No._____

IN THE SUPREME COURT OF THE UNITED STATES

Tatyana Evgenievna Drevaleva

PETITIONER
vs.

Mr. Denis Richard McDonough as a Secretary of the U.S. Department of Veterans Affairs

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE 10TH CIRCUIT

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI.

Tatyana Evgenievna Drevaleva, Petitioner Pro Se
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Appendix A.

Part 1.
The July 11, 2022 Order and Judgment of the U.S.
Court of Appeals for the 10th Circuit
in Appeal No. 21-2139
after case No. 1:21-cv-00761-WJ-JFR
(Document: 010110708480.)

FILED
United States Court of Appeal
Tenth Circuit

July 11, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

TATYANA EVGENIEVNA DREVALEVA,

Plaintiff - Appellant,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; DENIS RICHARD McDONOUGH, United States Secretary of Veterans Affairs; ROBERT WILKIE,

Defendants - Appellees.

No. 21-2139
(D.C. No. 1:21-CV-00761-WJ-JFR)
(D. N.M.)

ORDER AND JUDGMENT*

Before **HARTZ**, **HOLMES**, and **McHUGH**, Circuit Judges.

Tatyana Evgenievna Drevaleva appeals the district court's order dismissing her employment discrimination lawsuit against her former employer and several individual defendants as a sanction for not following the court's orders and rules. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

BACKGROUND

Ms. Drevaleva worked as a medical instrument technician at the Veterans Affairs Medical Center (VAMC) in New Mexico. After working there for about six weeks and while still in the probationary period of her employment, she asked her supervisor for leave without pay (LWOP) for six weeks to travel to Russia, where she planned to undergo in-vitro fertilization and search for a surrogate mother. Her supervisor informed her that to qualify for unpaid leave under the Family Medical Leave Act (FMLA), she had to be employed by VAMC for at least a year. She submitted a written LWOP request and left for Russia without waiting for approval. The request was denied and she was terminated for taking leave without permission. In the meantime, the VAMC hired two younger male technicians.

Ms. Drevaleva moved from New Mexico to California and filed an employment discrimination complaint against the Department of Veterans Affairs and the Secretary of Veterans Affairs in the Northern District of California, asserting claims for (1) gender and pregnancy discrimination; (2) disability discrimination and failure to accommodate; (3) age discrimination; (4) tort claims for libel and intentional infliction of emotional distress; and (5) deprivation of liberty and property without due process. She also filed a motion for a preliminary injunction, seeking reinstatement.

The district court denied the motion for a preliminary injunction. It also denied her motions to disqualify two assistant U.S. attorneys handling her case, barred her from filing more motions to disqualify, and denied a motion seeking leave

to file another motion to disqualify. The court ultimately dismissed some claims for lack of subject matter jurisdiction and dismissed the rest for failure to state a claim, but gave her an opportunity to seek leave to amend the complaint. She appealed the denial of the preliminary injunction to the Ninth Circuit and filed motions for an injunction in both district court and the Ninth Circuit. Both courts denied her motions for injunction pending appeal, and the Ninth Circuit affirmed the denial of her motion for preliminary injunction.

While the appeal was pending, Ms. Drevaleva filed an affidavit claiming the district court judge was biased against her. The court treated the affidavit as a motion to disqualify and another district court judge denied it, finding no evidence of partiality. She also moved to amend her complaint. After the appeal was resolved, the court denied the motion to amend as futile and entered judgment for defendants.

Ms. Drevaleva appealed the dismissal order to the Ninth Circuit. She filed another motion for preliminary injunction pending appeal in district court, which was denied. The Ninth Circuit denied her motions to vacate, for change of venue, and for injunction. It then reversed the dismissal order in part and remanded for reinstatement of the sex discrimination and failure-to-accommodate claims.

On remand, Ms. Drevaleva filed another motion for preliminary injunction. The district court denied it because, as in her previous motions, she did not address the standard for obtaining a preliminary injunction and failed to show a likelihood of success on the merits. The court also prohibited her from filing any additional

motions for preliminary injunction without leave. She appealed the denial of her preliminary injunction motion, and the Ninth Circuit affirmed.

Ms. Drevaleva then filed a slew of motions in district court, including for leave to seek a permanent injunction (since she was barred from seeking a preliminary injunction), for summary judgment, for default judgment, for judgment on the pleadings, to file supplemental briefs, to strike defendants' answer, to disqualify opposing counsel, and to transfer the case to the District of New Mexico. The court granted the motion to transfer and denied the other motions.

In the District of New Mexico, Ms. Drevaleva requested an expedited combined jury trial and hearing on a motion for permanent injunction, which the court denied because she had not filed a motion for preliminary injunction. She filed an appeal from that interlocutory order in this court. In the meantime, she filed a flurry of motions in district court, including motions for electronic case filing (ECF) privileges, for an expedited jury trial, for court-appointed counsel, to disqualify opposing counsel, for partial summary judgment, and an application for certification of her lawsuit as one of general public importance. She also filed a notice that the local rule governing summary judgment procedures did not apply to her and numerous filings she characterized as supplemental.

On September 14, 2021, the district court entered an order striking or denying all of the pending motions, referring the case to a magistrate judge, staying the case until the magistrate judge's issuance of a scheduling order, and ordering that any new filings be stricken. In denying her motions and striking her "rash of repetitive

filings," R. at 556, the court outlined her abusive litigation practices while her case was pending in the Northern District of California, and it denied her request for ECF privileges based on her persistent "abuse of the privilege" in that court and her continued abuses after the case was transferred, R. at 543. The court detailed the ways in which her filings violated the federal and local rules—including the requirement to confer with opposing counsel before filing a motion and the page limitations and other requirements for summary judgment motions—and it found that her conduct "demonstrates a headstrong refusal to familiarize herself and comply with the rules of this Court." R. at 544. It expressed particular concern about her motion to disqualify defense counsel, which contained "offensive" and "baseless" accusations that counsel committed fraud, multiple felonies, and genocide, R. at 552-53, and which the court concluded came "perilously close to a Rule 11 violation," R. at 557. The court also found Ms. Drevaleva repeatedly violated the prohibition on ex parte communications with the judge and staff by "bombard[ing] chamber[s]" with multiple daily "belligerent and abusive" calls and e-mails. *Id.* It ordered her to stop contacting chambers directly and warned her "that a continuation of non-compliance with the federal procedural rules and this Court's local rules and orders" could result in "filing restrictions or sanctions to include dismissal of the case." *Id.* (bolding omitted).

The next day, Ms. Drevaleva e-mailed the judge (once ex parte), demanding that he recuse himself and seeking reconsideration of the denial of ECF privileges.

On September 17, 2021, the court issued an initial scheduling order. Among other things, the order set a deadline for the parties to meet and confer and file a Joint Status Report and Provisional Discovery Plan (JSR). The order provided a detailed explanation of the requirements for preparing and submitting the JSR.

Soon thereafter, Ms. Drevaleva e-mailed opposing counsel, the judge, and the magistrate judge a 264-page document she called her "Statement of Facts." R. at 618-881 (capitalization and emphasis omitted). Over the next several days, she sent more e-mails to the same group, ostensibly as part of her obligation to meet and confer with opposing counsel, attaching over 1500 pages of documents that she said were excerpts from the record in her Ninth Circuit appeal, and her objections to facts of an unspecified origin. She then filed several notices and motions and 23 certificates of service concerning letters she had sent to various individuals, including VA employees, federal judges, and opposing counsel, notifying them of her intent to add them as defendants.

On September 28, 2021, the court issued an order striking Ms. Drevaleva's filings, finding that they violated the September 14 stay order and did not comply either with the requirements of the scheduling order for preparation and submission of a JSR or the meet-and-confer requirements of Fed. R. Civ. P. 26(f). The court again ordered her to stop contacting chambers directly, explaining that doing so was prohibited even if she copied opposing counsel and that documents e-mailed to chambers would not be filed with the court. The court found that her habitual noncompliance was "intentional" and "rampant," and it admonished her that

"continuing this pattern of conduct will" result in "the imposition of SANCTIONS by the Court, MOST LIKELY DISMISSAL of her lawsuit." R. at 569. It further warned that "this Order serves as her FINAL WARNING" that any subsequent violations of court orders and rules "will result in" sanctions, "**INCLUDING DISMISSAL OF HER CASE WITH PREJUDICE, WITHOUT FURTHER NOTICE.**" R. at 572.

Undeterred, Ms. Drevaleva e-mailed the judge and magistrate judge about two weeks later, asking for permission to e-mail some 600 pages for filing as part of her portion of the JSR so that she would not have to print and mail them. Four days later, having received no response, she shipped those documents to the court, ignoring its directives regarding the proper submission of a JSR.

The court found that her communication with chambers and her voluminous filing violated the court's orders and rules. As a result, and consistent with its September 14 and 28 warning orders, it dismissed Ms. Drevaleva's remaining claims with prejudice as a sanction. She filed a flurry of post-judgment motions. The court denied them and imposed filing restrictions. She now appeals the dismissal order and several of the district court's pre-dismissal interlocutory orders.

DISCUSSION

1. Dismissal Order

Under Rule 41(b) of the Federal Rules of Civil Procedure, a district court may dismiss an action for failure to comply with court rules or orders. Pro se litigants like Ms. Drevaleva are not immune from sanctions for failing to obey court orders. *See*

Nasious v. Two Unknown B.I.C.E. Agents, 492 F.3d 1158, 1161 (10th Cir. 2007) (affirming dismissal of pro se plaintiff's complaint under Rule 41(b)); *see also Klein-Becker USA, LLC v. Englert*, 711 F.3d 1153, 1160 (10th Cir. 2013) (affirming a district court's imposition of a default judgment as a Rule 37 sanction even though the offending party appeared pro se).

District courts have "very broad discretion to use sanctions where necessary" to ensure "the expeditious and sound management of the preparation of cases for trial." *Lee v. Max Int'l, LLC*, 638 F.3d 1318, 1320 (10th Cir. 2011) (internal quotation marks omitted). The "[d]etermination of the correct sanction . . . is a fact-specific inquiry that the district court is best qualified to make." *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920 (10th Cir. 1992).

We "review for an abuse of discretion the district court's decision to impose the sanction of dismissal for failure to follow court orders and rules." *Gripe v. City of Enid*, 312 F.3d 1184, 1188 (10th Cir. 2002). A court abuses its discretion when its decision is "arbitrary, capricious, whimsical, or manifestly unreasonable." *Jensen v. W. Jordan City*, 968 F.3d 1187, 1200 (10th Cir. 2020) (internal quotation marks omitted), *cert. denied*, 141 S. Ct. 2627 (2021). Under this standard, we will uphold a district court's decision unless we have "a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Id.* at 1200-01 (internal quotation marks omitted).

Dismissal is "an essential tool in the sanction toolbox" because "district court judges need to be able to control their courtrooms." *King v. Fleming*, 899 F.3d 1140,

1149-50 (10th Cir. 2018). But it is "an extreme sanction appropriate only in cases of willful misconduct." *Ehrenhaus*, 965 F.2d at 920. *Ehrenhaus* lists five factors a court should consider before choosing dismissal as a sanction: "(1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions." *Id.* at 921 (ellipsis and internal citations and quotation marks omitted).[1] The "first three factors, which analyze the wrongdoing and its effects, inform the decision to apply any sanction," and the last two aid the court in deciding which sanction to impose. *King*, 899 F.3d at 1150 & n.15.

Applying that test here, the district court found that dismissal was appropriate. It concluded the first three factors "weigh[ed] heavily in favor of imposing sanctions against [Ms. Drevaleva]." R. at 2114. It found that her conduct prejudiced defendants because they "had to waste their time and resources" responding to her "unnecessary," "frivolous," and "vexatious" filings, which "interfere[d] with their ability to defend themselves." R. at 2111, 2112. The court also found that because "there is no sign that [she] will change course," defendants "will continue to be prejudiced if the case is permitted to proceed." R. at 2112. The court described Ms. Drevaleva's conduct as "abusive treatment of the judicial process." R. at 2113.

[1] Although *Ehrenhaus* involved dismissal as a sanction for discovery violations, the same test applies in "resolving a variety of analogous violations," *King*, 899 F.3d at 1150, including violations of court orders and rules, *Nasious*, 492 F.3d at 1161-62 & 1162 n.4.

It explained that her frequent noncompliant and "repetitive filings . . . have consumed an inordinate amount of the Court's limited time and resources," R. at 2112 (quoting the September 28 order), and that her "e-mails to chambers force[d] the Court to turn its already stretched resources to address her continued attempts to circumvent Court rules and directives," R. at 2113. Finally, the court found that, as a pro se litigant, Ms. Drevaleva was "solely responsible for prosecuting her case." R. at 2114. It noted there was no indication that she did not understand the court's orders and rules. Indeed, it found that "her e-mails to chambers reflect[ed] [her] awareness" of the court's filing procedures and were an attempt to get around them. R. at 2116. It thus concluded she was culpable for her repeated violations. R. at 2114.

Turning to the remaining *Ehrenhaus* factors, the court found its September 14 and 28 orders gave Ms. Drevaleva "express and formal notice" that "dismissal of the action would be a likely sanction for" continued noncompliance with court orders and rules. R. at 2115. But she ignored those warnings and, based on her "continual willful violation of court rules and procedures," the court said it was "convince[d]" that lesser sanctions would not "curb [her] abuse of the litigation process" and "would not be effective." R. at 2116. The court noted that she "is no stranger to court orders and warnings about vexatious litigation conduct as evidenced by her record of abusive filings in" the Northern District of California, *id.*, and it found that "every indication is that she will continue to try and find ways around the Court's orders and rules," R. at 2112. In light of Ms. Drevaleva's insistence on "do[ing] exactly what she wants to do rather than what the Court requires," R. at 2116, the

court concluded her noncompliance was "intentional and willful," R. at 2117 (capitalization omitted), and that dismissal with prejudice was "the only suitable sanction," *id.*

Ms. Drevaleva did not even mention the *Ehrenhaus* test in her opening brief, much less explain why she thinks the district court's analysis was wrong.[2] Instead, she devotes the majority of her brief to arguments challenging various interlocutory orders that pre-date the dismissal order. In the context of those arguments, she takes issue with the court's findings in the September 14 and 28 orders that her filings were noncompliant and that her violations were intentional, blaming her conduct on opposing counsel. She also maintains that she did not "deserve dismissal of [her] lawsuit with prejudice." Aplt. Br. at 28-29.

Our review of the record supports the district court's factual findings, and Ms. Drevaleva's insistence that any noncompliance was unintentional and her attempts to shift blame are unpersuasive.

We recognize that she believes the district court erred by denying her requests for ECF privileges and refusing to accept her filings after it entered the stay order.

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[2] In her reply brief, Ms. Drevaleva contends that neither she nor Appellees were "eligible to discuss" the *Ehrenhaus* factors in their appellate briefs because they did not address them in their district court filings. Reply Br. at 11. This contention conflates the requirement that an appellant raise an issue in district court before raising it on appeal with discussing the applicable legal standards. The issue here is whether dismissal was an appropriate sanction. That issue was properly preserved for appeal, and the *Ehrenhaus* test is the applicable legal standard, regardless of whether the parties addressed it below.

We also recognize that complying with the meet-and-confer obligations set forth in the court's scheduling order was difficult for her given her contentious relationship with opposing counsel. But her disagreement with the court's orders did not justify her noncompliance—she was not free to decide on her own that she could ignore the stay and get around the court's filing requirements by e-mailing voluminous noncompliant documents to chambers. *See Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 886 F.3d 852, 856 (10th Cir. 2018) (affirming dismissal of counterclaims as a sanction for noncompliance with disclosure order despite disobedient party's contention that court lacked authority to order disclosure). "If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal." *Maness v. Meyers*, 419 U.S. 449, 458 (1975). Thus, the district court properly held that Ms. Drevaleva acted willfully when she disobeyed its orders, despite her subjective belief that the orders were wrong. *See GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc.*, 445 U.S. 375, 386 (1980) (holding that those subject to a court order "are expected to obey that [order] until it is modified or reversed, even if they have proper grounds to object to the order"); *see also Sheftelman v. Standard Metals Corp. (In re Standard Metals Corp.)*, 817 F.2d 625, 628-29 (10th Cir. 1987) (explaining that "willful failure" to follow court rules and orders includes "any intentional failure as distinguished from involuntary noncompliance. No wrongful intent need be shown" (internal quotation marks omitted)), *on rehearing*, 839 F.2d 1383, 1387 (10th Cir. 1987).

Ms. Drevaleva's conclusory assertion that she did not deserve the unforgiving sanction of dismissal is insufficient to establish that the district court abused its discretion. This court has repeatedly upheld dismissal, including dismissal with prejudice, as a sanction for a party's refusal to obey court orders. *See King*, 899 F.3d at 1153-54 (affirming dismissal with prejudice as a sanction for persistent misconduct); *Auto-Owners Ins. Co.*, 886 F.3d at 856 (affirming order dismissing counterclaims with prejudice); *Lee*, 638 F.3d at 1320-21 (holding that a "district court's considerable discretion" in determining an appropriate sanction "easily embraces the right to dismiss . . . a case . . . when a litigant" repeatedly disobeys court orders); *Jones v. Thompson*, 996 F.2d 261, 265 (10th Cir. 1993) (affirming dismissal with prejudice where the sanctioned party "repeatedly ignored court orders and thereby hindered the court's management of its docket and its efforts to avoid unnecessary burdens on the court and the opposing party"); *Green v. Dorrell*, 969 F.2d 915, 917 (10th Cir. 1992) (collecting cases).

Finally, we reject Ms. Drevaleva's contention that the district court violated her right to due process by dismissing her case without issuing an order to show cause or giving her an opportunity to respond. In its September 14 and 28 orders, the court explained its expectations clearly and warned her that dismissal with prejudice would be the likely sanction if she continued to disobey court orders and rules. The September 28 order cautioned that it was the court's final warning and that further noncompliance would result in dismissal with prejudice with no further notice.

These warnings were more than adequate.[3] *See Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1149-50 (10th Cir. 2007) (affirming dismissal despite lack of a specific warning by the district court of the possibility of dismissal, concluding that constructive notice was sufficient); *Gripe*, 312 F.3d at 1188 (affirming dismissal where court "twice clearly warned plaintiff that failure to follow court orders and rules could result in dismissal of his case"); *Jones*, 996 F.2d at 265 (affirming dismissal where district court warned that it "will, *sua sponte*, dismiss th[e] case with prejudice as a sanction for the continued" noncompliance (internal quotation marks omitted)).

Again, our review of the record supports the district court's determination that the *Ehrenhaus* factors were satisfied here, and Ms. Drevaleva has given us no reason to conclude that the district court "exceeded the bounds of permissible choice," *Jensen*, 968 F.3d at 1200-01 (internal quotation marks omitted).[4] Accordingly, we

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[3] The cases Ms. Drevaleva cites regarding the notice required before a court imposes filing restrictions are inapposite.

