lobby,*
22 *Inc.*, 477 U.S. 242, 250 (1986). The court must view the evidence in the light most
23 favorable to the nonmoving party and draw all reasonable inferences in that party's favor.
24 *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150-51 (2000).

25 However, the court need not, and will not, "scour the record in search of a genuine
26 issue of triable fact." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996); *see also*,

1 *White v. McDonnell-Douglas Corp.*, 904 F.2d 456, 458 (8th Cir. 1990) (the court need not
2 “speculate on which portion of the record the nonmoving party relies, nor is it obliged to
3 wade through and search the entire record for some specific facts that might support the
4 nonmoving party’s claim”). The opposing party must present significant and probative
5 evidence to support its claim or defense. *Intel Corp. v. Hartford Accident & Indem. Co.*,
6 952 F.2d 1551, 1558 (9th Cir. 1991). Uncorroborated allegations and “self-serving
7 testimony” will not create a genuine issue of material fact. *Villiarimo v. Aloha Island*
8 *Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002); *T.W. Elec. Serv. V. Pac Elec. Contractors*
9 *Ass’n*, 809 F. 2d 626, 630 (9th Cir. 1987).

10 **III. DISCUSSION**

11 Defendant argues that the parties’ settlement agreement bars all of Plaintiff’s
12 claims except for age discrimination. Dkt. # 10 at 5-9. Plaintiff does not dispute that the
13 settlement agreement, on its terms, bars Plaintiff’s non-age discrimination claims. Nor
14 does Plaintiff rebut Defendant’s evidence that the VA complied fully with the settlement
15 agreement, or offer any evidence of its own that Defendant has failed to adhere to the
16 terms of the settlement agreement.² Dkt. # 12 at pp. 2-3, ¶ 6; Dkt. # 12-3; Dkt. # 14.
17 The ORM and EEOC both determined that that the VA did not breach the settlement
18 agreement, and this Court gives deference to those findings, absent evidence to the
19 contrary. *See, e.g., E.E.O.C. v. California Psychiatric Transitions, Inc.*, 725 F. Supp. 2d
20 1100, 1113 (E.D. Cal. 2010)(“[C]ourts give deference to the EEOC administrative
21 decisions”); *see also Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash.
22 2001) (EEOC determination entitled to “some deference in employee's Title VII action
23 raising same issue”). The record currently reflects no such contrary evidence.

24 In its Response, Plaintiff’s only argument on this point is that the VA’s ORM

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26 ² As Defendant observes, Plaintiff concedes that the two instances of alleged post-settlement
27 agreement conduct do not reflect any violation of the settlement agreement or discrimination,
28 and do not create any additional liability for Defendant. Dkt. ## 10 at pp. 7-9, 15 at p. 10.

1 declared the settlement agreement void because it did not contain the requisite OWBPA
2 language related to age discrimination claims. Dkt. # 13 at 7-8. However, Plaintiff
3 ignores the fact that the EEOC later reached the opposite conclusion. Dkt. ## 12-3, 12-4.
4 The EEOC was clear that the settlement agreement was valid and enforceable as to all of
5 Plaintiff's non-age discrimination claims:

6 Accordingly, for failure to comply with the OWBPA, the court
7 finds that the Settlement Agreement in this instant case is void
8 only with regard to the Complainant's age-based claims (i.e., she
9 can proceed in this EEOC matter only with her age discrimination
claims); the remainder of the Settlement Agreement is valid and
enforceable, and bars her from proceeding with non-age based
claims.

10 Dkt. # 12-4 at 3. The EEOC also found that the ORM "lacked authority to void the
11 settlement agreement." Dkt. # 12-3 at 5. Plaintiff did not appeal these decisions, and the
12 Court sees no reason to deviate from this sound reasoning here. Indeed, these rulings
13 comport with the law according to the Ninth Circuit and the Supreme Court, both of
14 which held that OWBPA deficiencies do not invalidate settlement agreements
15 completely; they only invalidate the parts related to age discrimination claims. *Oubre v.*
16 *Entergy Operations, Inc.*, 522 U.S. 422, 428 (1998) (holding that OWBPA deficiencies
17 permitting ADEA claims exist "irrespective of the validity of the contract as to other
18 claims."); *Harmon v. Johnson & Johnson*, 549 F. App'x 687 (9th Cir. 2013) ("[T]he
19 failure to comply with the OWBPA did not invalidate the release as to Harmon's state law
20 claims because the OWBPA applies only to federal claims under the Age Discrimination
21 in Employment Act"). The Court agrees with Defendant that it is bound to follow the
22 precedent set by higher courts. Dkt. # 15 at 4.³

