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2
3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 RICK OLMSTEAD,

7 Plaintiff,

8 v.

9 SECRETARY OF THE NAVY RAY
10 MABUS,

11 Defendant.

CASE NO. C13-5051 BHS

ORDER GRANTING
PLAINTIFF'S MOTION FOR
VOLUNTARY DISMISSAL AND
DENYING AS MOOT
DEFENDANT'S MOTION TO
DISMISS AND/OR FOR
SUMMARY JUDGMENT

12 This matter comes before the Court on Plaintiff Rick Olmstead's ("Olmstead")
13 motion for voluntary dismissal (Dkt. 62) and Defendant Ray Mabus's ("Mabus") motion
14 to dismiss and/or for summary judgment (Dkt. 46). The Court has considered the
15 pleadings filed in support of and in opposition to the motions and the remainder of the
16 file and hereby grants Olmstead's motion and denies as moot Mabus's motion for the
17 reasons stated herein.

18 **I. PROCEDURAL HISTORY**

19 On January 23, 2013, Olmstead filed a complaint against Mabus, in his official
20 capacity as Secretary of the Navy, alleging age discrimination and harassment in
21 violation of the Age Discrimination in Employment Act. Dkt. 1. On January 29, 2014,
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1 Mabus filed a motion to dismiss and/or for summary judgment. Dkt. 16. On March 10,
2 2014, the Court granted Mabus's motion. Dkt. 31.

3 On March 21, 2014, the Court granted Olmstead leave to file an amended
4 complaint. Dkt. 32. On March 27, 2014, Olmstead filed an amended complaint, alleging
5 that the Navy retaliated against him for filing his earlier lawsuit. Dkt. 33.

6 On December 10, 2014, Mabus moved to dismiss and/or for summary judgment.
7 Dkt. 46. On December 16, 2014, Olmstead moved to voluntarily dismiss his suit under
8 Fed. R. Civ. P. 41(a)(2). Dkt. 62. On December 22, 2014, Mabus replied. Dkt. 64.

9 II. DISCUSSION

10 Olmstead moves to voluntarily dismiss under Rule 41(a)(2). Dkt. 62. Mabus does
11 not oppose Olmstead's motion. Dkt. 64. Mabus, however, argues that dismissal should
12 be with prejudice. *Id.*

13 Under Rule 41(a)(2), "an action may be dismissed at the plaintiff's request only by
14 court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2). The
15 decision to grant or deny a request pursuant to Rule 41(a)(2) is within the sound
16 discretion of the district court and is reviewed only for abuse of discretion. *Sams v.*
17 *Beech Aircraft Corp.*, 625 F.2d 273, 277 (9th Cir. 1980). "A district court should grant a
18 motion for voluntary dismissal under Rule 41(a)(2) unless a defendant can show that it
19 will suffer some plain legal prejudice as a result." *Smith v. Lenches*, 263 F.3d 972, 975
20 (9th Cir. 2001).

21 In order to protect the defendant's interest in having to relitigate the matter, the
22 Court may condition "the dismissal without prejudice upon the payment of appropriate

1 costs and attorney fees.” *Westlands Water Dist. v. United States*, 100 F.3d 94, 97 (9th
2 Cir. 1996). The defendant, however, “should only be awarded attorney fees for work
3 which cannot be used in any future litigation of these claims.” *Id.* (citing *Koch v.*
4 *Hankins*, 8 F.3d 650, 652 (9th Cir. 1993)).

5 Here, Mabus does not oppose Olmstead’s motion, and no legal prejudice has been
6 identified. The Court therefore grants Olmstead’s motion for voluntary dismissal. In
7 order to protect Mabus’s interest, the Court conditions this dismissal on the payment of
8 costs and attorney fees for work that cannot be used in future litigation of Olmstead’s
9 claims. Accordingly, the Court will set a briefing schedule to determine the proper
10 amount, if any, of Mabus’s costs and fees.

11 III. ORDER

12 Therefore, it is hereby **ORDERED** that Olmstead’s motion for voluntary
13 dismissal (Dkt. 62) is **GRANTED**. This action is **DISMISSED without prejudice**.
14 Mabus’s motion to dismiss and/or for summary judgment (Dkt. 46) is **DENIED as moot**.

15 Mabus may file a brief regarding the proper amount of costs and fees no later than
16 January 16, 2015. Olmstead may file a response brief no later than January 23, 2015.
17 The Clerk shall note the issue for consideration on January 23, 2015.

18 Dated this 31st day of December, 2014.

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21 BENJAMIN H. SETTLE
22 United States District Judge