[4] Ms. Drevaleva's conduct in this court bolsters the district court's determination that her misconduct would continue if her case were allowed to proceed. We initially allowed her to file electronically, but warned her that her ECF privileges would be revoked if she did not follow the rules or abused the privilege. After she filed an emergency motion for permanent injunction and eleven supplements containing more than 4500 pages, we revoked her ECF privileges. We also imposed filing restrictions because within two months of filing her appeal, she filed nineteen motions, including four motions for stay or injunction pending appeal and motions to disqualify the Department of Justice and strike opposing counsel's entry of appearance. She also filed three original proceedings seeking similar relief. The motions and petition for writ of mandamus concerning opposing counsel contained the same allegations of fraud, felonies, and genocide that troubled the district court. Most of her filings exceeded the length limits, none complied with the

conclude the district court did not abuse its discretion by dismissing her claims with prejudice. *See Lee*, 638 F.3d at 1320-21.

2. Interlocutory Orders

Ms. Drevaleva's appellate briefs focus primarily on her challenges to various interlocutory orders that pre-date the dismissal order, including the orders referring the case to the magistrate judge, revoking her ECF privileges, striking her filings, declining to strike defendants' filings, and denying her motions for court-appointed counsel, partial summary judgment, expedited jury trial, and permanent injunction.

Although these orders merge into the judgment, we decline to review them because doing so would be contrary to our prudential rule that we will rarely review a preceding, interlocutory order when a district court dismisses a case as a result of the plaintiff's litigation conduct. *See AdvantEdge Bus. Grp., L.L.C. v. Thomas E. Mestmaker & Assocs., Inc.*, 552 F.3d 1233, 1237 (10th Cir. 2009) (declining to review interlocutory order in appeal following dismissal of plaintiff's complaint for failure to prosecute). Under that rule, the party seeking review must demonstrate good reasons why we should allow appellate review of an interlocutory order. *Id.* at 1238. In deciding whether to do so, we focus on the conduct that led to the dismissal. *Id.* at 1237-38 (recognizing that the "salutary principle" underpinning the prudential rule is "prohibiting manipulation of the district court processes to effect the premature review of an otherwise unappealable interlocutory order"). Here, the

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rules regarding content and format, and few acknowledge the applicable legal standards.

district court found Ms. Drevaleva's failure to comply with court orders and rules was willful and interfered with the judicial process. The record supports that finding, and she advances no good reason for us to review the pre-dismissal orders. Accordingly, we will not review them. *See Garcia v. Berkshire Life Ins. Co. of Am.*, 569 F.3d 1174, 1183 (10th Cir. 2009) (declining to address summary judgment order in light of affirmance of dismissal as a sanction for abusive litigation practices); *cf. Sere v. Bd. of Trs. of Univ. of Ill.*, 852 F.2d 285, 288 (7th Cir. 1988) (declining to review interlocutory Rule 12(b) dismissal order that preceded dismissal of remaining claim as sanction for discovery violation); *John's Insulation, Inc. v. L. Addison & Assocs., Inc.*, 156 F.3d 101, 108 (1st Cir. 1998) (declining to review interlocutory orders preceding Rule 41(b) dismissal and default judgment imposed as sanction for plaintiff's delay and failure to follow court orders).

CONCLUSION

We affirm the district court's order dismissing Ms. Drevaleva's complaint. We grant her motion to proceed without prepayment of costs and fees. We deny her motions for court-appointed counsel and to supplement the record with documents the district court received but either refused to file or struck.

Entered for the Court

Jerome A. Holmes
Circuit Judge

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
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Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

July 11, 2022

Tatyana Evgenievna Drevaleva
2222 Pacheco Street, Apartment 603
Concord, CA 94520

RE: 21-2139, Drevaleva v. DOVA, et al
Dist/Ag docket: 1:21-CV-00761-WJ-JFR

Dear Appellant:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Christine H. Lyman

CMW/jjh

Appendix A.

Part 2.

The January 13, 2022 Order of the U.S. Court of Appeals for the 10th Circuit that prohibited the Clerk of the Court to accept any filings from me in Appeal No. 21-2139 after case No. 1:21-cv-00761-WJ-JFR (Document: 010110631948.)

FILED
United States Court of Appeals
Tenth Circuit

January 13, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

TATYANA EVGENIEVNA DREVALEVA,

Plaintiff - Appellant,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; DENIS RICHARD McDONOUGH, United States Secretary of Veterans Affairs; ROBERT WILKIE,

Defendants - Appellees.

No. 21-2139
(D.C. No. 1:21-CV-00761-WJ-JFR)
(D. N.M.)

ORDER IMPOSING FILING RESTRICTIONS

Before **HOLMES**, **MORITZ**, and **EID**, Circuit Judges.

Appellant, Tatyana E. Drevaleva, filed this pro se appeal from the district court's order dismissing her complaint in the underlying employment action as a sanction for her abusive litigation practices and failure to follow the court's orders and local rules. In addition to dismissing her complaint, the district court imposed filing restrictions.

Ms. Drevaleva has proven to be an abusive litigant in this court as well. Since filing her appeal in mid-November, she has filed nineteen motions, including four motions for stay or injunction pending appeal and motions to disqualify the Department of Justice, to strike opposing counsel's entry of appearance, to take judicial notice, to

supplement the record, for appointment of counsel, and for leave to file oversized replies in support of several of her motions. She also filed three separate original proceedings (Nos. 21-2148, 21-2149, and 21-2150) involving the same district court case. Most of her filings exceed the length limits, none complies with the rules regarding content and format, and few acknowledge the applicable legal standards. Her filing of eleven supplements totaling over 4500 pages in support of her first motion for stay or injunction prompted this court to revoke her electronic filing privileges and to warn her that any filings that do not comply with the applicable rules will be stricken. Because Ms. Drevaleva has abused the appellate process just as she abused the district court process, we impose the following reasonable filing restrictions on her, pursuant to the court's inherent authority to manage its docket.

First, we restrict Ms. Drevaleva from filing in this court any further petitions for writ of mandamus or other original proceedings related to or involving the subject matter of the lawsuit underlying this appeal, District of New Mexico Case No. 1:21-cv-00761, or related to Northern District of California Case No. 18-cv-03748, unless she is represented by a licensed attorney admitted to practice in this court. The Clerk of Court shall return any such documents unfiled. Regarding this first restriction only, Ms. Drevaleva has ten days from the date of this order to file any objection. The objection may not exceed ten pages in length. The court will not consider any objection exceeding ten pages, and if such a noncompliant objection is submitted, the restriction will take effect as if no objection was filed. If a timely, compliant objection is filed, this filing restriction will not take effect until further order of the court after consideration of such objection. If no

objection is filed, this restriction will take effect on the eleventh day after entry of this order.

Second, as of the date this order is filed, the court will not accept any further pro se motions from Ms. Drevaleva in this appeal (No. 21-2139), other than for an extension of time to file her principal or reply brief, and a petition for rehearing after the appeal has been decided. Any filing pursuant to this exception must meet the requirements of Fed. R. App. P. 27 and 10th Cir. R. 27.6, and/or Fed. R. App. P. 40. If an excepted motion for extension of time or petition for rehearing does not comply with these applicable rules, the filing will not be considered and may be stricken.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

Appendix B.

The August 15, 2022 Order of the
U.S. Court of Appeals for the 10th Circuit that denied my timely Petition for Rehearing
in Appeal No. 21-2139
after case No. 1:21-cv-00761-WJ-JFR
(Document: 010110724415.)

FILED
United States Court of Appeals
Tenth Circuit

August 15, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

TATYANA EVGENIEVNA DREVALEVA,

Plaintiff - Appellant,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, et al.,

Defendants - Appellees.

No. 21-2139
(D.C. No. 1:21-CV-00761-WJ-JFR)
(D. N.M.)

ORDER

Before **HARTZ**, **HOLMES**, and **McHUGH**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

Appendix C.

The November 18, 2020 Opinion of
the U.S. Court of Appeals for the 9th Circuit
in Appeal No. 19-16395
after case No. 3:18-cv-03748-WHA.

NOT FOR PUBLICATION

FILED

NOV 18 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TATYANA EVGENIEVNA DREVALEVA, Plaintiff-Appellant, v. DEPARTMENT OF VETERANS AFFAIRS; et al., Defendants-Appellees.	No. 19-16395 D.C. No. 3:18-cv-03748-WHA MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding

Submitted November 9, 2020**

Before: THOMAS, Chief Judge, TASHIMA and W. FLETCHER, Circuit Judges.

Tatyana Evgenievna Drevaleva appeals pro se from the district court's judgment dismissing her employment action alleging federal and state law claims. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal for

* 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).

failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1040 (9th Cir. 2011). We may affirm on any basis supported by the record. *Thompson v. Paul*, 547 F.3d 1055, 1058-59 (9th Cir. 2008). We affirm in part, reverse in part, and remand.

The district court properly dismissed Drevaleva's claim that she was discriminated against in violation of the Americans with Disabilities Act ("ADA") because the federal government is excluded from the coverage of the ADA. *See* 42 U.S.C. § 12111(5)(B) (stating that "[t]he term 'employer' does not include the United States [or] a corporation wholly owned by the government of the United States").

Dismissal of Drevaleva's Age Discrimination in Employment Act ("ADEA") claim was proper because Drevaleva failed to allege facts sufficient to show that Drevaleva was discriminated against on the basis of her age. *See Sheppard v. David Evans & Assoc.*, 694 F.3d 1045, 1050 (9th Cir. 2012) (setting forth requirements for stating an ADEA claim).

The district court properly dismissed Drevaleva's constitutional and state law claims because federal employees are limited to using federal employment laws to redress employment discrimination. *See White v. Gen. Servs. Admin.*, 652 F.2d 913, 916-17 (9th Cir. 1981) (Title VII provides the exclusive judicial remedy for claims of discrimination in federal employment); *see also Ahlmeyer v. Nev. Sys.*

of Higher Educ., 555 F.3d 1051, 1054 (9th Cir. 2009) (the ADEA provides the exclusive remedy for age discrimination); *Vinieratos v. U.S., Dep't of Air Force*, 939 F.2d 762, 773 (9th Cir. 1991) (Title VII provides the exclusive channel through which Rehabilitation Act claims may be heard in federal court).

The district court dismissed Drevaleva's Title VII claim because Drevaleva failed to allege facts sufficient to establish a prima facie case of sex discrimination on the basis of her fertility issues. However, Federal Rule of Civil Procedure 8(a), not the *McDonnell Douglas* framework, provides the appropriate pleading standard for reviewing a Rule 12(b)(6) motion in an employment discrimination action. *See Austin v. Univ. of Or.*, 925 F.3d 1133, 1136-37 (9th Cir. 2019) (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002)). Drevaleva alleged that her supervisors fraudulently concealed available leave options when she requested time off to travel to Russia to continue her in vitro fertilization procedures in Russia, imposed additional requirements on her application for leave without pay that were inconsistent with the agency's policies, and failed to provide a full explanation of the reason for her leave to the medical staff responsible for approving the leave request. At this early stage in the proceedings, these allegations are sufficient to warrant proceeding to summary judgment. *See Buckey v. County of Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992) (review on a motion to dismiss is based on the contents of the complaint, and factual allegations are taken as true); *see also Costa*

v. Desert Palace, Inc., 299 F.3d 838, 855 (9th Cir. 2002) (the *McDonnell Douglas* framework is a legal proof structure that is only relevant at the summary judgment stage of a discrimination action). We therefore reverse the district court's dismissal of Drevaleva's sex discrimination claim and remand for further proceedings on this claim.

The district court dismissed Drevaleva's Rehabilitation Act claim based on the finding that an affidavit submitted by defendant Dunkelberger demonstrated that Drevaleva's requested accommodation for her alleged impairment in reproductive functioning was denied for the legitimate reason of Drevaleva's failure to follow the proper procedure for requesting leave. However, Drevaleva alleged that she was denied leave for her alleged disability and terminated even though she made a proper request that was approved by her supervisor. Liberally construed, these allegations, in conjunction with those discussed above with respect to Drevaleva's Title VII claim, are sufficient to warrant proceeding to summary judgment. *See Buckey*, 968 F.2d at 794. We therefore reverse the district court's dismissal of Drevaleva's Rehabilitation Act claim and remand for further proceedings on this claim.

The district court did not abuse its discretion by denying Drevaleva's first post-judgment Federal Rule of Civil Procedure 60(b) motion because Drevaleva failed to demonstrate any basis for such relief. *See Sch. Dist. No. 1J, Multnomah*

Cty., Or. v. ACandS, Inc., 5 F.3d 1255, 1262, 1263 (9th Cir. 1993) (setting forth standard of review and grounds for reconsideration under Rule 60).

The district court properly concluded that it lacked jurisdiction to entertain Drevaleva's second Rule 60(b) motion to vacate, which was filed after the notice of appeal became effective, thereby depriving the district court of its jurisdiction. *See* Fed. R. App. P. 4(a)(4)(B)(ii) (notice of appeal becomes effective when the order disposing of the last remaining tolling motion is entered); *see also Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2004) (vacating for lack of jurisdiction an order denying a Rule 60(b) motion where the motion was filed after the notice of appeal and movant did not follow the procedure for seeking a remand of the case back to district court).

The district court did not abuse its discretion in denying Drevaleva's motion to appoint counsel. *See Bradshaw v. Zoological Soc. of San Diego*, 662 F.2d 1301, 1318 (9th Cir. 1981) (setting forth standard of review and the three factors relevant to the exercise of the district court's discretion).

We do not consider matters not specifically and distinctly raised in the opening brief, or arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

In sum, we reverse the dismissal of Drevaleva's sex discrimination claim and failure-to accommodate claim, and remand for further proceedings as to these

claims only. We affirm the dismissal of all other claims. In light of our disposition, the district court should reconsider whether the appointment of counsel is warranted.

All remaining pending motions and requests are denied.

The parties shall bear their own costs on appeal.

AFFIRMED in part; REVERSED in part; and REMANDED.

Appendix D.

The Orders and the Judgments of
both the U.S. District Court for the District of New
Mexico and the U.S. District Court for the Northern
District of California.

Part 1.

The December 03, 2018 Order of the U.S. District Court for the Northern District of California
in case No. 3:18-cv-03748-WHA
(Doc. No. 69.)

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

TATYANA EVGENIEVNA DREVALEVA,

Plaintiff,

v.

U.S. DEPARTMENT OF VETERANS AFFAIRS, *et al.*,

Defendants.

/

No. C 18-3748-WHA

ORDER GRANTING MOTION TO DISMISS; DENYING MOTION TO STRIKE; DENYING MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

In this employment discrimination action, federal defendants move to dismiss for lack of subject-matter jurisdiction and failure to state a claim. *Pro se* plaintiff moves to strike and for preliminary injunction. For the reasons stated herein, federal defendants' motion to dismiss is **GRANTED**. Plaintiff's motions to strike and for preliminary injunction are **DENIED**.

STATEMENT

The following is taken from the allegations set forth in *pro se* plaintiff's complaint. Defendants Department of Veterans Affairs and Robert Wilkie, United States Secretary of Veterans Affairs hired *pro se* plaintiff Tatyana E. Drevaleva as a medical instrument technician at the Raymond G. Murphy Veterans Affairs Medical Center in Albuquerque starting in April 2017. Approximately six weeks after starting, while still in the probationary period of her

employment, plaintiff requested a leave without pay for a month and a half to travel to Russia to undergo in-vitro fertilization. Plaintiff's supervisor informed plaintiff that to qualify for an unpaid leave, plaintiff had to be employed by the hospital for a minimum of twelve months, not just six weeks. Additionally, she informed plaintiff that she would need to support her request for a leave with written medical documentation, in English, from plaintiff's OB/GYN (Dkt. No. 1 at 2–4).

On May 17, 2017, after learning her supervisor would be out of the office for two weeks, plaintiff approached the assistant manager and requested a leave without pay to go to Russia. The assistant manager advised plaintiff of the proper procedure for requesting such a leave, but told her, "If you need to go — go!" which plaintiff treated as verbal permission to travel to Russia. Plaintiff filled out the necessary form and slipped it under her supervisor's door without the required medical documentation. Plaintiff left for Russia the next day (*id.* at 5–6). While in Russia, plaintiff emailed her supervisor several times to transmit copies of translated medical documents from her OB/GYN, to request more time off, and to generally keep her apprised of her health status. Plaintiff did not receive any response to her emails (*id.* at 6–8).

On July 3, 2017, plaintiff received an email from her supervisor advising plaintiff that her employment had been terminated. In September 2017, plaintiff participated in mediation with her supervisor. During the mediation, her supervisor stated she had received plaintiff's request for a leave without pay and submitted it to the nursing director, who then denied the request because plaintiff had not been employed at the hospital for the minimum one-year period. Plaintiff was advised she had been terminated for taking a leave without permission.

Plaintiff then filed a formal complaint of employment discrimination (Dkt. No. 1, Exh. 8 at 8). In February 2018, the Office of Resolution Management requested a sixty-day extension to complete their investigation, which plaintiff approved (Dkt. No. 1, Exh. 14–15). After waiting for a resolution for over sixty days, plaintiff notified the Office of Resolution Management of her intent to sue in federal court. The Office of Employment Discrimination

Complaint Adjudication advised plaintiff that her case was docketed with a due date of June 2018, but, if she wished to file suit in federal court, her complaint with their office would be dismissed on procedural grounds (Dkt. No. 1, Exh. 19).

Plaintiff commenced this action on June 25, 2018. On July 2, plaintiff moved to transfer this action from San Jose to San Francisco, which was granted. The complaint alleges the following claims: (1) gender and pregnancy discrimination under Title VII of the Civil Rights Act; (2) disability discrimination under the ADA and failure to accommodate under the Rehabilitation Act of 1973; (3) age discrimination under the Age Discrimination in Employment Act; (4) tort claims for libel and intentional infliction of emotional distress; and (5) deprivation of liberty and property without due process. All of plaintiff's claims arise from her employment at the VA hospital. Plaintiff seeks relief in the form of back pay, five million dollars of compensatory damages, two million dollars of punitive damages, and attorney's fees (Dkt. No. 1 at 24–25). Additionally, plaintiff has filed a motion for a preliminary injunction and seeks an order reinstating her to her previous position or "a similar full time job with benefits" (Dkt. No. 39 at 4). Defendants now move to dismiss. This order follows full briefing and oral argument.

ANALYSIS

1. MOTION TO DISMISS.

To survive a motion to dismiss, a complaint must allege facts "sufficient to state a claim to relief that is plausible on its face," and allegations that are merely conclusory need not be accepted as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). When the plaintiff proceeds *pro se*, "courts should construe the pleadings liberally . . . to afford the petitioner the benefit of the doubt." *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). Plaintiff points to various instances of alleged wrongful conduct to support her numerous claims, but offers no legal support for her conclusions. With due solicitude, this order addresses each theory in turn.

A. Discrimination Claims.

(1) Gender and Pregnancy Discrimination.

