NOT FOR PUBLICATION

FILED

OCT 26 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARILEE BROWN, Plaintiff-Appellant, v. RYAN K. ZINKE, Secretary of the U.S. Department of Interior; UNITED STATES FISH AND WILDLIFE SERVICE, Defendants-Appellees.	No. 17-16063 D.C. No. 2:16-cv-00637-MCE-CKD MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, Jr., District Judge, Presiding

Submitted October 22, 2018**

Before: SILVERMAN, GRABER, and GOULD, Circuit Judges.

Marilee Brown appeals pro se from the district court's judgment dismissing her Title VII action alleging a retaliation claim. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal under Federal Rule of Civil

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Procedure 12(b)(6). *Wood v. City of San Diego*, 678 F.3d 1075, 1080 (9th Cir. 2012). We affirm.

The district court properly dismissed Brown's action because Brown failed to allege facts sufficient to state a plausible retaliation claim. *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1064-65 (9th Cir. 2002) (setting forth elements of a retaliation claim, and explaining that "in order to support an inference of retaliatory motive, the termination must have occurred fairly soon after the employee's protected expression" (citation and internal quotation marks omitted)).

The district court did not abuse its discretion in denying Brown's motion for reconsideration because Brown failed to set forth any basis for relief. *See Sch. Dist. No. 1J, Multnomah Cty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1262-63 (9th Cir. 1993) (setting forth standard of review and grounds for reconsideration under Fed. R. Civ. P. 59(e) and 60(b)); *see also* E.D. Cal. R. 230(j) (setting forth basis for reconsideration under local rules).

We do not consider matters not specifically and distinctly raised and argued in the opening brief. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

Brown's request for mediation, set forth in her opening brief, is denied.

AFFIRMED.

FILED

MAR 26 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARILEE BROWN, Plaintiff-Appellant, v. DAVID BERNHARDT, Acting Secretary of the U.S. Department of Interior; UNITED STATES FISH AND WILDLIFE SERVICE, Defendants-Appellees.	No. 17-16063 D.C. No. 2:16-cv-00637-MCE-CKD Eastern District of California, Sacramento ORDER

Before: SILVERMAN, GRABER, and GOULD, Circuit Judges.

Brown's petition for panel rehearing (Docket Entry No. 30) is denied.

No further filings will be entertained in this closed case.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MARILEE BROWN,

Plaintiff,

v.

SALLY JEWELL,

Defendant.

No. 2:16-cv-00637 MCE CKD PS

ORDER

This matter was referred to a United States Magistrate Judge pursuant to Local Rule 302(c)(21).

On February 28, 2017, the magistrate judge filed findings and recommendations herein which were served on the parties and which contained notice to the parties that any objections to the findings and recommendations were to be filed within fourteen days. Objections to the findings and recommendations have been filed.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

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Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed February 28, 2017 are adopted in full; and
2. Defendant's motion to dismiss (ECF No. 19) is granted without leave to amend; and
3. This action is closed.

IT IS SO ORDERED.

Dated: March 22, 2017

MORRISON C. ENGLAND, JR
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MARILEE BROWN,

Plaintiff,

v.

SALLY JEWELL,

Defendant.

No. 2:16-cv-0637 MCE CKD PS

ORDER AND

FINDINGS AND RECOMMENDATIONS

Pending before the court is defendant's motion to dismiss. This matter was submitted on the briefs. ECF No. 31; E.D. Cal. L.R. 230(g). Upon review of the documents in support and opposition, and good cause appearing therefor, THE COURT FINDS AS FOLLOWS:

In this action, plaintiff alleges retaliation arising out of her employment and subsequent removal from her law enforcement position as a United States Fish and Wildlife Service ("USFWS") criminal investigator. In the complaint, plaintiff alleges one omnibus cause of action for retaliation, whistleblowing, discrimination on the basis of sex, perceived disability and age. The allegations in the complaint, however, relate only to plaintiff's claim that defendants engaged in retaliation against plaintiff for her protected EEO activities.

In 2005, plaintiff sustained a back injury, for which she filed a worker's compensation claim. Plaintiff again injured her back in 2009. Although plaintiff was released to full duty by her treating physician, plaintiff was placed on activity restrictions by the physician. Plaintiff was

thereafter removed from her position due to physical inability to perform the essential functions of her position, effective June 27, 2012. In support of the removal, the agency relied on a fitness-for-duty report completed on April 11, 2011 by a reviewing physician from the Department of Health and Human Services' Federal Occupational Health Services. Plaintiff's removal was upheld by the Merit Systems Protection Board ("MSPB").

Defendant moves to dismiss under Federal Rule of Civil Procedure 12(b)(6).[1] Plaintiff has filed an opposition comprising 407 pages, including exhibits. The exhibits submitted by plaintiff have not been considered by the court in ruling on the motion to dismiss as they are not referred to in the complaint and are not subject to judicial notice.[2]

In considering a motion to dismiss for failure to state a claim upon which relief can be granted, the court must accept as true the allegations of the complaint in question, Erickson v. Pardus, 127 S. Ct. 2197, 2200 (2007), and construe the pleading in the light most favorable to the plaintiff, see Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

In order to avoid dismissal for failure to state a claim a complaint must contain more than "naked assertions," "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-557 (2007). In other words, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Furthermore, a claim upon which the court can grant relief has facial plausibility. Twombly, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678.