23 Because the Court concludes that the settlement agreement is valid and
24 enforceable against all of Plaintiff's non-age discrimination claims, Plaintiff's claims in
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26 ³ Plaintiff also concedes Defendant's argument, echoed by the EEOC, that Plaintiff "did not void
27 the settlement agreement when she instead sought to enforce it and accepted the benefits of the
28 agreement." Dkt. # 10 at 9.

1 this suit are largely barred. Moreover, as Defendants observe (and Plaintiff concedes),
2 Plaintiff's ADA and Title I claims are not cognizable against the federal government
3 because the ADA does not apply, and Title I "does not create a substantive right and is
4 not a basis for an independent claim apart from Title VII." *Thompson v. N. Am.*
5 *Terrazzo, Inc.*, No. C13-1007RAJ, 2014 WL 2048188, at *1 (W.D. Wash. May 19,
6 2014); Dkt. # 10 at 9-10.

7 Accordingly, as to Plaintiff's non-age discrimination claims, there is no genuine
8 issue of material fact and summary judgment is appropriate. The only question remains
9 is whether this Court must also dismiss Plaintiff's potential age discrimination claim. At
10 the outset, the parties disagree on whether Plaintiff has asserted an age discrimination
11 claim under ADEA at all. Defendant claims that Plaintiff failed to make any age
12 discrimination claim in her Complaint because she did not cite the ADEA, the exclusive
13 remedy for federal employees' age discrimination claims. Dkt. # 15 at 4. Plaintiff
14 claims that the Complaint satisfies Rule 8 because she still alleged discrimination "due to
15 her race, age, and disability." Dkt. # 13 at 6-7.

16 The Court recognizes that Plaintiff's Complaint, on this point, is inartfully pled at
17 best, and appears to conflate age discrimination with statutes related to other types of
18 discrimination. Plaintiff's Complaint does not cite the ADEA for her age discrimination
19 claims. Dkt. # 1-2. However, Plaintiff's Complaint alleges multiple times that
20 Defendant engaged in "age" discrimination, and had asserted ADEA claims in earlier
21 proceedings. *Id.* at 7-8; Dkt. # 14 at 10-11, 18. Plaintiff apparently attempted to assert an
22 age discrimination claim in her Complaint when she filed it in state court, but was
23 technically unsuccessful in doing so because she did not cite the correct legal authority.

24 The Court may grant leave to amend freely when justice so desires. Fed. R. Civ.
25 P. 15(a)(2). It is true that Plaintiff's Complaint, as it currently stands, does not properly
26 assert an age discrimination claim under the ADEA. However, based on the current

1 record, the Court cannot conclude that Plaintiff's potential age discrimination claim, if
2 amended, would be futile as a matter of law, as Plaintiff's age discrimination would not
3 be barred by the settlement agreement. Accordingly, the Court will permit Plaintiff to
4 file an amended pleading properly alleging age discrimination under ADEA, **so long as**
5 **Plaintiff does so within fourteen (14) days of this Order.** If Plaintiff fails to make such
6 a filing, or if this filing does not properly allege an age discrimination claim under the
7 correct legal authority, this Court will dismiss the claim, and this case, with prejudice.

8 **IV. CONCLUSION**

9 For all the foregoing reasons, the Court **GRANTS IN PART AND DENIES IN**
10 **PART** Defendant's Motion for Summary Judgment. Dkt. # 14. Plaintiff's non-age
11 discrimination claims under are **DISMISSED WITH PREJUDICE.** Plaintiff's age
12 discrimination claim is **DISMISSED WITHOUT PREJUDICE.** Plaintiff may file an
13 amended pleading asserting an age discrimination claim within fourteen (14) days of this
14 Order; otherwise, the Court will dismiss the entire case with prejudice.

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16 Dated this 28th day of August, 2018.

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20 The Honorable Richard A. Jones
21 United States District Judge