Title VII prohibits employers, including the Department of Veterans Affairs, from discriminating against individuals with respect to compensation, terms, conditions, or privileges of employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e–2(a). The elements of a *prima facie* discrimination case require that: (1) plaintiff is a member of a protected class; (2) plaintiff performed his or her job satisfactorily; (3) plaintiff suffered an adverse employment action; and (4) plaintiff was treated less favorably than a similarly situated, non-protected employee. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). While a plaintiff's employment discrimination complaint need not contain specific facts fully establishing a *prima facie* case at this stage in the proceedings, it must still "contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Swierkiewicz v. Sorema, N.A.*, 534 US 506, 508 (2002) (quoting FRCP 8(a)(2)). Though plaintiff need not establish a *prima facie* discrimination case at this point, this order uses the required elements to determine whether the facts that are alleged state plausible claims for relief. *See Twombly*, 550 U.S. at 570.

Accepted as true, plaintiff's complaint sufficiently alleges she is a member of a protected class and that she suffered an adverse employment action (Dkt. No. 1 at 17). The complaint, however, lacks any facts showing that plaintiff was performing her job satisfactorily or that she was treated less favorably than a similarly situated non-protected employee. Instead, the complaint mentions two of plaintiff's female colleagues, one who was allegedly allowed to work once per month while pursuing her nursing degree and the other who allegedly received phone calls from plaintiff's supervisor, asking her to apply for a nursing job (Dkt. No. 1 at 9). Neither allegation, however, contains facts regarding the actual treatment of these women, nor facts showing how they were similarly situated to plaintiff. In sum, plaintiff's complaint provides no factual allegations that support her conclusory claim that she was terminated on account of her sex and desire to get pregnant.

At oral argument, plaintiff cited *Hall v. Nalco*, 534 F.3d 644 (7th Cir. 2008), for the proposition that the Pregnancy Discrimination Act covers discrimination against a person experiencing infertility who wishes to become pregnant. To the extent plaintiff would like the undersigned judge to consider this argument, she must plead the relevant facts and cite to the relevant case law in her amended complaint. As currently pleaded, plaintiff's gender and pregnancy discrimination claim under Title VII must be **DISMISSED.**

(2) Disability Discrimination and Failure to Accommodate.

Plaintiff alleges that defendants discriminated against her and failed to accommodate her on the basis of her disability, which she describes as an inability to "give birth to children in a natural way" (Dkt. No. 1 at 21). While the Rehabilitation Act of 1973 provides a cause of action for both claims, on its face, the complaint only alleges disability discrimination under the ADA. The ADA does not allow claims against the federal government, which is excluded from the statute's definition of employer. 42 U.S.C. § 12111(5)(B)(i). Accordingly, plaintiff's claim for disability discrimination under the ADA is **DISMISSED.**

The complaint further fails to allege facts to support her claim that defendants failed to accommodate her. On its face, the complaint merely alleges that defendants failed to provide her with "placement and advancement" in violation of the Rehabilitation Act of 1973 (Dkt. No. 1 at 21). Plaintiff, however, submitted an exhibit to her complaint where her supervisor stated, under oath, that she had advised plaintiff of the procedure for requesting an unpaid leave on two occasions, once on April 8, 2017, and again on May 15, 2017 (Dkt. No. 1, Exh. 16 at 116). Plaintiff waited to submit the requisite form until the night before she left for Russia, without the supporting medical documentation and before receiving approval, despite having over a month's notice of the required procedure (Dkt. No. 1 at 6). Thus, defendants' alleged failure to accommodate plaintiff's leave was not at all plausibly motivated by animus towards plaintiff's alleged disability. Rather, the plausible inference is that her employment was terminated for failing to timely submit her request for an unpaid leave and subsequently becoming absent without leave.

Additionally, at oral argument, plaintiff stated that she was forced to request a leave

without pay though she felt she was entitled to sick leave. This theory was not pleaded in her complaint. Moreover, plaintiff's complaint states that she told her supervisor that she was not asking for salary and benefits while she was in Russia, rather, she was specifically requesting a leave without pay (Dkt. No. 1 at 4). Sick leave is with pay. Plaintiff also admits that because she was a probationary employee, she was not eligible for a leave under the Family Medical Act (Dkt. No. 1 at 14).

Because plaintiff fails to plausibly allege that she is disabled under the proper statute or that she was denied reasonable accommodations based on that disability, plaintiff's claim under the Rehabilitation Act of 1973 is **DISMISSED.**

(3) Age Discrimination.

Plaintiff's complaint alleges she was fired for being fifty years of age (Dkt. No. 1 at 18). The Age Discrimination in Employment Act of 1967 (ADEA) makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1). To establish a *prima facie* case of age discrimination, plaintiff must allege in her complaint that: (1) she was at least forty years old; (2) she was performing her job satisfactorily; (3) she was discharged; and (4) she was either replaced by substantially younger employees with equal or inferior qualifications or discharged under circumstances otherwise giving rise to an "inference of age discrimination." *Sheppard v. David Evans and Assoc.*, 694 F.3d 1045, 1049 (9th Cir. 2012). Here, plaintiff alleges facts sufficient to establish the first and third elements of a *prima facie* case of age discrimination; however, plaintiff fails to plead facts showing she was performing her job satisfactorily or that the allegedly younger employees hired for her position had equal or inferior qualifications (Dkt. No. 1 at 18). Accordingly, plaintiff's claim under the ADEA is **DISMISSED.**

(4) Retaliation.

In addition to her discrimination claims, plaintiff alleges that defendants retaliated against her based on age and gender when they hired two younger, male employees to fill two vacancies for her position (Dkt. No. 1 at 9). To establish a *prima facie* claim of retaliation

under Title VII plaintiff must show that: (1) she engaged in a protected activity; (2) her employer subjected her to an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action. *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000). Here, plaintiff failed to show a causal link between her termination and the age and sex of the employees subsequently hired. Additionally, plaintiff submitted evidence to the contrary in the form of a signed affidavit from her supervisor stating that one the employees hired for plaintiff's job was, in fact, a woman (Dkt. No. 1, Exh. 16 at 113). As a result, this order finds insufficient evidence to support a retaliation claim, thus this claim is **DISMISSED.**

B. Improper Defendant.

Defendants argue that the Department of Veterans Affairs is an improper defendant in this action. This order agrees. The proper defendant for a civil action based on each of the above noted anti-discrimination statutes is the head of the agency or department. *Mahoney v. U.S. Postal Service*, 884 F.2d 1194, 1196 (9th Cir. 1989) (Title VII & Rehabilitation Act); *Romain v. Shear*, 799 F.2d 1416, 1418 (9th Cir. 1986) (ADEA). Here, plaintiff improperly named both the United States Department of Veteran Affairs and the Secretary of Veterans Affairs as defendants (Dkt. No. 1 at 1). Plaintiff is at liberty to seek leave to amend her complaint to name the proper defendant. The United States Department of Veterans Affairs is hereby **DISMISSED** as a defendant.

C. Tort and Constitutional Claims.

Plaintiff's fifth and sixth claims allege defamation and intentional infliction of emotional distress. Under her defamation claim, plaintiff alleges she was denied unemployment benefits when the Department of Veterans Affairs reported to the EDD that she was fired for cause. Plaintiff further alleges that the denial of benefits, coupled with defendants' refusal to reinstate plaintiff to her previous position, caused her to suffer emotional distress (Dkt. No. 1 at 21–22).

Plaintiff's seventh and final claim alleges a due process violation under the Fifth Amendment for deprivation of the liberty to work and property she could have purchased had she been able to work (Dkt. No. 21–23). Because plaintiff's tort and constitutional claims arise from the same factual predicate as her discrimination claims, Title VII provides the exclusive

remedy. *Brown v. GSA*, 425 U.S. 820, 835 (1976). To the extent that plaintiff's ADEA and Rehabilitation Act claims could be segregated, those claims would also be preempted under their respective statutes. *See Ahlmeyer v. Nevada System of Higher Educ.*, 555 F.3d 1051, 1060–61; *Boyd v. U.S. Postal Service*, 752 F.2d 410, 419 (9th Cir. 1985). Accordingly, plaintiff's fifth, sixth, and seventh claims are **DISMISSED WITH PREJUDICE**.

D. Punitive Damages.

Defendants seek to dismiss plaintiff's request for two million dollars in punitive damages for her libel claim because punitive damages are not recoverable from federal defendants (Dkt. No. 34 at 9). This order agrees. Tort claims against the United States only arise under the Federal Torts Claims Act, which provides a statutory waiver of sovereign immunity. 28 U.S.C. § 1346(b). The FTCA specifically provides that the Government has not waived its sovereign immunity with respect to "[a]ny claim arising out of . . . libel." 28 U.S.C. § 2680(h). The FTCA also bars the award of punitive damages. 28 U.S.C. § 2674. Although the judicial policy of treating *pro se* litigants leniently suggests allowing leave to amend, because plaintiff's tort and constitutional claims are dismissed with prejudice, plaintiff's prayer for punitive damages is **DENIED AS MOOT**.

E. Failure to Comply with FRCP 10.

Defendants argue that plaintiff's complaint should be dismissed for failure to comply with FRCP 10 (Dkt. No. 34 at 4). FRCP 10 requires a party to "state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances." Here, plaintiff's complaint lacks numbered paragraphs and thus fails to comply with FRCP 10. Accordingly, plaintiff is advised that should she seek leave to amend, her amended complaint must be written in numbered paragraphs.

F. Plaintiff's Additional Requests.

In her opposition, plaintiff includes request for a temporary restraining order, a request for a jury trial, and an order instructing the Department of Veterans Affairs to pay plaintiff's legal costs (Dkt. No. 40 at 18–19). In light of the dismissal, her request for a temporary restraining order is **DENIED**. Assuming plaintiff is entitled to a jury trial in a case like this,

plaintiff is advised that a jury trial must be requested under Federal Rule of Civil Procedure 38(b). Should plaintiff file a motion for leave to file an amended complaint, she may include a demand for a jury trial therein and it can later be litigated whether failure to demand a jury trial in her original complaint constitutes a waiver of that right. In regards to plaintiff's request for defendants to pay her legal costs, plaintiff is advised that request is premature.

2. MOTION TO STRIKE.

In her reply, plaintiff admits she made a mistake in filing a motion to strike in response to defendants' motion to dismiss and requests that it be considered as part of her opposition (Dkt No. 47 at 1–2). Plaintiff's motion to strike defendants' motion to dismiss is hereby **DENIED AS MOOT.**

3. MOTION FOR A PRELIMINARY INJUNCTION.

Plaintiff also seeks an order reinstating her to the same or a substantially similar position at any Veterans Affairs Medical Center (Dkt. No. 39 at 4). To support a preliminary injunction, plaintiff must establish four elements: (1) likelihood of success on the merits, (2) irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in its favor, and (4) that the injunction is in the public interest. *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008). The four-part test is also satisfied if "serious questions going to the merits [are] raised and the balance of hardships tips sharply in the plaintiff's favor" so long as there is also a likelihood of irreparable harm and an injunction would be in the public's interest. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (citations and quotations omitted). Here, plaintiff has not offered legal arguments or evidence to support a request for a preliminary injunction, nor has she raised serious questions going to the merits. In light of the dismissal, plaintiff's motion for a preliminary injunction is **DENIED.**

CONCLUSION

For the reasons stated above, defendants' motion to dismiss plaintiff's complaint is **GRANTED**. Plaintiff's motion to strike is **DENIED**. Plaintiff's motion for a preliminary injunction is **DENIED**. Plaintiff may file a motion to obtain leave to amend her complaint and will have until **JANUARY 7, 2019** to file such a motion, to be noticed on the normal 35-day

track. A proposed amended complaint must be appended to her motion. Plaintiff should plead her best case. The motion should clearly explain how the amendments cure the deficiencies identified herein. If such motion is not filed by the deadline, this case will be closed.

IT IS SO ORDERED.

Dated: December 3, 2018.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

Part 2.

The July 11, 2019 Order of the U.S. District Court for the Northern District of California
in case No. 3:18-cv-03748-WHA
(Doc. No. 154.)

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

TATYANA EVGENIEVNA DREVALEVA,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, and ROBERT WILKIE, Secretary, United States Department of Veterans Affairs,

Defendants.
/

No. C 18-03748 WHA

ORDER RE MOTIONS TO STAY, CERTIFY, SEVER, RECONSIDER, AND FOR LEAVE TO AMEND

INTRODUCTION

In this employment discrimination action, *pro se* plaintiff moves (1) for leave to amend her complaint; (2) to stay three claims for relief; (3) for reconsideration of her motion for preliminary injunction; (4) to sever one of her claims; and (5) to certify this action to our court of appeals or to appoint a master. For the reasons stated herein, the motions for leave to amend the complaint and for reconsideration are **DENIED**. The motions to stay, sever, and certify or appoint a master are **DENIED AS MOOT**.

STATEMENT

The alleged facts giving rise to the instant action, which remain unchanged in the proposed amended complaint, are detailed in a prior order (Dkt. No. 69 at 1–3). Briefly, in April 2017, defendants United States Department of Veterans Affairs and Robert Wilkie, Secretary of United States Department of Veterans Affairs, hired *pro se* plaintiff Tatyana E.

Drevaleva as a medical instrument technician at the Raymond G. Murphy Veterans Affairs Medical Center in Albuquerque (Dkt. No. 86-2 ¶ 2).

In May 2017, plaintiff spoke with her supervisor about requesting leave without pay to travel to Russia to undergo *in vitro* fertilization. Plaintiff informed her supervisor that as a citizen of Russia, she was entitled a free IVF attempt. She detailed the history of her attempts to conceive a child, explaining that she had been married twice, had sexual relationships with men, and underwent approximately eight intrauterine inseminations at Kaiser Permanente, to no avail. Plaintiff also disclosed that she had a frozen embryo in Russia, a result of three IVF attempts that spanned from January 2014–July 2016. Her plan was to travel to Russia, undergo a fourth IVF attempt, freeze the embryo if the IVF attempt was successful, and return to work in order to earn money to hire a surrogate mother in Russia. Plaintiff's supervisor informed her that she did not meet the minimum duration of employment (twelve months) required for FMLA, but described the procedure for requesting unpaid leave outside of FMLA (*id.* ¶¶ 5–6, 8–11; Dkt. No. 86-18 at 110).

On May 17, 2017, plaintiff approached her assistant supervisor with the same request. Plaintiff's assistant supervisor advised plaintiff of the proper procedure for requesting unpaid leave but allegedly said "If you need to go — go!" Allegedly believing she had verbal permission, plaintiff filled out the form without any medical documentation, slipped it under her assistant supervisor's door, and left for Russia the following evening. While in Russia, plaintiff emailed her supervisors several times without response. On July 3, 2017, plaintiff received an email from her supervisor indicating that plaintiff had been terminated on June 30, 2017. The termination letter was also mailed to plaintiff's home address in New Mexico. Plaintiff was not able to complete a successful IVF attempt and she returned to the United States in August 2017. During a mediation session with her supervisor in September 2017, plaintiff learned that her request for unpaid leave had been denied and her termination had been a result of taking leave without permission (Dkt. Nos. 86-2 ¶¶ 13–14, 17–18, 20–21, 26–28; 86-7 at 4). Following unsuccessful mediation through the Office of Resolution, plaintiff commenced this action (Dkt. No. 86, Exhs. 8 at 8; 14–15; 19).

On June 25, 2018, plaintiff filed a complaint that advanced three sets of claims: (1) discrimination claims; (2) tort claims; and (3) constitutional claims. Her discrimination claims included: (a) gender and pregnancy discrimination under Title VII of the Civil Rights Act; (b) disability discrimination and failure to accommodate under the Rehabilitation Act of 1973; and (c) age discrimination under the Age Discrimination in Employment Act. Plaintiff also moved for preliminary injunction, seeking an order reinstating her to her previous position or "a similar full time job with benefits" (Dkt. No. 39 at 4).

On December 3, 2018, an order was issued which, *inter alia*, dismissed the entire suit and denied plaintiff's motion for a preliminary injunction. Plaintiff's tort and constitutional claims were dismissed with prejudice because Title VII provided the exclusive remedy for these claims (Dkt. No. 69 at 7–8). The order detailed the legal standards for each of plaintiff's discrimination claims and explained why plaintiff's complaint insufficient. That order also provided plaintiff the opportunity to seek leave to file an amended complaint, which she did in a timely manner (*id.* at 4–6, 9).

Throughout the course of these proceedings, plaintiff made five trips to our court of appeals (*see* Dkt. Nos. 58, 70, 72, 85, 105). Each of plaintiff's appeals resulted in either a denial or dismissal (Dkt. Nos. 90, 114–115, 136). Plaintiff petitioned for a writ of certiorari before the United States Supreme Court twice (Dkt. Nos. 60, 132). Both petitions and plaintiff's subsequent petition for rehearing were denied (Dkt. Nos. 133, 145, 152).

A stay was instituted due to the federal government shutdown, pending restoration of funds to the Department of Justice (Dkt. No. 107). During this time, plaintiff filed an affidavit, pursuant to 28 U.S.C. § 144, claiming that the undersigned judge "ha[d] a bias and prejudice towards the Plaintiff and act[ed] in favor of the opposing Party" (Dkt. No. 102). After the stay was lifted, the undersigned judge declined to recuse himself, instead treating the affidavit as a motion to disqualify (Dkt. Nos. 117; 129 at 2). This action was stayed once more, pending resolution of the motion to disqualify (*ibid.*). The motion to disqualify was reassigned to Judge Yvonne Gonzales Rogers, who denied it on the ground that no reasonable question was raised as to the undersigned judge's impartiality (Dkt. No. 138 at 10). In total, these stays

spanned multiple months. Plaintiff then requested that the stay be maintained, pending the United States Supreme Court's decision on one of plaintiff's petitions for a writ of certiorari (Dkt. No. 139). Because of the slim likelihood that the petition would be granted, the stay was lifted (Dkt. No. 142). On April 15, 2019, the petition was denied (Dkt. No. 133).

Now, plaintiff moves for the following: (1) leave to amend her complaint; (2) to stay the tort and constitutional claims; (3) for reconsideration of her motion for preliminary injunction; (4) to sever two of her discrimination claims; and (5) to certify the action to our court of appeals or to appoint a master. This order follows full briefing and oral argument.

ANALYSIS

1. MOTION FOR LEAVE TO AMEND.

Rule 15(a)(2) permits a party to amend its pleading with the court's leave, advising that "[t]he court should freely give leave when justice so requires." In ruling on a motion for leave to amend, courts consider: (1) bad faith; (2) undue delay; (3) prejudice to the opposing party; (4) futility of amendment; and (5) whether plaintiff has previously amended his complaint. *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990). Futility alone can justify denying leave to amend. *Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir. 2004). The legal standard for assessing futility on this motion is identical to that of a motion to dismiss under Rule 12(b)(6). *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988), *overruled on other grounds by Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Pro se pleadings must be liberally construed. *Balisteri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). "A pro se litigant must be given leave to amend his or her complaint unless it is absolutely clear that the deficiencies in the complaint could not be cured by amendment." *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987), *superseded on other grounds by statute as stated in Lopez v. Smith*, 203 F.3d 1122, 1126–27 (9th Cir. 2000) (en banc). A court, however, "is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994).