Plaintiff's claim for retaliation has three elements. Plaintiff must allege that she engaged in protected activity, that she suffered an adverse action, and that there is a causal link between

[1] Defendant submits two MSPB decisions as background context for the motion to dismiss and requests that the court take judicial notice of these documents. The MSPB decisions are properly subject to judicial notice and defendant's request will therefore be granted.

[2] The court has considered plaintiff's exhibits insofar as they are relevant to the determination of whether leave to amend should be granted.

the protected activity and the adverse action. See T.B. ex rel Brenneise v. San Diego Unified School Dist., 806 F.3d 451, 473 (9th Cir. 2015) (retaliation standard under Title VII of the Civil Rights Act of 1964); see also Poland v. Chertoff, 494 F.3d 1174, 1180 (9th Cir. 2007) (retaliation claim brought under Age Discrimination in Employment Act); Coons v. U.S. Dep't Treasury, 383 F.3d 879 (9th Cir. 2004) (Rehabilitation Act). Defendant moves to dismiss plaintiff's retaliation claim on the ground that she fails to allege any facts demonstrating causation. Assuming arguendo that plaintiff has sufficiently pled the first two elements, defendant is correct that plaintiff fails to allege plausible facts supporting an inference of causation. Plaintiff's claim for retaliation is predicated on her involvement with EEOC proceedings dating back to 1996 which involved her sister and her own employment discrimination claim which plaintiff settled in 2008. The adverse action about which plaintiff complains is the fitness for duty examination conducted in 2011, and her subsequent termination in June 2012 as medically unqualified for her position after plaintiff refused other positions that were offered to her as an accommodation. The lapse in time between the alleged protected activity and the adverse action is simply too long to give rise to an inference of causation. See Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1065 (9th Cir. 2002) (18-month lapse too long to give rise to inference of causation).

In opposition, plaintiff now asserts that she filed an EEO claim in January 2012 and contends this was the protected activity giving rise to the alleged retaliation. However, the fitness for duty examination, upon which plaintiff's termination was based, was conducted in 2011. An alleged adverse action which predates the alleged protected activity cannot serve as the basis for a retaliation claim. In addition, plaintiff's conclusory allegation that at least seven managers and supervisors conspired over two decades to retaliate against plaintiff, without more, is implausible on its face. The motion to dismiss should be granted.

Plaintiff's opposition, while prolix, does not suggest that amendment would be anything other than futile. Plaintiff raises a myriad of other vague, amorphous and conclusory claims in her opposition relating to alleged discriminatory actions based on perceived disability, age and gender. Plaintiff fails to demonstrate in her opposition how she can allege, within the strictures of Federal Rule of Civil Procedure 11, the elements necessary to establish any of these claims.

Because it appears amendment would be futile, the motion to dismiss should be granted with prejudice.

Accordingly, IT IS HEREBY ORDERED that defendant's request for judicial notice (ECF No. 20) is granted; and

IT IS HEREBY RECOMMENDED that:

1. Defendant's motion to dismiss (ECF No. 19) be granted without leave to amend; and

2. This action be closed.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: February 28, 2017

Carolyn K. Delaney

CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MARILEE BROWN, Pro Se,

Plaintiff,

v.

SALLY JEWELL, as Secretary of the U.S. Department of the Interior; THE UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Defendants.

No. 2:16-cv-00637-MCE-CKD-PS

ORDER

Plaintiff Marilee Brown, proceeding in pro se ("Plaintiff") filed the instant action on grounds that she was subject to retaliation arising out of her employment and subsequent removal as a criminal investigator for the United States Fish and Wildlife Service ("USFWS"). She sues both Sally Jewell, as Secretary of the Department of the Interior, and the USFWS (collectively referred to as "the Federal Defendants").

The Federal Defendants moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) on grounds that Plaintiff failed to state any cognizable claim for retaliation. By Findings and Recommendations filed on February 28, 2017 (ECF No. 33), the assigned Magistrate Judge recommended that the Federal Defendants' Motion be granted. Thereafter, on March 23, 2017, the undersigned adopted those findings and

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Appendix B

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recommendations and dismissed Plaintiff's case without leave to amend. (ECF No. 36)

On March 16, 2017, Plaintiff filed a Request for Reconsideration purporting to include further supporting arguments (ECF No. 39).

Under Eastern District Local Rule 230(j), an application for reconsideration must show what new or different facts are claimed to exist at the time of reconsideration which did not exist beforehand, or what other grounds exist for the Motion. Plaintiff's instant request fails to meet that standard. Despite claiming otherwise, Plaintiff provides no new or different facts or circumstances indicating that reconsideration is appropriate. Nor does Plaintiff do more than rehash the same legal issues that have already been decided against him. Plaintiff's Request for Reconsideration (ECF No. 39) is accordingly DENIED.

IT IS SO ORDERED.

Dated: January 3, 2018

MORRISON C. ENGLAND, JR
UNITED STATES DISTRICT JUDGE

Additional material from this filing is available in the Clerk's Office.