A. Discrimination Claims.

(1) Gender and Pregnancy Discrimination.

Title VII prohibits employers, including the Department of Veterans Affairs, from discriminating against individuals "with respect to . . . compensation, terms, conditions, or privileges of employment" on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). The Pregnancy Discrimination Act of 1978 ("PDA") amended the term "on the basis of sex" to encompass "pregnancy, childbirth, or related medical conditions." 42 U.S.C §2000e(k). At this stage in the proceedings, plaintiff need not establish a *prima facie* case. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002). Plaintiff does, however, need to allege facts that, when taken as true, "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) .

Though plaintiff need not allege specific facts to establish a *prima facie* case, this order uses the elements of a *prima facie* discrimination case as a guideline to assess the plausibility of plaintiff's claims — namely, that: (1) plaintiff is a member of a protected class; (2) plaintiff performed his or her job satisfactorily; (3) plaintiff suffered an adverse employment action; and (4) plaintiff was treated less favorably than a similarly situated, non-protected employee. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). In response to plaintiff's repeated attempts to undermine controlling law, this order notes that "[t]he facts . . . will vary in Title VII cases, and the specification . . . of the prima facie proof required . . . is not necessarily applicable in every respect to different factual situations." *Ibid.* at n.13; *see, e.g.*, *Hawn v. Exec. Jet Mgmt., Inc.*, 615 F.3d 1151, 1156 (9th Cir. 2010).

This order finds that the proposed amendment to plaintiff's gender and pregnancy discrimination claims is futile because plaintiff fails to provide factual allegations that support a plausible inference that she was terminated on account of her sex and desire to get pregnant. She went absent without leave. That is why she was terminated. She failed to obtain permission to leave her job. The reason she wanted to go to Russia was not the cause of her termination. Rather, it was her failure to obtain approval. There is no law that allows

employees to decide on their own when they can abandon their jobs in order to undergo discretionary medical procedures.

Identical to plaintiff's original complaint, the proposed amended complaint mentions two other female employees. The first was allegedly allowed to work once per month while pursuing her nursing degree. The other allegedly received phone calls from plaintiff's supervisor, asking her to apply for a nursing job (*id.* ¶ 30). Still, these allegations do not describe the actual treatment of these women, nor do they establish that these women were similarly situated to plaintiff.

Plaintiff's amended complaint cites three decisions to support her pregnancy discrimination claim: (1) *Hall v. Nalco Co.*, 534 F.3d 644 (7th Cir. 2008); (2) *Erickson v. Board of Governors of State Colleges & Universities for Northeastern Illinois University*, 911 F. Supp. 316 (N.D. Ill. 1995); and (3) *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393 (N.D. Ill. 1994) (Dkt. No. 86-2 ¶ 55). These decisions hold that, in the Seventh Circuit, infertility is covered under the PDA; thus, discrimination on this basis is a cognizable sex-discrimination claim. *Hall*, 534 F.3d at 645; *Erickson*, 911 F. Supp. at 319; *Pacourek*, 858 F. Supp. at 1401. These decisions, however, are persuasive authority and are distinguishable from the instant action because the plaintiff-employees plausibly alleged that their terminations were a result of their fertility issues. In *Hall*, the plaintiff-employee alleged that after returning from *approved leave* to undergo IVF, she was terminated after the defendant-employer declared that it was "in her best interest due to [her] health condition." 534 F.3d at 646. In *Erickson*, the plaintiff-employee was terminated following the frequent but *legitimate* use of her sick leave in order to receive infertility treatments. 911 F. Supp. at 318–19.

In contrast, plaintiff left for Russia on very short notice *without approved leave* after failing to follow the proper procedure for requesting leave without pay. Plaintiff also did not request sick leave (Dkt. No. 86-2 ¶ 10). In *Pacourek*, the plaintiff-employee was allegedly "chided for her efforts to become pregnant," and "a leave policy was disparately applied against her . . . because of her attempts to become pregnant." 858 F. Supp. at 1402. Here, plaintiff

does not plausibly allege that she received similarly disparate treatment. Rather, the plausible inference is that plaintiff's termination was a result of an established, hospital-wide policy that precluded extended absences without leave (Dkt. No. 50-2, Exh. A), not as a result of her infertility. Accordingly, the motion for leave to amend the gender and pregnancy discrimination claims is **DENIED**.

(2) Disability Discrimination and Failure to Accommodate.

Plaintiff alleges defendants violated the Rehabilitation Act of 1973 by failing to accommodate her based on her disability (Dkt. No. 86-2 at 21). The Rehabilitation Act of 1973 prohibits, in part, disability discrimination in programs run by federal agencies. This act applies the same "standards applied under [T]itle I of the Americans with Disabilities Act of 1990" to determine whether a violation occurred. 29 U.S.C. § 791(f). The ADA defines a disability as "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A).

Plaintiff thus appears to allege that defendants violated the Rehabilitation Act of 1973 when they failed to give plaintiff — a federal employee with an allegedly cognizable disability under the ADA — reasonable accommodation in the form of sick leave. Though the amended complaint does not state plaintiff's disability, this order construes her inability to "give birth to children by a natural way" as the alleged disability (Dkt. No. 1 at 21). In support of the claim that infertility constitutes a disability under the ADA, plaintiff cites to *Bragdon v. Abbot*, 524 U.S. 624, 628 (1998), which established that reproduction is a major life activity (Dkt. No. 86-2 ¶ 68). *Bragdon*, however, does not hold that the inability to reproduce is a *per se* disability under the ADA. *See id.* at 641–42. Our court of appeals has yet to address this issue.

Regardless, plaintiff's amended complaint fails to plausibly allege that she was denied reasonable accommodation. Plaintiff cites to the dissent and an *amicus curiae* brief in *Gedulig v. Aiello*, 417 U.S. 484, 500 (1974), *superseded by* 42 U.S.C. § 2000e(k) (1978), to suggest that defendants denied reasonable accommodation by depriving plaintiff of the use of her accumulated sick leave. Brief for the United States EEOC as Amicus Curiae, *Gedulig v. Aiello*, 417 U.S. 484 (1974) (No. 73-640), 1974 WL 185756 at *21 n.12. This argument is

unavailing because a dissent and an *amicus curiae* brief are never binding authorities. In any event, plaintiff's amended complaint concedes that she at no point requested sick leave. It is also unclear whether plaintiff, who worked at the hospital for about a month and a half prior to leaving for Russia, had accumulated enough sick leave to sustain her extended absence (Dkt. No. 86-2 ¶¶ 2, 5). When plaintiff spoke to her supervisor about her need to travel to Russia, plaintiff's supervisor informed her that she could not pay plaintiff during this leave. Plaintiff responded that she "didn't require . . . salary and benefits when [she] was in Russia" and clarified that she sought leave without pay (Dkt. No. 86-2 ¶ 10). While plaintiff does not allege facts in her amended complaint supporting why plaintiff's supervisor could not provide paid leave, plaintiff's own exhibits suggest that she had not accrued enough sick leave to even support such a request (*see* Dkt. Nos. 86-2 ¶10; 86-23). In addition, though plaintiff's supervisor acknowledged that plaintiff was not eligible for paid leave, plaintiff was apprised of the procedure for requesting unpaid leave on two separate occasions, which she failed to follow (Dkt. No. 86-18 at 116).*

At bottom, plaintiff's amended complaint fails to plausibly allege that she was denied reasonable accommodation. She concedes that she never requested paid leave, and does not sufficiently allege that she had enough sick leave to support her trip, nor that such a request was denied. Instead, plaintiff details two instances in which she was informed of the procedure for requesting leave without pay. Accordingly, the motion for leave to amend the disability discrimination and failure to accommodate claims is **DENIED**.

(3) Age Discrimination.

Plaintiff alleges that she was fired for being fifty years of age, supported by the allegation that the two employees who replaced her were thirty and thirty-five years old (Dkt. No. 86-2 at 20). The Age Discrimination in Employment Act of 1967 makes it unlawful for an employer to "fail or refuse to hire or discharge any individual or otherwise discriminate against any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1).

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* Insofar as plaintiff fails to plausibly allege that she was denied reasonable accommodation, this order need not and does not address whether plaintiff's infertility is a cognizable disability under the ADA.

Plaintiff's amended age discrimination claim is substantively identical to her original complaint (Dkt. Nos. 1 at 17–18; 86-2 ¶¶ 60–62). This age discrimination claim was previously dismissed pursuant to Rule 12(b)(6) for failing to plead facts which plausibly allege that plaintiff was performing her job satisfactorily or that the allegedly younger employees had equal or inferior qualities (Dkt. No. 69 at 6). To the extent that plaintiff's age discrimination claim remains unchanged and did not survive a Rule 12(b)(6) dismissal, this order finds that amendment is futile. The motion for leave to amend the age discrimination claim is **DENIED**.

B. Tort Claim (Intentional Infliction of Emotional Distress).

Plaintiff's tort claims (libel and IIED) were dismissed with prejudice in a prior order following a detailed explanation of why these claims failed (*id.* at 7–8). Plaintiff is barred from reintroducing this claim in her proposed amendment. Thus, the motion for leave to amend the IIED claim is **DENIED**.

2. MOTION TO STAY.

Plaintiff moves to stay her IIED, libel, and constitutional claims (Dkt. No. 96). This order notes that plaintiff's tort and constitutional claims were *dismissed with prejudice* in a prior order (Dkt. No. 69 at 7–8). In other words, these claims are not currently in play, and plaintiff is precluded from reasserting these claims. Furthermore, plaintiff's reply specifically requested that the court "dismiss [her] Libel and Constitutional claims," despite the fact that they were already dismissed with prejudice (Dkt. No. 69 at 7–8; 120 at 5). For the foregoing reasons, the motion to stay the tort and constitutional claims is **DENIED AS MOOT**.

3. MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION.

Plaintiff moves for leave to file a motion for reconsideration of a prior order, issued on January 3, 2019, which denied a preliminary injunction pending appeal (Dkt. No. 99). The crux of this motion is plaintiff's belief that her motion for preliminary injunction was not read before preliminary injunction was denied. In support of this allegation, plaintiff alleges that the prior order "didn't address the arguments [plaintiff] raised in [her] Motion for Injunction Pending Appeal" (*id.* at 7).

Plaintiff bases her motion on Civil Local Rule 7-9(b)(3), which requires a motion for leave to file a motion for reconsideration to show "[a] manifest failure by the Court to consider material facts or dispositive legal arguments which were presented to the Court before such interlocutory order." Each of plaintiff's briefs, motions, and other filings are read and carefully considered before a determination is made. Though plaintiff introduced new arguments alleging procedural issues with respect to her termination, these arguments were unavailing and did not merit granting a preliminary injunction (*see* Dkt. Nos. 69 at 9; 98 at 4). Our court of appeals agrees, as evidenced by the denial of plaintiff's appeals on this issue (Dkt. Nos. 90, 131). Accordingly, the motion for leave to file a motion for reconsideration is **DENIED**.

4. MOTION TO SEVER.

Plaintiff also moved to sever her pregnancy discrimination claim because she is unsure whether Defendant Wilkie is a proper defendant in this claim (Dkt. No. 124 at 2). The pregnancy discrimination claim, however, was dismissed in the December 3 order and this order denies leave to amend. There is no existing claim to sever. Thus, the motion to sever the pregnancy claim is **DENIED AS MOOT**.

5. MOTION TO CERTIFY ACTION TO THE NINTH CIRCUIT OR APPOINT A MASTER.

Plaintiff moves to certify this action to our court of appeals or to appoint a master pursuant to 42 U.S.C. § 2000e-5(f)(4)–(5), respectively. These motions are without merit for two reasons. *First*, Section 2000e-5(f)(4) states that "it shall be the duty of the chief judge of the district . . . to designate a judge in such district to hear and determine the case." If no judge in the district is available, the chief judge of the district "shall certify this fact to the chief judge of the circuit . . . who shall then designate a district or circuit judge of the circuit to hear and determine the case." *Ibid.* From the beginning, plaintiff has been assigned district judges in a timely manner. Plaintiff filed her original complaint on June 25, 2018 (Dkt. No 1). That same day, the action was assigned to Magistrate Judge Susan van Keulen (Dkt. No. 2). Plaintiff then moved to transfer this action from San Jose to San Francisco, which was granted. From there, the action was immediately assigned to Magistrate Judge Lucy Koh (Dkt. No. 9). The action was then reassigned to the undersigned judge (Dkt. No. 33). At no point has plaintiff's action

been without a district judge "to hear and determine the case." *Second*, Section 2000e-5(f)(5) states that if the designated judge "has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge *may* appoint a master" (emphasis added). This order declines to appoint a master.

Finally, this order notes that plaintiff seems to agree to move forward with the action before the undersigned judge (Dkt. No. 144 at 2). Accordingly, the motions to certify this action to our court of appeals or to appoint a master are **DENIED AS MOOT**.

CONCLUSION

This order recognizes that infertility has been recognized at least in the Seventh Circuit as a cognizable disability under the ADA. This order further assumes that plaintiff is infertile. Nevertheless, the alleged fact pattern in the instant case demonstrates that plaintiff was terminated for legitimate reasons, namely her failure to follow proper procedures for requesting an absence from work and simply, skipping out on her responsibilities at work to go to Russia for an extended time. There is nothing that remotely suggests that the VA terminated plaintiff because of infertility. That she wanted to have infertility treatments in Russia did not give her any right to walk out on her job obligations without notice and without going through VA procedures for obtaining an extended leave. The Court has already given plaintiff one opportunity to try to cure the pleading deficiencies in the complaint. The fact pattern is as clear as it is going to get. It would simply be futile to permit leave to amend.

For the reasons stated above, plaintiff's motions for leave to amend and for leave to file a motion for reconsideration are **DENIED**. Plaintiff's motions to stay, to sever, to certify the action to our court of appeals, and to appoint a master are **DENIED AS MOOT**. This case is now ready for our court of appeals. Plaintiff should be mindful of her obligation to file a timely notice of appeal if she wishes to appeal. She should not further litigate this action in district court.

IT IS SO ORDERED.

Dated: July 11, 2019.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

Part 3.

The July 11, 2019 Judgment of the U.S. District Court for the Northern District of California
in case No. 3:18-cv-03748-WHA
(Doc. No. 155.)

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

TATYANA EVGENIEVNA DREVALEVA,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, and ROBERT WILKIE, Secretary, United States Department of Veterans Affairs,

Defendants.
_____/

No. C 18-03748 WHA

JUDGMENT

For the reasons stated in the accompanying order dismissing leave to amend, **FINAL JUDGMENT IS HEREBY ENTERED** in favor of defendants United States Department of Veterans Affairs and Robert Wilkie, Secretary of United States Department of Veterans Affairs, and against plaintiff Tatyana E. Drevaleva. The Clerk **SHALL CLOSE THE FILE.**

IT IS SO ORDERED.

Dated: July 11, 2019.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

Part 4.

The September 14, 2021 Order of the U.S. District Court for the District of New Mexico
in case No. 1:21-cv-00761-WJ-JFR
(Doc. No. 491.)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

TATYANA EVGENIEVNA DREVALEVA,

Plaintiff,

vs. **No. 21-cv-761 WJ-JFR**

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, ET AL.

Defendants.

MEMORANDUM OPINION AND ORDER
(1) REGARDING PENDING MOTIONS, "SUPPLEMENTS," AND "NOTICES";
(2) SETTING STAY ON CASE PENDING REFERRAL TO MAGISTRATE JUDGE FOR CASE MANAGEMENT DEADLINES;
and
(3) ESTABLISHING COURT'S EXPECTATIONS FOR LITIGATION OF CASE, SUBJECT TO POTENTIAL SANCTIONS FOR VIOLATIONS OF THIS COURT'S ORDERS AND RULES

THIS MATTER comes before the Court on several motions pending in this employment discrimination case and on other matters which the Court finds appropriate to take up *sua sponte* following the transfer of this case from the Northern District of California on August 13, 2021. Doc. 453.

BACKGROUND

Ms. Drevaleva, who is proceeding *pro se,* filed her complaint in the Northern District of California on June 25, 2018. She claims that Defendants discriminated against her and violated her constitutional rights by denying her leave and terminating her employment.[1] Defendants counter that Ms. Drevaleva was a probationary employee at the Raymond G. Murphy VA Medical

[1] The Department of Veterans Affairs was dismissed as an improper defendant. Doc. 69 at 7.

Center ("the VA") who abruptly left her job for three months to obtain fertility treatment in Russia without obtaining approval for leave without pay ("LWOP").

I. Procedural History

United States District Judge William Alsup presided over the case while it was in the Northern District of California ("NDC").The case has a convoluted procedural history, due largely to Ms. Drevaleva's propensity for littering the docket with cumulative and irrelevant pleadings which failed to comply with the court's federal and local rules, including filing frequent notices of appeal. *See, e.g.,* Docs. 58, 70, 75, 157, 173, 196, 197, 284, 250, & 355 (Notices of Appeal). The Court condenses the now-almost 500 docket entries and provides a brief iteration of the case's history before its transfer to this Court.

On December 3, 2018, Plaintiff's claims were dismissed in their entirety by Judge Alsup, including the following claims: gender and pregnancy discrimination under Title VII; retaliation claims under Title VII; disability and failure-to-accommodate claims under the ADA and the Rehabilitation Act of 504; age discrimination claims under the ADEA; and state tort and due process claims including libel and due process violations. Doc. 69. Plaintiff sought reconsideration of Judge Alsup's rulings by filing motions for reconsideration and numerous "administrative motions" (*see, e.g.,* Docs. 78, 94, 96, 99, 100, 103, 108), but they were all denied (*see, e.g.,* Doc. 98, 109).

Ms. Drevaleva also filed numerous notices of appeal in her efforts to reverse Judge Alsup's rulings, trying every procedural mechanism she could imagine, regardless of the appropriateness of such notices of appeal. Her motions for writs of mandamus, motions for reconsideration, motions to reopen under Rule 60, motions to amend, motions for injunctive relief and motion for *en banc* rehearings were all denied by the Ninth Circuit. *See, e.g.,* Docs. 115, 136, 146, 161, 188,

209, 235, 285. There is no doubt that the Ninth Circuit must have been somewhat frustrated by Ms. Drevaleva's constant stream of procedurally defective filings, as indicated by the tone of some of its orders. *See, e.g.,* Docs. 115, 161, 209 (advising Plaintiff that the case had been closed and that "[n]o further filings will be entertained . . .").

Undaunted by the Ninth Circuit's denials of her appeals, Plaintiff continued her efforts (unsuccessfully) to vacate the district court judgment, again resorting to procedural means that were unsuitable for obtaining the relief requested, such as motions to amend and for injunctive relief. *See, e.g.,* Doc. 163 ("Supplemental Brief re: First Motion to Amend"); Doc. 174 (Motion for Preliminary Injunction); Doc. 171 at 2 (noting that Plaintiff continued to violate the court's local rules regarding "filing supplementary material after the operative brief was filed" and advising her that it would "not be permitted"); Doc. 193 at 2 (". . . plaintiff's action was dismissed, judgment has been entered, and the case remains closed."

After having dispensed with the flurry of defective notices of appeals filed over several months by Ms. Drevaleva, the Ninth Circuit settled into addressing Plaintiff's appeal on the merits. The court affirmed Judge Alsup's dismissal of most of Plaintiff's claims, but reversed the dismissal of Plaintiff's Title VII claims for sex discrimination and pregnancy discrimination, and for failure-to-accommodate under the Rehabilitation Act, because of the early stage of the litigation and the required liberal construction of a *pro se* plaintiff's allegations. Doc. 291 at 3

After the Ninth Circuit issued its mandate reversing those two claims (Doc. 315, Mandate), Judge Alsup recused himself from the case (Doc. 319) which was reassigned to Chief Magistrate Judge Joseph C. Spero (Docs. 337, 338). The case management hearing was continued to August 20, 2021 (Docs. 372, 436)—after the point at which this case was transferred to the U.S. District Court for the District of New Mexico and thus, the case management hearing never took place.

Following Magistrate Judge Spero's recusal (Doc. 450), the case was reassigned to United States District Judge Haywood S. Gilliam, Jr. *See* Docs. 450 & text entry dated 8/10/2021. Judge Gilliam denied all of Plaintiff's then-pending motions except for her unopposed motion to transfer to the District of New Mexico. He granted the motion concluding that the balance of factors under 28 U.S.C. §1404(a) favored transfer to this District. Doc. 451 at 6 ("There is no indication that any witness except Plaintiff herself is located in the Northern District of California.").

DISCUSSION

Plaintiff's lawsuit now consists of two claims—Title VII and the failure-to-accommodate claim under the Rehabilitation Act. The Court finds that the best way to proceed is to hit the "reset" button on the entire case. This includes imposing a temporary stay and striking certain filings in order to begin with a clean slate in this Court.

I. Stay of Case Pending Entry of Case Management Order

Since the transfer of this case, Plaintiff has continued to file motions and other pleadings (which may or may not have anything to do with the motions she has filed) even before this Court can assess the case and establish a scheduling order.

The Court hereby REFERS this case to the Magistrate Judge assigned to the case to set a case management hearing and discuss relevant scheduling deadlines with the parties.

The Court also imposes a STAY on this case until the Magistrate Judge issues a scheduling order regarding discovery and the deadlines for pretrial matters. *See Landis v. North American Co.*, 299 U.S. 248, 254 (1936) (a district court has the power to stay proceedings pending before it and to control its docket for the purpose of "economy of time and effort for itself, for counsel, and for litigants"); *Pet Milk Co. v. Ritter,* 323 F.2d 586, 588 (10th Cir. 1963); *see also U.S. v. Schneider,*594 F.3d 1219, 1226 (10th Cir. 2010).

Parties are precluded from filing any documents in this case from the date this Order is entered until a scheduling order is in place allowing pleadings to be filed. Any filings made contrary to this Order shall be immediately STRICKEN from the record.

II. Pending Motions and Other Pleadings Filed by Plaintiff

In an effort to set some ground rules and clear the way to an orderly litigation process here, the Court addresses Plaintiff's pending motions and other various pleadings filed since the case was transferred from the NDC.

A. Plaintiff's Motion for Permission for Electronic Case Filing (Doc. 456)

Plaintiff wishes to file documents electronically in this case, noting that she was granted permission in the NDC case to do so. Actually, Ms. Drevaleva was denied that permission initially (*see* Docs. 6, 12), and then granted access to electronic filing on a motion to reconsider the ruling (*see* Docs. 14, 21).

To electronically file documents, *pro se* parties must obtain permission from the presiding judge. *See* District of New Mexico's CM/ECF Administrative Procedures Manual at 4; Guide for Pro Se Litigants at 13. *Mallgren v. Thomas*, No. 16CV1256 JCH/KBM, 2016 WL 9725194, at *3 (D.N.M. Dec. 7, 2016). At this time, the Court will not grant Plaintiff's request, given what this Court considers to be Plaintiff's abuse of the privilege of electronic filing while her case was being litigated in the NDC. As an example, Judge Alsup advised Plaintiff that her constant filing of "supplementary material [such as 'supplements' and 'administrative motions'] after the operative brief has been filed is a violation" of that court's local rule. Doc. 171 at 2. Yet, within five months after receiving that directive from Judge Alsup, Plaintiff continued to file at least fourteen

additional "supplemental briefs" and within two months of Judge Alsup's directive, Plaintiff filed at least *ten* administrative motions within a two-month period.[2]

Judge Alsup also subsequently denied Plaintiff's motions for leave to file supplemental briefs:

> It is Plaintiff's responsibility to articulate her arguments in each of her filings, and Plaintiff should take sufficient time to include all arguments that she wishes to raise in the first instance. Plaintiff's failure to do so, leading to later efforts to supplement her filings, is inefficient and results in a needlessly lengthy docket.

Doc. 451 at 2. Plaintiff's conduct thus far in this District likewise demonstrates a headstrong refusal to familiarize herself and comply with the rules of this Court. Within a very short time from when this case was transferred to this District, Plaintiff has already resorted to frequent and non-stop communications to chambers by phone and e-mails. Such *ex parte* communications flagrantly disregard the Court's prohibition on such conduct. *See* Court's Guide for Pro Se Litigants at 11 (prohibiting *pro se* parties from all *ex parte* communication with the judge or judge's staff"); *Mallgren v. Thomas*, No. 16CV1256 JCH/KBM, 2016 WL 9725194, at *1 (D.N.M. Dec. 7, 2016) (noting that plaintiff failed to comply with Court rules "[w]ithin the first months" of the case, and denying plaintiff's electronic filing request where plaintiff sent ex parte to magistrate judge).

This Court has no assurance at this time that Plaintiff can or will comply with her responsibilities as a litigant in this case. **Thus, Plaintiff is hereby advised that until the Court has the assurance by way of her litigation conduct that she will comply with this Court's local rules, Plaintiff will not be allowed to participate in electronic filing, as the Court will not grant her license to abuse the privilege at the outset. Accordingly, Plaintiff's request is DENIED at this time.** *See Werner v. State of Utah*, 32 F.3d 1446, 1447 (10th Cir. 1994) (filing

[2] *See* "Administrative Motions" Docs. 94, 95, 96, 100, 101, 103, 106, 111, 113, 126 filed from December 28, 2018 to February 20, 2019.

restrictions are appropriate when a litigant abuses privileges such as proceeding *in forma pauperis* and being afforded the lenience due pro se litigants).

B. Motion for Expedited Jury Trial that is Consolidated with Hearing of My Motion for Permanent Injunction (Doc. 458)

Plaintiff seeks an "immediate" jury trial on all issues in this case and injunctive relief in the form of reinstatement to her job at the VA.

The Court's first impression is that Plaintiff has violated this Court's local rule requiring a movant to confer with opposing party *before* (not *after*) the filing of a motion. *See* Doc. 467 (Deft's resp, citing to D.N.M.LR-Civ.7.1(a). The Court's second impression on the merits is that Plaintiffs presents her requests to the Court without having any legal or factual foundation. As Defendants observe, Plaintiff has already demanded a jury trial (Doc. 1 at 1, 18 and none of the authorities she cites provides for an expedited jury trial. For example, her reference to Rule 65 for a "hearing at the earliest practicable date" concerns proceedings relating to requests to injunctive relief, not the setting of jury trials.

The motion also fails on the merits. Plaintiff puts the "cart before horse," to borrow Defendants' description of the matter. As noted above in the procedural background history, no case management hearing was held following remand from the Ninth Circuit Court of Appeals, nor has this Court entered a scheduling order. Plaintiff has indicated that she wishes to engage in discovery, and motions for summary judgment may be filed that would obviate the need for a trial. Thus, there may never be a trial in this case, much less an expedited one.

Ms. Drevaleva's request for a permanent injunction is also premature. She refers to a "motion" for an injunction, without indicating what motion that might be, and the only motion the

Court has found listed on the docket has already been denied. *See* Doc. 451 (denying Doc. 449 among other motions).[3]

There is no proper motion for injunctive relief before the Court. While the Court must construe Plaintiff's filings liberally as a *pro se* plaintiff, *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam); accord *Garza v. Davis*, 596 F.3d 1198, 1201 n.2 (10th Cir. 2010), the Court will not go beyond what Plaintiff offers, *see United States v. Parker*, 720 F.3d 781, 784 n.1 (10th Cir. 2013) (court "will not 'assume the role of advocate") quoting *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

Therefore, Plaintiff's requests for both an "expedited trial" and a "permanent injunction" (Doc. 458) are hereby DENIED.

C. Plaintiff's Motion to Appoint an Attorney (Doc. 463)

In this motion, Plaintiff requests that the Court appoint counsel to represent her in this case, pointing to her "eligibility" under 28 U.S.C. §1915. She claims that she should be appointed counsel because the judges on the Ninth Circuit "exhibited fierce bias and prejudice" toward her and "disregarded the material facts of the case" and "applied the wrong legal standards." Doc. 463 at 10.

There is no constitutional right to assistance of counsel in the prosecution of a civil rights action. *Bethea v. Crouse*, 417 F.2d 504, 505 (10th Cir. 1969). Appointment of counsel to represent an indigent proceeding pursuant to §1915 is a matter of discretion. *See Shabazz v. Askins*, 14 F.3d 533, 535 (10th Cir. 1994). The Court considers a variety of factors in determining whether to

[3] Judge Gilliam denied Plaintiff's motion for injunctive relief largely because Plaintiff "proffers no evidence to support her claim and refuses to address the relevant legal standard." Doc. 451 at 3. Judge Gilliam also pointed to Plaintiff's language in her declaration that she did not "need to satisfy four stupid and unnecessary elements of the Prima Facie Case in the irrelevant case law *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008)." *Id.* Plaintiff is put on notice that in this case, motions she files of a similar caliber will be met with similar rulings by this Court.

appoint counsel, such as: the merit of the litigant's claims, the nature of the factual issues raised, the litigant's ability to present the claims, and the complexity of the legal issues raised. *Rucks v. Boergermann*, 57 F.3d 978 (10th Cir. 1995).

The Court DENIES Plaintiff's request to have counsel appointed. First, only two claims remain from the many claims first asserted in her complaint. The Court is convinced that, based on the review of the lengthy docket while the case was in the NDC, Plaintiff has shown herself to be capable of representing her legal interests thus far. Second, Plaintiff has already tried to obtain legal representation from no fewer than twenty-five law firms and agencies—all unsuccessful attempts—and the Court sees no point in allowing Plaintiff more time to find an attorney. The case will go forward with Plaintiff representing herself *pro se,* as she has done so since June of 2018 when the complaint was first filed.

Plaintiff's motion for appointment of counsel is therefore DENIED.

D. Plaintiff's Motion for Partial Summary Judgment (Doc. 464)

This motion is STRICKEN. Plaintiff may re-file it as a motion when a case management order is in place, and unless the re-filed version complies with all applicable local rules, it will again be stricken. For example, at 42 pages, the motion exceeds the page limitation for motions under D.N.M.LR-7.5.

E. Plaintiff's "Notice-Application to Certify that Lawsuit is of General Public Importance" (Doc. 465)

This "Notice" is **STRICKEN** because: (1) it appears to be cumulative of her motion for summary judgment; (2) a request for relief from the Court must be made by *motion,* not a "notice," *see* Fed.R.Civ.P. 7(b)(1); D.N.M-LR-Civ. 7.1(a); and (3) the pleading fails to comply with the requirements for summary judgment motions under either the federal or local rules in setting out the pertinent facts and support thereof.

F. Plaintiff's self-styled "Part 1: "Notice/Statement that Civil Local Rule 56.1(a) of Federal Rules in "Inapplicable to Me." Part 2: Memorandum in Support to My First Motion for Partial Summary Judgment" (Doc. 477)

This motion is DENIED as well for several reasons. First, Plaintiff claims that her case is exempt from various procedural rules, including Fed.R.Civ.P. 56 because it is a condemnation action and requests only injunctive or other emergency relief. This representation is false, as the case is and has always been an employment discrimination case, which is subject to Rule 56 as well as local rules governing case management. *See, e.g.,* D.N.M.LR-Civ. 16.3.

Second, Plaintiff again has violated this Court's local rule D.N.M.LR-Civ.7.1(a) by failing to seek Defendants' concurrence before filing the motion. *See* Doc. 480 at 1, n.1.

Third, Plaintiff's briefing purports to include the Statement of Material Facts required under the Court's local rules to support Plaintiff's First Motion for Partial Summary Judgment (Doc. 464), which makes this pleading (according to Plaintiff herself) an *additional* summary judgment brief. *See* Doc. 480-1 (e-mail from Plaintiff to defense counsel Lyman stating that "[m]y intention for now is to file the Second Motion for Partial Summary Judgment"). Breaking "what is in reality a single motion for summary judgment into distinct and individual pleadings" is not permitted in this Court. *See Vera v. Rodriguez*, No. CV 16-491 SCY/KBM, 2017 WL 6621048, at *1 (D.N.M. Dec. 27, 2017) (noting that district courts have inherent power to limit successive summary judgment motions and briefs in order to manage their dockets and providing examples of cases where district judges in this district have exercised this power in such situations). For Plaintiff's benefit, the Court explains its reasons for discouraging such piecemeal litigation:

> ["Piecemeal litigation"] forces the parties to file multiple motions, responses, and replies, when a single omnibus document would suffice and further causes extra work for this busy Court, which has to read and analyze overlapping and often duplicative arguments." As the Honorable Bruce Black emphasized, "such tactics—which look like transparent attempts to skirt the rules—waste judicial resources, unnecessarily burden the litigants, and ultimately prove counterproductive because

> . . . they create additional haystacks in which courts are obliged to look for the needle."

See Vera v. Rodriguez, No. CV 16-491 SCY/KBM, 2017 WL 6621048, at *1 (D.N.M. Dec. 27, 2017) (internal citations and quotations omitted).

As Defendants note, Ms. Drevaleva's abusive practice of filing multiple supplemental briefs led the NDC to order her not to file "[a]dditional briefs beyond the motion, opposition and . . . reply" without first obtaining the Court's leave. *See* Doc. 415. Ms. Drevaleva is hereby cautioned that a similar practice here will result in the summary striking of all multiple and/or successive pleadings, as well as briefs containing overlapping or duplicative arguments. Judge Alsup advised Plaintiff to "take sufficient time to include all arguments that she wishes to raise in the first instance," Doc. 451 at 2, and the Court here advises Plaintiff to do the same. Failure to do so will have consequences in this District.

Fourth, Plaintiff's summary judgment filings grossly exceed the page limitations of the local rules, and as just noted previously, the initial summary judgment motion alone is over the page limit. *See* D.N.M.LR-Civ.7.5. With the additional 64 pages of facts separately filed in Doc. 477, Plaintiff has presented a total of 106 pages for the Court's consideration. Because the Court has certainly not granted Plaintiff permission to exceed the page limitations set forth in Local Rule 7.5, the Court takes the position that Plaintiff has filed only one summary judgment motion (Doc. 464) which has been denied without prejudice and will be subject to re-filing in accordance with this Court's local rules and once a case management order is in place. The Court also intends to ignore or strike any pleadings which appear to be attempts by Plaintiff to circumvent compliance with the procedural rules. *See, e.g.*, *Vera*, 2017 WL 6621048, at *2 (noting that "piecemeal motions which strike the Court as merely attempts to skirt procedural rules, including those providing page limitations, should be disallowed").

G. Motion to Disqualify Assistant AUSA Christine Lyman (Doc. 484)

In this motion, Plaintiff seeks to disqualify AUSA Christine Lyman, claiming that she is unauthorized to practice before this Court, and "committed fraud and multiple felonies" by opposing Plaintiff's motions. In addition to Ms. Lyman's disqualification, Plaintiff also seeks other remedies, such as criminal penalties for conspiracy, obstruction of justice, and genocide. *See* Doc. 484 at 2-4.

Attorneys are bound by the local rules of the court in which they appear. Because motions to disqualify counsel in federal proceedings are substantive motions affecting the rights of the parties, they are decided by applying standards developed under federal law." *Cole v. Ruidoso Mun. Sch.*, 43 F.3d 1373, 1383 (10th Cir. 1994). Plaintiff's motion is **DENIED**for a variety of reasons.

First, Plaintiff lacks standing to seek disqualification. Generally speaking, only clients have standing to move to disqualify counsel. *Smith v. TFI Fam. Servs., Inc.*, No. 17-02235-JTM-GEB, 2018 WL 2926474, at *3 (D. Kan. June 8, 2018). Here, Ms. Drevaleva fails to plausibly demonstrate how Ms. Lyman's representation of Defendants cause her as a plaintiff to suffer any injury-in-fact. *See O'Hanlon v. AccessU2 Mobile Sols., LLC*, No. 18-CV-00185-RBJ-NYW, 2018 WL 3586395, at *4 (D. Colo. July 26, 2018), *report and recommendation adopted*, No. 18-CV-00185-RBJ-NYW, 2019 WL 1081079 (D. Colo. Jan. 22, 2019) (noting that the "irreducible minimum of standing" requires the plaintiff to prove an injury-in-fact that is "concrete, particularized, and actual or imminent").

Second, some courts grant standing to an opposing party to disqualify counsel "where the interests of the public are so greatly implicated that an apparent conflict of interest may tend to undermine the validity of the proceedings." *Abbott v. Kidder Peabody & Co.*, 42 F. Supp. 2d 1046,

1050 (D. Colo. 1999). Plaintiff points to no such conflict of interest that would "tend to undermine the validity of the proceedings of the case." *O'Hanlon v. AccessU2 Mobile Sols., LLC*, No. 18-CV-00185-RBJ-NYW, 2018 WL 3586395, at *5 (D. Colo. July 26, 2018), *report and recommendation adopted,* No. 18-CV-00185-RBJ-NYW, 2019 WL 1081079 (D. Colo. Jan. 22, 2019)

Third, even assuming Plaintiff had standing, she offers nothing by way of meritorious argument. The party seeking disqualification has the burden to establish the grounds for disqualification. *Religious Tech. Ctr. v. F.A.C.T.Net, Inc.*, 945 F. Supp. 1470, 1473 (D. Colo. 1996). Plaintiff seeks disqualification because she never "consented to be represented by the U.S. Department of Justice and particularly by Ms. Christine Lyman." Doc. 484 at 2. However, Ms. Drevaleva offers no legal authority or rule for the proposition that evidence of representation must be provided either to the Court or to opposing counsel. In other words, Plaintiff offers nothing at all to suggest that the United States Attorney's Office must obtain Ms. Drevaleva's permission or consent before assigning any particular AUSA to a case. *See HSBC Bank USA, N.A. v. Dela Cuesta*, No. C-11-4584 EMC, 2012 WL 10527, at *1 n.1 (N.D. Cal. Jan. 3, 2012) (noting that "there is no federal rule requiring evidence of representation before an attorney may make an appearance on behalf of a client"). Moreover, the record in this case clearly establishes that the Department of Justice has and continues to represent the Defendants in this case. Accordingly, the Court accepts defense counsel's representation as an officer of the Court that she is, in fact, authorized to represent Defendants and besides, Plaintiff has no say over which lawyer(s) are selected by the Attorney General or the U.S. attorney to represent an agency of the United States Government.

Fourth, Plaintiff is simply incorrect that Ms. Lyman is engaged in the unauthorized practice of law because she is not admitted to practice law before the state courts of New Mexico. *See* Doc. 484 at 18. This Court's local rules permit admission of attorneys "licensed by the highest court of a state, federal territory, or the District of Columbia." D.N.M.LR-Civ. 83.2(a). In addition, this Court's website also indicates that "[a]ttorneys employed by, or on special assignment for the United States Government may practice before this court in their official capacity as long as they are licensed by, and on active status in any state, federal territory, or the District of Columbia." *See* Admissions, *available at* https://www.nmd.uscourts.gov/admissions (last visited September 7, 2021). Ms. Drevaleva is highly advised and encouraged to become familiar with these rules and website before filing motions that are legally unfounded. Stated another way, Ms. Lyman is authorized to and will be allowed to represent Defendants in this case regardless of whether Plaintiff agrees with Ms. Lyman's representation of Defendants.

Fifth, Plaintiff conflates Ms. Lyman's opposition to her motions with the notion that defense counsel is violating ethical rules. Plaintiff is familiar enough by now—or should be—that defense counsel's job *is* to oppose Plaintiff's motions if Ms. Lyman believes opposition is in the best interest of her client, which is an agency of the United States Government. *See, e.g.*, *Brown v. Marriott Hotel*, 602 F. App'x 726, 727 (10th Cir. 2015) (affirming denial of a motion to disqualify opposing counsel because attempting to dismiss claims and opposing motions did not "violate any ethical rules or justify disqualification from the case").

Sixth—and probably the most disturbing of Plaintiff's arguments—are Ms. Drevaleva's accusations of criminal conduct, including genocide. None of these accusations have any kind of factual footing and thus at best, the Court finds them offensive and frivolous. *See Matter of Lisse*, 921 F.3d 629, 644 (7th Cir. 2019) ("Flippant, unfounded accusations of misconduct and fraud by

opposing counsel and court officials demean the profession and impair the orderly operation of the judicial system." At worst, the Court would be inclined to consider the appropriateness of sanctions for making such baseless accusations. *Id.* ("Such behavior warrants punishment.")

For all these reasons, Plaintiff's motion to disqualify is DENIED.

H. Plaintiff's Pro Se Status Does not Give Her License to Abuse the Judicial Process

The Court hereby STRIKES all of Plaintiff's "Supplements" and "Supplemental Briefs" and "Appendix/Supplements" that were filed since the case's transfer to this District as being cumulative or otherwise violating this Court's local rules. All such pleadings filed prior to transfer will not be considered by the Court.

The Court will also STRIKE all supplemental and repetitive filings ("supplemental briefs," "supplements" and "administrative motions") filed by Plaintiff in the future that are cumulative or overlap with previous filings; and Plaintiff is hereby put on notice that the Court will NOT CONSIDER pleadings that include old arguments—notwithstanding the inclusion of new arguments in that pleading.

III. General Notice to Plaintiff Proceeding Forward With this Case

This section of the Court's Opinion is directed toward Ms. Drevaleva in particular and she is advised as follows:

A. This Court's Inherent Right to Manage Its Docket

Plaintiff's lawsuit is now being litigated in this District, which has long insisted that "*pro se* parties follow the same rules of civil procedure as any other litigant." *In re Young*, No. 1:14-cv-01143-JB-LF, 2015 WL 11718113, at *1 (D.N.M. Oct. 28, 2015), *report and recommendation adopted*, 546 B.R. 218 (D.N.M. 2015); *Yang v. Archuleta*, 525 F.3d 925, 927 n. 1 (10th Cir. 2008) ("*Pro se* status does not excuse the obligation of any litigant to comply with the fundamental

requirements of the Federal Rules of Civil and Appellate Procedure"); *Brick v. Estancia Mun. Sch. Dist.*, No. 1:20-CV-00881-KK, 2020 WL 5204294, at *3 (D.N.M. Sept. 1, 2020).

Ms. Drevaleva certainly has a right of access to the courts, but that right "is neither absolute nor unconditional and there is no constitutional right of access to the courts to prosecute an action that is frivolous or malicious." *Sieverding v. Colo. Bar Ass's*, 469 F.3d 1340, 1343 (10th Cir. 2006). The Court has "the inherent power to regulate the activities of abusive litigants by imposing carefully tailored restrictions under the appropriate circumstances." *Id.* "Even onerous conditions may be imposed upon a litigant as long as they are designed to assist the court in curbing the particular abusive behavior involved, except that they cannot be so burdensome as to deny a litigant meaningful access to the Courts." *Landrith v. Schmidt*, 732 F.3d 1171, 1174 (10th Cir. 2013).

The United States District Court for the District of New Mexico is one of the five southwest border courts in the United States. Consequently, this District has had and continues to have a chronic overload of criminal, border related cases resulting in a large percentage of Defendants charged with criminal offenses having to remain in custody pending trial or case resolution. Additionally, the United States Congress has authorized seven district judge positions for this District and for the past two years, there have been 2 to 3 judicial vacancies and as of the date of the filing of this opinion, the District of New Mexico has two judicial vacancies. When an individual is charged with a felony offense and his or her liberty interests are at stake, the Court has to give priority to criminal cases over civil cases. Consequently, while the Court understands and recognizes that this case is important to Ms. Drevaleva, this case is not the only important case before the undersigned judge and in fact, priority must and will be given to pending criminal cases because, as the Court previously stated, incarcerated criminal defendants are given a higher priority over civil litigants because the liberty interests of the criminal defendants are at stake. The ongoing

COVID-19 pandemic presents additional challenges for the Court in that there is currently a backlog of criminal defendants awaiting trial and these cases involving criminal defendants must be given priority over pending civil cases.

As a result of the demands of this Court's caseload, the Court has a strong interest in managing its docket and minimizing the impact of frivolous or meritless actions on its resources. *Mallgren v. United States*, No. 16CV1285 JAP/KBM, 2016 WL 9725195, at *1 (D.N.M. Dec. 12, 2016). In its efforts to mange its docket, the Court may impose sanctions in the form of **filing restrictions** on *pro se* parties who misuse court privileges. *See Tripati v. Beaman*, 878 F.2d 351, 352 (10th Cir. 1989) ("[E]ven onerous conditions may be imposed upon a litigant as long as they are designed to assist the district court in curbing the particular abusive behavior involved" as the conditions imposed to not deny a litigant meaningful access to the court); *Sieverding v. Colo. Bar Ass's*, 469 F.3d 1340, 1343 (10th Cir. 2006). Thus this Court has "the inherent power to regulate the activities of abusive litigants by imposing carefully tailored restrictions under the appropriate circumstances." *Landrith v. Schmidt,* 732 F.3d 1171, 1174 (10th Cir. 2013).

B. Court's Notice to Plaintiff Regarding Compliance With Federal and Local Rules

Plaintiff's continuous filing of frivolous and non-compliant pleadings in the NDC showed a complete disregard of that court's orders and procedural rules. Despite receiving clear directives from the Ninth Circuit and from Judge Alsup in the NDC, Plaintiff did not alter her course in either the frequency or nature of her filings throughout its litigation there. *See, e.g.,* Doc. 193, 349, 368 and 451 (orders relating to Plaintiff's unnecessary filings).

In addition to filing a motion to disqualify Ms. Lyman from this case (which the Court has denied with prejudice), Ms. Drevaleva previously made a habit of attempting to disqualify others associated with her case while it was being litigated in California. She filed two motions to

disqualify AUSA Kimberly Robinson which were summarily denied by Judge Alsup. (Docs. 349, 354). Plaintiff also moved to disqualify Judge Alsup because "he cruelly tortured and humiliated me" (Doc. 318) and Magistrate Judge Spero because he "wanted to continue torturing me with pleasure like both Alsup and Robinson did" (Doc. 369). As mentioned previously, both Judge Alsup and Judge Spero recused from the case. See Doc. 487 at 2.

This practice of seeking disqualification and filing other frivolous motions has earned Ms. Drevaleva the dubious distinction of being declared a vexatious litigant in California. *See Drevaleva v. Alameda Health Sys.*, No. A158862, 2020 WL 5790940, at *1, 4-5 (Cal. Ct. App. Sept. 28, 2020); *see also* Vexatious Litigant List (current through Aug. 1, 2021) at 21, *available at* https://www.courts.ca.gov/documents/vexlit.pdf (last visited Sept. 7, 2021).

Plaintiff's rash of repetitive filings following transfer of the case to this District indicates that she has no intention of changing her abusive litigation behavior while the case is being litigated in this Court. Moving forward, the Court expects and will assume that Plaintiff will take the time to become familiar with this Court's local rules and the federal procedural rules. Specifically, the Court recommends that Plaintiff familiarize herself with Rule 11 of the Federal Rules of Civil Procedure, which requires parties (or their attorneys, for those who have them) to conduct a reasonable investigation into the facts that they believe will support their claims, and into the laws that they believe will provide them with a legal basis for seeking relief from the court. *See Marley v. Wright,* 968 F.2d 20, *2 (10th Cir. 1992). A person's actions must be objectively reasonable in order to avoid Rule 11 sanctions. *See Adamson v. Bowen,* 855 F.2d 668, 673 (10th Cir.1988).

Ms. Drevaleva's status as a *pro se* party does not relieve her of this responsibility, but the standard remains one of objective reasonableness under the circumstances, *Adamson,* 855 F.2d at 670, and this standard applies whether the person being sanctioned is a pro se litigant, an attorney,

or both. *Wesley v. Don Stein Buick, Inc.*, 184 F.R.D. 376, 378 (D. Kan. 1998); *see also* Fed.R.Civ.P. 11 advisory committee notes (1983 amendment) ("[T]he court has sufficient discretion to take account of the special circumstances that often arise in *pro se* situations"). The Court finds that Ms. Drevaleva's blatant and factually unfounded accusations of "genocide" against defense counsel Christine Lyman comes perilously close to a Rule 11 violation. Plaintiff claims that Ms. Lyman "willfully subjected me to irreparable body injury in a form of preventing me from continuing my treatment of infertility." Doc. 484 at 26. Accusing someone of "genocide" who purportedly thwarted access to fertility treatment is not objectively reasonable, even for a non-attorney. Going forward, the Court will not tolerate outbursts attacking the opposing party unless they are supported by some indicia of evidence.

Plaintiff is hereby given formal notice that a continuation of non-compliance with the federal procedural rules and this Court's local rules and orders will result in quick action by the Court in exercising its right to manage its docket. Such action may take the form of filing restrictions or sanctions to include dismissal of the case.

C. Cessartion of *Ex Parte* Communications With Court

Soon after this case was transferred to this District, Ms. Drevaleva proceeded to bombard chamber with *ex parte* communications, which are prohibited. *See* Court's Guide for Pro Se Litigants at 11 (prohibiting *pro se* parties from all *ex parte* communication with the judge or judge's staff"); *Mallgren v. Thomas*, No. 16CV1256 JCH/KBM, 2016 WL 9725194, at *1 (D.N.M. Dec. 7, 2016. These communications are apparently intended to coerce the Court into ruling on her pending motions. They come in the form of phone calls (her tone on these calls is belligerent and abusive) and e-mails, and they occur with a frequency (several daily) which amounts to, in the Court's estimation, harassment. In one e-mail, Plaintiff insists that the Court provide her with a

time frame for rulings on those motions, and threatens to file a motion to disqualify the undersigned and file a writ of mandamus if chambers does not respond to the e-mail by providing her with a time frame for a ruling on her motions. ***See* Court's Exhibit 1. Plaintiff is put on notice that the Court will get to her motions when the Court is ready to rule on said motions and not before then.**

In this Order, the Court has denied Ms. Drevaleva's motion for permission to file electronically. Allowing Plaintiff the privilege will not be considered at all by the Court since Plaintiff continues to hound chambers staff with *ex parte* communications.

THEREFORE,

IT IS ORDERED that:

(1) **This case is hereby STAYED and referred to the Magistrate Judge assigned to the case** to schedule a case management hearing and discuss relevant scheduling deadlines with the parties;

(2) Until a scheduling order is in place following the case management hearing, **parties are precluded from filing any documents in this case from the date this Order is entered until a scheduling order is in place allowing such filing. Any filings made contrary to this Order shall be STRICKEN**;

(3) The Court has ruled on the following motions:

- Plaintiff's Motion for Permission for Electronic Case Filing **(Doc. 456)** is DENIED;
- Plaintiff's motion requesting an "expedited trial" and a "permanent injunction" **(Doc. 458)** IS DENIED;
- Plaintiff's motion for appointment of counsel **(Doc. 463)** is DENIED;
- Plaintiff's Motion for Summary Judgment **(Doc. 464)** is STRICKEN;

- Plaintiff's Notice/Application to Certify That Lawsuit is of General Public Importance **(Doc. 465)** is STRICKEN;

- Plaintiff's "Part 1: "Notice/Statement that Civil Local Rule 56.1(a) of Federal Rules in "Inapplicable to Me." Part 2: Memorandum in Support to My First Motion for Partial Summary Judgment" **(Doc. 477)** is DENIED with prejudice; and

- Plaintiff's Motion to Disqualify Ms. Lyman **(Doc. 484)** is DENIED with prejudice.

(4) The Court has STRICKEN all of Plaintiff's "Supplements," "Supplemental Briefs" and "Appendix/Supplements." Future pleadings in these categories shall be STRICKEN or NOT CONSIDERED. The Court hereby adopts and reiterates Judge Alsup's directive to Ms. Drevaleva that she "should take sufficient time to include all arguments that she wishes to raise in the first instance. . . ." Doc. 171 at 2.

WILLIAM P. JOHNSON
CHIEF UNITED STATES DISTRICT JUDGE

Part 5.

Exhibit 1 to the September 14, 2021 Order of the U.S. District Court for the District of New Mexico
in case No. 1:21-cv-00761-WJ-JFR.

Ashley Kittrell

From: Tatyana Drevaleva <tdrevaleva@gmail.com>
Sent: Monday, September 13, 2021 1:15 PM
To: NMDdb_Proposed Text Johnson; Lyman, Christine (USANM)
Subject: Case No. 1:21-cv-00761-WJ-JFR.

To the Chief District Judge Mr. William P. Johnson.

Please, give me a time frame when you are finally going to rule on my Motion for Permission for Electronic Case Filing, on my Motion to Appoint a Counsel, and on my Motion for an expedited Jury Trial that is consolidated with a hearing of my Motion for Permanent Injunction.

If I don't hear from you until the end of this week, I will file a Motion to Disqualify you from judging my lawsuit No. 1:21-cv-00761-WJ-JFR, and I will file a Petition for Writ of Mandate with the 10th Circuit to compel you to rule on my Motion for Permission for Electronic Case Filing, my Motion to Appoint a Counsel, and on my Motion for an Expedited Jury Trial that is consolidated with a hearing of my Motion for Permanent Injunction.

Plaintiff Pro Se Tatyana Drevaleva.

Part 6.

The September 17, 2021 Initial Scheduling Order of the U.S. District Court for the District of New Mexico in case No. 1:21-cv-00761-WJ-JFR
(Doc. No. 497.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TATYANA EVGENIEVNA DREVALEVA,

Plaintiff,

vs. **Civ. No. 21-761 WJ/JFR**

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, ET AL.,

Defendants.

INITIAL SCHEDULING ORDER

This case is assigned to me for scheduling, case management, discovery and other non-dispositive motions. The Federal Rules of Civil Procedure, as amended, as well as the Local Civil Rules of the United States District Court for the District of New Mexico will apply to this lawsuit.

The parties, appearing through counsel or *pro se*, will "meet and confer" no later than **Thursday, October 14, 2021,** to discuss the nature and basis of their claims and defenses, the possibility of a prompt resolution or settlement, and to formulate a provisional discovery plan. Fed. R. Civ. P. 26(f). The parties will cooperate in preparing a *Joint Status Report and Provisional Discovery Plan* ("JSR") which follows the sample JSR available at the Court's website, www.nmd.uscourts.gov. The parties will fill in the proposed dates, bearing in mind that the time allowed for discovery is generally 120 to 150 days from the date of the Rule 16 Initial Scheduling Conference. The Court will determine actual case management deadlines after considering the parties' requests. Plaintiff, or Defendant in removed cases, is responsible for filing the JSR by **Monday, October 25, 2021**.

Good cause must be shown and the Court's express and written approval obtained for any modification of the case management deadlines that the Court will establish at the scheduling conference.

Initial disclosures under Fed. R. Civ. P. 26(a)(1) must be made within fourteen (14) days of the meet-and-confer session.

A Rule 16 Initial Scheduling Conference will be held telephonically on **Thursday, November 4, 2021,** at **10:00 a.m.** Five minutes prior to the start of the Conference, the parties shall call the **AT&T Conference line at 888-363-4735, Access Code 2387395,**[1] to connect to the proceedings. At the Rule 16 scheduling conference, counsel must be prepared to discuss initial disclosures; discovery needs and scheduling; the process for resolving discovery disputes;[2] all claims and defenses; the use of scientific evidence and whether a *Daubert*[3] hearing is needed; and the timing of expert disclosures and reports under Fed. R. Civ. P. 26(a)(2). We will also discuss settlement prospects and alternative dispute resolution possibilities. Client attendance is not required. All parties should review the Court's webpage at: https://www.nmd.uscourts.gov/content/honorable-john-f-robbenhaar, particularly noting the Procedures Tab and linked Guidelines for Proposed Protective Orders, Phone Conference Procedures and Procedures for Civil Discovery and Settlement Matters.

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[1] **REMINDER: Recording or broadcasting of this conference is strictly prohibited. See D.N.M.LR-Civ. 83.1**

[2] The Court will not entertain any motion to resolve a discovery dispute pursuant to Fed. R. Civ. P. 26 through 37, or a motion to quash or modify a subpoena pursuant to Fed. R. Civ. P. 45(c), unless the attorney for the moving party has conferred or has made reasonable effort to confer with opposing counsel concerning the matter in dispute prior to the filing of the motion. Every certification required by Fed. R. Civ. P. 26(c) and 37 and this rule related to the efforts of the parties to resolve discovery or disclosure disputes must describe with particularity the steps taken by all attorneys to resolve the issues in dispute. A "reasonable effort to confer" means more than mailing or faxing a letter to the opposing party. It requires that the parties in good faith converse, confer, compare views, consult, and deliberate, or in good faith attempt to do so. Absent exceptional circumstances, parties should converse in person or telephonically.

[3] *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

Plaintiff shall serve a copy of this order on any parties that have been served but have not yet entered an appearance and shall file a certificate of service with the Court documenting such service. Plaintiff shall serve a copy of this order on any parties not yet served along with the summons and complaint.

IT IS SO ORDERED.

JOHN F. ROBBENHAAR
United States Magistrate Judge

Part 7.

The September 28, 2021 Order of the U.S. District Court for the District of New Mexico
in case No. 1:21-cv-00761-WJ-JFR
(Doc. No. 522.)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

TATYANA EVGENIEVNA DREVALEVA,

Plaintiff,

vs. No. 21-cv-761 WJ-JFR

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, ET AL.

Defendants.

MEMORANDUM OPINION AND ORDER PROVIDING PLAINTIFF SECOND AND FINAL NOTICE REGARDING VIOLATIONS OF COURT ORDER AND RULES

THIS MATTER comes before the Court *sua sponte*, following the Court's recently filed Memorandum Opinion (Doc. 491) and the filing of the Court's Initial Scheduling Order (Doc. 497), regarding Plaintiff's recent violations of both.

Ms. Drevaleva, who is proceeding *pro se,* is suing Defendants for violations of Title VII and the Rehabilitation Act of 504. This case was transferred from the Northern District of California on August 13, 2021, *see* Doc. 453, where she has been declared as a "vexatious litigation"—and is fast becoming worthy of that moniker in this District as well. Shortly after the transfer, the Court issued a Memorandum Opinion and Order ruling on Plaintiff's pending motions, and also gave Plaintiff formal notice regarding her of the potential consequences of failing to comply with this Court's orders and rules. The Court's message to Plaintiff was clear:

> Parties are precluded from filing any documents in this case from the date this Order is entered until a scheduling order is in place allowing pleadings to be filed. Any filings made contrary to this Order shall be immediately STRICKEN from the record.

Doc. 49, pp. 5 & 20. The Court also admonished Plaintiff for continuing to communicate with chambers *ex parte* by e-mail and phone and denied her electronic filing privileges based on her past and current abusive filing conduct:

> Thus, Plaintiff is hereby advised that until the Court has the assurance by way of her litigation conduct that she will comply with this Court's local rules, Plaintiff will not be allowed to participate in electronic filing, as the Court will not grant her license to abuse the privilege at the outset.

Doc. 491 at 6.

I. Continuing Violations After Stay Was Imposed

Immediately after the Stay was imposed on September 14, 2021, and in flagrant violation of the Court's stay and its abundantly clear directives, Ms. Drevaleva proceeded to violate it in several ways.

A. Filing of Pleadings and Motions

09/14/2021	view	[COURT ONLY] (Court only) ***Set STAYED Flag pursuant to Order 491 . (cmm) (Entered: 09/14/2021)
09/17/2021	view492	REPLY to Response to 484 Motion to Disqualify Counsel filed by Tatyana Evgenievna Drevaleva. (cmm) (Entered: 09/17/2021)
09/17/2021	view493	MEMORANDUM in Support re 492 Reply to Response to Motion to Disqualify filed by Tatyana Evgenievna Drevaleva. (cmm) (Entered: 09/17/2021)
09/17/2021	view494	NOTICE of Briefing Complete by Tatyana Evgenievna Drevaleva re 484 MOTION to Disqualify Counsel filed by Tatyana Evgenievna Drevaleva. (cmm) (Entered: 09/17/2021)
09/17/2021	view495	FIRST MOTION for PERMISSION TO EXCEED Page LIMITATIONS by Tatyana Evgenievna Drevaleva. (cmm) (Entered: 09/17/2021)
09/17/2021	view496	FIRST MOTION for Permission to File More Motions for Summary Judgment or, As an Alternative, to File a Supplemental Brief in Support to My First Motion for Partial Summary Judgment by Tatyana Evgenievna Drevaleva. (cmm) (Entered: 09/17/2021)

All of these filings violated the Court's stay order and were summarily stricken. Doc. 498.

B. Continuing E-Mail Communications with Court

On September 15th and 16th, Ms. Drevaleva also picked up where she left off with her daily e-mail communications with the Court. This time, however, Plaintiff copied defense counsel on the e-mails—no doubt under a misguided perception that doing so would successfully circumvent the Court's restrictions regarding *ex parte* communications. The Court assures Plaintiff that it does not, for several reasons. These e-mails still constitute communications made to the Court off the record and as such have no relevance to the lawsuit. Based on the substance and tone of those e-mails, Plaintiff sole objective was to vent displeasure at the Court's rulings which are not favorable to her, particularly the denial of electronic filing privileges. These off-the-record communications force the Court to waste its time having to address them, taking valuable time from other cases that need the Court's attention. Also, under this Court's local rule 5.1(a), "[f]axing, email or any other form of electronic submission does not constitute electronic filing and will not be accepted by the Clerk." Thus, sending these emails to the Court—even *after* Plaintiff was formally provided notice regarding compliance with the Court's Orders and Rules—still violates those very Orders and Rules, regardless of whether Plaintiff copies defense counsel on the e-mails.

C. E-Mails to Magistrate Judge Chambers With Hundreds of Exhibits

On September 17, 2021,United States Magistrate Judge John F. Robbenhaar, who is assigned to this case, set an initial scheduling order on September 17, 2021, ordering parties to submit a Joint Status Report by October 25, 2021. Doc. 497.

On September 25, 2021, Plaintiff sent five e-mails to Judge Robbenhaar's chambers, with literally hundreds of pages of attachments (*by exact page count, 1531 pages total*), copied to opposing counsel and chambers of the undersigned—ostensibly as part of her "meet and confer" with opposing counsel for submission of the Joint Status Report. However, despite the Court's previous caution that Plaintiff must become familiar with this Court's rules

and comply with this Court's Orders, Ms. Drevaleva stubbornly refuses to do so. Her very conduct in sending these e-mails to Judge Robbenhaar's chambers violates both the local rules and the Court's Initial Scheduling Order several times over:

(1) Plaintiff has not complied with this Court's local rule governing the preparation and submission of the Joint Status Report ("JSR"), or with the Court's Initial Scheduling Order. This Court's local rule states that:

> A Joint Status Report form is available at the Clerk's office and **online.** Following the FED. R. CIV. P. 26(f) **meet-and-confer conference**, the parties must complete the Joint Status Report. The parties must file the completed Report at least seven (7) days before the scheduling conference, or as ordered by the Court.

D.N.M.LR-Civ. 16.1 (emphasis added). Instead of clicking on the highlighted link to obtain and complete the form (available in the online version of the local rules), Ms. Drevaleva sent to Judge Robbenhaar's chambers e-mail hundreds upon hundreds of pages of what is purportedly the appeal record from the Ninth Circuit and hundreds of pages of "objections" to "facts" (which have an unknown origin). The Court's initial scheduling order repeats the exact same requirements for submission of the JSR:

> The parties, appearing through counsel or *pro se*, will "meet and confer" no later than Thursday, October 14, 202, to discuss the nature and basis of their claims and defenses, the possibility of a prompt resolution or settlement, and to formulate a provisional discovery plan. Fed. R. Civ. P. 26(f). **The parties will cooperate** in preparing a *Joint Status Report and Provisional Discovery Plan* ("JSR") **which follows the sample JSR available at the Court's website, www.nmd.uscourts.gov.** The parties will fill in the proposed dates, bearing in mind that the time allowed for discovery is generally 120 to 150 days from the date of the Rule 16 Initial Scheduling Conference. The Court will determine actual case management deadlines after considering the parties' requests.

Doc. 497 at 1 (emphasis added).

(2) Plaintiff was supposed to "meet and confer" or otherwise "cooperate" with the opposing party in preparation of the JSR, but there is no indication at all that Ms. Drevaleva attempted to do so with the opposing party.

(3) There is no language in either the Court's local rules or the Court's initial scheduling order remotely suggesting that a "meet and confer" session can be accomplished by deluging Judge Robbenhaar's chambers with e-mails and hundreds of exhibits.

(4) Other than filling in certain dates for discovery needs, the JSR mainly requires Plaintiff to list her "Stipulations" and "Contentions" related to the lawsuit. Instead, Plaintiff chose to ignore the Court's rule and Order by circumventing those requirements and dumping hundreds of pages of unrelated matter on the Court.

D. Certificates of Services

On September 27, 2021, Plaintiff filed twenty-three (23) Certificates of Services (Docs. 499 to 521) which appear to put additional parties on notice that she intends to add their names to her Complaint and advising them of certain obligations pursuant to the ISO (including as parties the district judge presiding over this lawsuit while it was being litigated in the Northern District of California, and a federal magistrate judge involved in the litigation of one of Plaintiff's many other related cases, *see* Docs. 499 and 500).

The Court will STRIKE those documents because they violate the Court's stay Order and have absolutely no relevance to the information required in the preparation of a Joint Status Report. For example, while the JSR form asks for information pertaining to "amendments to pleading and joinder of parties," it does not call for (or allow) the actual *addition* of parties. Nor is a JSR form or a certificate of service the proper way to add parties.[1] While Ms. Drevaleva is

[1] Even assuming the stay was lifted and Plaintiff were allowed to add parties through proper procedure, she would need to formally amend her complaint and then effect service on all the parties she has included in her certificates of

afforded a liberal construction of her pleadings as a *pro se* litigant, *see Garza v. Davis*, 596 F.3d 1198, 1201 n.2 (10th Cir. 2010), she is expected to be familiar with the rules that will govern her case and comply with the plain language of Court Orders, *see Yang v. Archuleta*, 525 F.3d 925, 927 n. 1 (10th Cir. 2008).

Given Plaintiff's blatant disregard for carrying out *any* of the requirements related to the submission of the Joint Status Report, the Court is convinced that Ms. Drevaleva's abusive pattern of behavior is intentional. Lest there be any question regarding the degree of intentional abuse and willful failure to comply with this Court's rules and Orders, the Court attaches in PDF form Ms. Drevaleva's latest e-mails to Judge Robbenhaar's chambers, including attachments. **See Court's Exhibit 1 (PDF version of omnibus compilation of Plaintiff's e-mails and attachments).**

The Court advises Plaintiff here and now that continuing this pattern of conduct will not persuade the Court to exempt her from the compliance all litigants must show. Instead, it will accomplish only one thing: the imposition of SANCTIONS by the Court, MOST LIKELY DISMISSAL of her lawsuit. The Court also advises Plaintiff that this Order will serve as her LAST NOTICE before the Court does so, should she continue to ignore Court rules and Orders. The undersigned has already expended an inordinate amount of time exercising damage control to the rampant disregard shown by Ms. Drevaleva in her filing practices to this Court's rules and orders.

Next, for Plaintiff's benefit, the Court provides some background on the Court's authority to impose sanctions, including dismissal of a case.

II. Court's Authority to Impose Sanctions, Including Dismissal

services." However, none of these parties have been added or properly served, nor can Plaintiff do so during the stay imposed by the Court.

District courts have the power to impose sanctions, including dismissal, from various sources.

A court has an inherent power to regulate the activities of vexatious or abusive litigants after appropriate notice is given. *Ayala v. Holmes*, 29 F. App'x 548, 551 (10th Cir. 2002). In *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), the United States Supreme Court stated that the court's inherent powers are governed not by rules or statutes but by the control necessarily vested in courts to manage their own affairs in order to achieve the orderly and expeditious disposition of cases. *Id.* at 49. *Chambers* recommended that the court follow the statutes and rules when they are applicable, but when "in the informed discretion of the court, neither the statute nor the rules are up to the task, the court may safely rely on its inherent power." *Id.* at 50.

Rule 11(b) of the Federal Rules of Civil Procedure states that, for every pleading, filing, or motion submitted to the Court, an attorney or unrepresented party certifies that it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation," that all claims or "legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law," and that factual contentions have evidentiary support.

Under Rule 11(c)(3), the Court is empowered to order a party "to show cause why conduct specifically described in the order has not violated Rule 11(b)." If, after notice and opportunity to respond, a court determines that a party has violated Rule 11(b), it may impose sanctions. *See King v. Fleming*, 899 F.3d 1140, 1148 (10th Cir. 2018). These sanctions must be limited to what can deter future bad conduct. *Id.* The imposition of sanctions under Rule 11 is within the discretion of the court, *id.* at 1147, and one available sanction is dismissal. *Id.* at 1149-50.

Although dismissal is an "extreme sanction" not "to be taken lightly," it is a permissible option, because "district court judges need to be able to control their courtrooms." *King v. Fleming*, 899 F.3d 1140, 1149 (10th Cir. 2018). The Tenth Circuit reasoned that, "because dismissal with prejudice defeats altogether a litigant's right to access to the courts, it should be used as a weapon of last, rather than first, resort." *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920 (10th Cir. 1992). Dismissal is "appropriate only when the aggravating factors like bad faith or willfulness outweigh the judicial system's strong predisposition to resolve cases on their merits." *Id.* However, "willful failure" can be "any intentional failure" and no *wrongful* intent need be shown. *In re Standard Metals corp.,* 817 F.2d 625, 628 (10th Cir. 1987). In determining what sanctions to impose, the Court should consider factors such as:

(1) the degree of actual prejudice to the defendant;

(2) the amount of interference with the judicial process;

(3) the culpability of the litigant;

(4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and

(5) the efficacy of lesser sanctions.

965 F.2d at 921. The first three factors aid the Court in deciding whether to apply any sanction. *King v. Fleming*, 899 F.3d 1140, 1150, n.15 (10th Cir. 2018). The last two inform on whether dismissal or a lesser sanction is appropriate. *Id.*, cited in *Jaiyeola v. Garmin Int'l, Inc.*, No. 2:20-CV-02068-HLT, 2021 WL 2515023, at *13 (D. Kan. June 18, 2021)

The *Ehrenhaus* case dealt with sanctions for misconduct under Rule 37 relative to the discovery process, but involuntary dismissals for failure to comply with court orders are determined by reference to same criteria as dismissals for discovery violations – in other words, applying the *Ehrenhaus* factors. *See Mobley v. McCormick*, 40 F.3d 337 (10th Cir. 1994). For

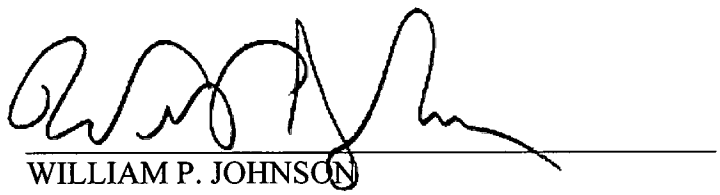
example, in *Jones v. Thompson*, the district court used those factors to dismiss a plaintiff's complaint with prejudice "for noncompliance with court orders." 996 F.2d 261, 264 (10th Cir.1993). The Tenth Circuit has recognized that these factors are also appropriately considered for cases arising under Rule 11 or a court's inherent power to sanction. *King v. Fleming*, 899 F.3d 1140, 1150 (10th Cir. 2018), cited in *Jaiyeola v. Garmin Int'l, Inc.*, No. 2:20-CV-02068-HLT, 2021 WL 2515023, at *13 (D. Kan. June 18, 2021).

THEREFORE,

(1) **The Court hereby STRIKES Documents 499-521** because they violate the Court's temporary stay imposed in this case and have no relevance to the clear requirements set forth in the Court's rules and scheduling order regarding the preparation of the Joint Status Report; and

(2) **Plaintiff is hereby (and again) advised that this Order serves as her FINAL WARNING that any subsequent violation of this Order or of other Court orders and rules will result in SANCTIONS, INCLUDING DISMISSAL OF HER CASE WITH PREJUDICE, WITHOUT FURTHER NOTICE.**

IT IS SO ORDERED.



WILLIAM P. JOHNSON
CHIEF UNITED STATES DISTRICT JUDGE

Part 8.

The November 02, 2021 Order of the U.S. District Court for the District of New Mexico in case
No. 1:21-cv-00761-WJ-JFR
(Doc. No. 526.)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

TATYANA EVGENIEVNA DREVALEVA,

Plaintiff,

vs. No. 21-cv-761 WJ-JFR

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER IMPOSING SANCTION OF DISMISSAL WITH PREJUDICE

THIS MATTER comes before the Court *sua sponte*. Plaintiff Tatyana Drevaleva, who is proceeding *pro se,* is suing Defendants for violations of Title VII and the Rehabilitation Act of Section 504. The case was transferred from the Northern District of California ("NDC") on August 13, 2021, *see* Doc. 453, where Plaintiff was declared a "vexatious litigant." It was apparent soon after transfer of the case that Plaintiff continued the same disregard for court orders and rules in this District as well. *See* Doc. 491 at 1.[1] Despite two formal warnings by this Court and after having been given several opportunities to fulfill her responsibilities as a *pro se* litigant, Ms. Drevaleva continues to show a blatant indifference to those responsibilities as well as a blatant disregard for court orders and the Federal Rules of Civil Procedure and the local rules of court in this District. Consequently, the Court has determined that the appropriate course of action is to dismiss the above captioned lawsuit with prejudice.

BACKGROUND

First Warning:

[1] This Court summarized Ms. Drevaleva's abusive litigation practices in the Northern District of California in its previous opinion. *See* Doc. 491 at 1-4.

On September 14, 2021, following transfer of the case from the NDC, this Court issued a Memorandum Opinion and Order that:

- ruled on Plaintiff's pending motions (either striking or denying them);
- entered a stay in the case and advised Plaintiff that "[a]ny filings made contrary to this Order shall be immediately STRICKEN from the record." Doc. 491 at 6 and 20;
- admonished Plaintiff for continuing to communicate with chambers *ex parte* by e-mail and phone; and
- denied Plaintiff's request for electronic filing privileges based on her past and current abusive filing conduct.

Doc. 491. The Court also gave Plaintiff formal notice regarding potential consequences of failing to comply with this Court's orders and rules:

> Plaintiff is hereby given formal notice that a continuation of non-compliance with the federal procedural rules and this Court's local rules and orders will result in quick action by the Court in exercising its right to manage its docket. Such action may take the form of filing restrictions **or sanctions to include dismissal of the case.**
>
> Doc. 491 at 19 (emphasis added).

After the Court filed its decision and imposed a stay on the case, Ms. Drevaleva again e-mailed chambers (only this time copying opposing counsel) mainly to express her annoyance with the Court's rulings (particularly with its denial of electronic filing privileges) and to "clarify" issues that the Court did not understand. Plaintiff also stated that she would file a petition to the Tenth Circuit to disqualify the undersigned and a writ of mandamus if she did not receive electronic filing privileges. *See* Doc. 522-1 (e-mails dated September 15th and 16th, 2021).

Second (and Final) Warning:

On September 17, 2021, the United States Magistrate Judge assigned to this case, John F. Robbenhaar, set a Scheduling Conference for November 4, 2021 and issued an Initial Scheduling Order describing in detail the requirements parties must follow for the preparation of a Joint Status Report ("JSR"). Instead of following any of those requirements (and under the obvious pretext of satisfying the "meet and confer" requirement prior to the submission of a JSR), Ms. Drevaleva bombarded Judge Robbenhaar's chambers with e-mails to which she attached well over a thousand pages of attachments and exhibits. At the same time, she filed over twenty "Certificates of Service" which appear to put additional parties on notice that she intends to add their names to her complaint (including the district judge and magistrate judge presiding over the litigation of her other cases) and to advise them of certain obligations pursuant to the initial scheduling order.

The Court addressed Plaintiff's abusive pattern of conduct in a second Memorandum Opinion and Order, noting that the e-mail dumping of thousands of pages of irrelevant material and the filing of inappropriate pleadings continued to be in violation of the Court's Orders and rules, and that through such conduct, Plaintiff showed that she had absolutely no intention of following the requirements set forth in the Initial Scheduling Order or the related local rule:

> There is no language in either the Court's local rules or the Court's initial scheduling order remotely suggesting that a "meet and confer" session can be accomplished by deluging Judge Robbenhaar's chambers with e-mails and hundreds of exhibits.

Doc. 522 at 5. The Court struck all 23 noncompliant Certificates of Services and again issued a clear and formal warning to Plaintiff, hoping to curb Ms. Drevaleva's persistent flouting of her responsibilities as a litigant:

> Plaintiff is hereby (and again) advised that this Order serves as her FINAL WARNING that any subsequent violation of this Order or of other Court orders

and rules will result in SANCTIONS, INCLUDING DISMISSAL OF HER CASE WITH PREJUDICE, WITHOUT FURTHER NOTICE.

Doc. 522 at 9.

Plaintiff's Continued Violations After Final Warning

On October 14, 2021, Ms. Drevaleva e-mailed Judge Robbenhaar's chambers again, advising that the parties had met and conferred and stated as follows:

To the Court.

The Parties in case No. 1:21-cv-00761-WJ-JFR exchanged the "meet and confer" statements.
Now, it is my responsibility to file our writings with the U.S. District Court for the District of New Mexico.

Previously, the Court filed over 1500 pages of my Excerpts of the Record, Volumes 1, 2, 3, and 4 in Appeal No. 198-16395 and Plaintiff's Statement of Facts, Part 1, see Doc. No. 522-1. I am reminding that I **emailed** all these documents to the email address of the Hon. Judges Johnson and Robbenhaar.

I am respectfully asking the Court's permission for me **to email** the "meet and confer" session to the Court because it is over 600 pages, and currently I don't have money to print out these documents and to mail them to the U.S. District Court for the District of New Mexico.

Moreover, I don't want to leave my elderly client alone for another half of the day in order to go to Oakland and to print out these documents.

Please, allow me to send these documents to the email addresses of the Hon. Judges Johnson and Robbenhaar.

Moreover, by allowing me to email over 600 pages to the Court, you will relieve the Clerks from the necessity to manually scan all these 600 pages and to file them.

Please, let me know whether I can email the documents to the Court as soon as you can.

Thank you,
Respectfully,
Tanya.

Notably, Plaintiff's e-mail incorrectly states Ms. Drevaleva "filed" over 1500 pages of the appeal record by sending them to chambers e-mail, when they were actually found to violate the Court's order related to preparation of the JSR:

> . . . Other than filling in certain dates for discovery needs, **the JSR mainly requires Plaintiff to list her "Stipulations" and "Contentions" related to the lawsuit**. Instead, Plaintiff chose to ignore the Court's rule and Order by circumventing those requirements and dumping hundreds of pages of unrelated matter on the Court.

Doc. 522 at 5 (emphasis added).

In addition, four days later—and most likely because she did not get any response to her e-mail from the Court—Ms. Drevaleva shipped a box of documents to the Clerk's Office which appear to be the documents related to her portion of the JSR (and which she claimed in her e-mail that she could not afford to ship). The FedEx shipping label on the box shows a ship date of October 18, 2021. The box itself is 12.5 inches long, 10.75 inches high and 8.5 inches wide and weighs 14 pounds, 9 ounces including the over 5-inch stack of papers inside the box.

The Court's previous Order was sufficiently clear that submitting hundreds of pages of documents does *not* comply with the Court's Order to present her "Stipulations" and "Contentions" related to this lawsuit. On its face, Plaintiff's e-mail is a request for permission to e-mail hundreds of documents that she cannot afford to send by postal mail but it is unmistakably a polite, yet determined refusal to conform to the Court's orders and rules. Then, not getting a response from the Court to her e-mail, Plaintiff went ahead and shipped the documents, still ignoring the Court's directives related to proper submission of a JSR.

Thus, despite the Court's express and final warning, Plaintiff again snubs Court orders. Ms. Drevaleva's insistence on doing things her own way instead of complying with what the Court needs her to do in order to resolve this civil matter efficiently indicates that nothing less than dismissal is suitable.

DISCUSSION

In its most recent warning to Plaintiff, the Court provided information regarding its authority to impose sanctions, including dismissal of a case—and the Court now addresses the relevant factors when considering dismissal as a form of sanctions.

A court has an inherent power to regulate the activities of vexatious or abusive litigants after appropriate notice is given. *Ayala v. Holmes*, 29 F. App'x 548, 551 (10th Cir. 2002). In *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), the United States Supreme Court stated that the court's inherent powers are governed not by rules or statutes but by the control necessarily vested in courts to manage their own affairs in order to achieve the orderly and expeditious disposition of cases. *Id.* at 49. *Chambers* recommended that the court follow the statutes and rules when they are applicable, but when "in the informed discretion of the court, neither the statute nor the rules are up to the task, the court may safely rely on its inherent power." *Id.* at 50.

Although dismissal is an "extreme sanction" not "to be taken lightly," it is a permissible option, because "district court judges need to be able to control their courtrooms." *King v. Fleming*, 899 F.3d 1140, 1149 (10th Cir. 2018). The Tenth Circuit reasoned that, "because dismissal with prejudice defeats altogether a litigant's right to access to the courts, it should be used as a weapon of last, rather than first, resort." *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920

(10th Cir. 1992).[2] Dismissal is "appropriate only when the aggravating factors like bad faith or willfulness outweigh the judicial system's strong predisposition to resolve cases on their merits." *Id.* However, "willful failure" can be "any intentional failure" and no *wrongful* intent need be shown. *In re Standard Metals corp.,* 817 F.2d 625, 628 (10th Cir. 1987). In determining what sanctions to impose, the Court should consider factors such as:

(1) the degree of actual prejudice to the defendant;

(2) the amount of interference with the judicial process;

(3) the culpability of the litigant;

(4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and

(5) the efficacy of lesser sanctions.

965 F.2d at 921. The first three factors aid the Court in deciding whether to apply any sanction. *King v. Fleming*, 899 F.3d 1140, 1150, n.15 (10th Cir. 2018). The last two inform on whether dismissal or a lesser sanction is appropriate. *Id.*, cited in *Jaiyeola v. Garmin Int'l, Inc.*, No. 2:20-CV-02068-HLT, 2021 WL 2515023, at *13 (D. Kan. June 18, 2021). This list of factors "is not exhaustive, nor are the factors necessarily equiponderant." *Atlas Res., Inc. v. Liberty Mut. Ins. Co.*, 291 F.R.D. 638, 643 (D.N.M. 2013) (citing *Archibeque v. Atchison, Topeka, and Santa Fe Railway Co.,* 70 F.3d 1172, 1174 (10th Cir.1995).

I. Degree of Actual Prejudice to Defendant

[2] The *Ehrenhaus* case dealt with sanctions for misconduct under Rule 37 relative to the discovery process, but the Tenth Circuit has recognized that the factors set forth in *Ehrenhaus* are also appropriately considered for cases arising under Rule 11 or a court's inherent power to sanction. *See King v. Fleming*, 899 F.3d 1140, 1150 (10th Cir. 2018); *Mobley v. McCormick*, 40 F.3d 337 (10th Cir. 1994); *Jones v. Thompson*, 996 F.2d 261, 264 (10th Cir. 1993) (using *Ehrenhaus* factors to dismiss a plaintiff's complaint with prejudice "for noncompliance with court orders." 996 F.2d 261, 264 (10th Cir. 1993)).

The Court's first Memorandum Opinion and Order ("First Opinion"), following transfer of the case to this district, provided an overview of the case while it was in the Northern District of California ("NDC"). The Court described how the course of litigation (up to almost 500 docket entries at the time the case was transferred here) was driven largely by Plaintiff's filings, most of which were found to be unnecessary and frivolous by United States District Judge William Alsup, who presided over the case in the NDC. *See* Doc. 491 at 5. Ms. Drevaleva continued to ignore the court's cautions about complying with court rules and avoiding frivolous filings. Doc. 491 at 5-6 (noting that "within five months after receiving that directive from Judge Alsup [to discontinue filing "supplementary materials"], Plaintiff continued to file them). Defendants, of course, were bound to consider and respond to Plaintiff's filings to fulfill their responsibilities as opposing parties, regardless of whether those filings were unnecessary or frivolous.

Here as well, Defendants are obligated to consider Ms. Drevaleva's filings, including motions that were pending upon transfer here—and they would have had to address the merits of the voluminous appeal record sent to Judge Robbenhaar as well as the hundreds of pages of documents Plaintiff attempted to submit for her portion of the JSR—had the Court not stricken the filings or otherwise found them to be noncompliant. *See* Doc. 491 at 20, Doc. 522 at 5. When one party follows the rules and the other does not, the compliant party is usually prejudiced. Here, Defendants have had to waste their time and resources addressing matters that they would not have to if Plaintiff just followed the rules.

Many of Plaintiff's filings can be described as nothing short of vexatious. As noted in the Court's First Opinion, Ms. Drevaleva "has made a habit of attempting to disqualify others

associated with her case while it was being litigated in California [including district and magistrate judges]" and has been declared a "vexatious litigant" in that District. Doc. 491 at 17-18. Judge Alsup summarily denied two motions filed by Plaintiff to disqualify defense counsel at that time, and this Court recently denied Ms. Drevaleva's motion to disqualify current counsel for Defendant, AUSA Christine Lyman, finding it to be completely meritless. *Id.* In one of her "arguments" in that motion, Plaintiff accused Ms. Lyman of "genocide" which the Court found "offensive and frivolous" and coming "perilously close to a Rule 11 violation." *Id.* at 19. Defendants were still required to address the matter and respond to it.

For these reasons, the Court finds that Defendants are prejudiced by Plaintiff's conduct and that this factor weighs heavily in favor of imposing sanctions. Plaintiff's insistence on filing what she wants and how she wants, causes Defendants to have to deal with frivolous matters that are distracting, time-consuming and expensive and interferes with their ability to defend themselves in this case. Moreover, there is no sign that Ms. Drevaleva will change course, and every indication is that she will continue to try and find ways around the Court's orders and rules.

As a result, the Court finds that Defendants will continue to be prejudiced if the case is permitted to proceed.

II. Amount of Interference With Judicial Process

The second factor considers the interference with the judicial process. The Court noted in its Memorandum Opinion and Order of September 28, 2021 ("Court's Second Opinion") that:

> Plaintiff has engaged in frequent and repetitive filings that have consumed an inordinate amount of the Court's limited time and resources.

Doc. 522 at 3. The Court explained to Plaintiff that her conduct is particularly disruptive in the United States District Court for the District of New Mexico because of this District Court's chronic overload of criminal/border-related cases, the backlog of criminal defendants awaiting trial as a result of the COVID-19 pandemic and the shortage of active federal judges available to handle the civil and criminal caseload. Doc. 491 at 16. Ms. Drevaleva's filings and e-mails to chambers force the Court to turn its already stretched resources to address her continued attempts to circumvent Court rules and directives. *See Jaiyeola v. Garmin Int'l, Inc.*, No. 2:20-CV-02068-HLT, 2021 WL 2515023, at *14 (D. Kan. June 18, 2021) (finding interference with judicial process factor weighed in favor of imposing dismissal as a sanction where plaintiff was filing meritless motions and emailing chambers with his scheduling expectations). *See King v. Fleming*, 899 F.3d 1140, 1150, n.15 (10th Cir. 2018) ("Greater degrees of obstruction help justify a dismissal sanction.").

Ms. Drevaleva's last barrage of documents by FedEx is yet another sign that she does not plan to let up on her abusive treatment of the judicial process, and so the Court finds that this factor also weighs in favor of the imposition of sanctions.

III. Culpability of Litigant

In determining whether sanctions are appropriate, the district court should consider sanctioning the responsible party. *Bud Brooks Trucking, Inc. v. Bill Hodges Trucking Co., Inc.*, 909 F.2d 1437, 1439 (10th Cir. 1990); *see Davis v. Miller*, 571 F.3d 1058, 1062 (10th Cir. 2009)

(sanctions should be directed at counsel "when the fault lies with him rather than with his client"). Here, Ms. Drevaleva as a *pro se* litigant is, and has always been, solely responsible for prosecuting her case and the Court's cautions have always been directed at her. Thus, Plaintiff's culpability weighs in favor of sanctions imposed against her alone.

The Court's analysis of the first three factors weighs heavily in favor of imposing sanctions against Plaintiff. The Court now determines whether dismissal is appropriate. *King,* 899 F.3d at 1150, n.15 (first three factors aid court in deciding whether to apply any sanctions, and last two "inform on whether dismissal or lesser sanction is appropriate").

IV. Notice to Party and Appropriateness of Less Sanctions

The last two factors the Court should consider are:

> (A) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and
>
> (B) the efficacy of lesser sanctions.

A. Notice

A court must consider whether plaintiff was warned that dismissal would be a potential sanction for his or her actions. *Ehrenhaus*, 965 F.2d at 921, cited in *Valdez v. Liberty Mutual Ins. Co.,* 2020 WL 4882436, at *3 (D. Colo. Aug. 19, 2020). Under the *Ehrenhaus* factors, notice is not a prerequisite for dismissal and constructive notice of dismissal is enough to satisfy the notice prong of the *Ehrenhaus* factors. *Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1145–46 (10th Cir. 2007) (dismissal was appropriate where district court's warning put litigant and counsel "at least on constructive notice"); *Davis v. Miller*, 571 F.3d

1058, 1063–64 (10th Cir. 2009) (accord). It is also not necessary that the district court *promise* to dismiss the case in the event of further delay, nor is it necessary that the notice be given regarding "the specific behavior that later forms the basis of the dismissal." *Ecclesiastes 9:10-11-12, Inc.*, 497 F.3d at 1150.

There is no gray area in this case regarding the notice factor. The Court provided Ms. Drevaleva express and formal notice twice. In the First Opinion, the Court warner Plaintiff that failure to follow Court orders, rules and procedures would result in "filing restrictions **or sanctions to include dismissal of the case.**" Doc. 491 at 19 (emphasis in original). In its Second Opinion, the Court stated:

> any subsequent violation of this Order or of other Court orders and rules will result in SANCTIONS, **INCLUDING DISMISSAL OF HER CASE WITH PREJUDICE, WITHOUT FURTHER NOTICE.**

Doc. 522 at 9 (emphasis added). Moreover, even though a court is not required to give notice on the *specific behavior* that later forms the basis of the dismissal, this Court nevertheless placed Plaintiff on formal notice that filing huge numbers of documents to satisfy her portion of the JSR violated the Court's order. Yet that is exactly what Ms. Drevaleva continues to attempt to do.

The Court therefore finds that Plaintiff was sufficiently warned in advance that dismissal of the action would be a likely sanction for noncompliance.

B. Efficacy of Lesser Sanctions

The final question is whether a lesser sanctions would deter Plaintiff from further misconduct. *See Oklahoma Federated Gold & Numismatics, Inc. v. Blodgett*, 24 F.3d 136, 139

(10th Cir. 1994). The Court finds that a lesser sanction than dismissal would not curb Ms. Drevaleva's abuse of the litigation process.

Dismissal represents an extreme sanction appropriate only in cases of willful misconduct, *Ehrenhaus,* 965 F.2d at 920, and it is Plaintiff's continual willful violation of court rules and procedures that convinces the Court lesser sanctions would not be effective. There is no indication that Ms. Drevaleva did not comprehend the Court's findings and warnings set out in it Opinions; and in fact, her e-mails to chambers reflect that awareness. Moreover, Ms. Drevaleva is no stranger to court orders and warning about vexatious litigation conduct as evidenced by her record of abusive filings in the United States District Court for the Northern District of California. Clearly, Ms. Drevaleva understood the Court's denial of her request for electronic filing privileges (on which she registered her annoyance); she grasped the point of the Court's warning regarding *ex parte* communications with the Court (which she attempted to dodge by simply copying defense counsel on subsequent unofficial communications); and most recently, she responded to the Court's Second Order regarding preparation of the JSR by ignoring it—twice.

In the end, Ms. Drevaleva does exactly what she wants to do rather than what the Court requires. It is this behavior which shows that Plaintiff has no intention of changing course, regardless of any further warnings or lesser sanctions that are imposed. The Court's warning in its Second Opinion was expressed as *final,* and the dispositive consequences were unequivocal

and clear, and yet Ms. Drevaleva continues her submission of frivolous, irrelevant and non-compliant pleadings. The Court finds that this refusal to comply with court orders and to follow appropriate procedures applicable to all court litigants is INTENTIONAL and WILLFUL, and therefore finds that DISMISSAL WITH PREJUDICE is the only suitable sanction that will stem Plaintiff's abuse of the judicial process. *See Ehrenhaus*, 965 F.2d at 920 (dismissal is "appropriate only when the aggravating factors like bad faith or willfulness outweigh the judicial system's strong predisposition to resolve cases on their merits.").

THEREFORE,

IT IS ORDERED that all Plaintiff's pending claims in the instant lawsuit are hereby **DISMISSED WITH PREJUDICE** and in their entirety.

A Rule 58 Judgment shall issue separately.

WILLIAM P. JOHNSON
CHIEF UNITED STATES DISTRICT JUDGE

Part 9.

The November 02, 2021 Judgment of the U.S. District Court for the District of New Mexico in case
No. 1:21-cv-00761-WJ-JFR
(Doc. No. 527.)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

TATYANA EVGENIEVNA DREVALEVA,

Plaintiff,

vs. No. 21-cv-761 WJ-JFR

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, et al.,

Defendants.

RULE 58 JUDGMENT

THIS MATTER came before the Court *sua sponte.* Pursuant to the findings and conclusions set forth in the Memorandum Opinion and Order which accompanies this Rule 58 Judgment; document number 526;

IT IS THEREFORE ORDERED and **ADJUDGED** that all Plaintiff's pending claims in this lawsuit are hereby **DISMISSED WITH PREJUDICE** and in their entirety.

WILLIAM P. JOHNSON
CHIEF UNITED STATES DISTRICT JUDGE

Part 10.

The November 19, 2021 Order of the U.S. District Court for the District of New Mexico in case
No. 1:21-cv-00761-WJ-JFR
(Doc. No. 544.)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

TATYANA EVGENIEVNA DREVALEVA,

Plaintiff,

vs. No. 21-cv-761 WJ-JFR

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER DENYING / STRIKING PLAINTIFF'S MOTIONS (DOCS. 528, 530 and 537) and REGARDING DOCUMENTS MAILED IN FedEx BOX TO CLERK OF COURT

THIS MATTER comes before the Court upon these motions, following an Order of Abatement issued by the Tenth Circuit Court of Appeals (Doc. 536):

- Plaintiff's First Motion to Amend the Judgment Pursuant to Fed.R.Civ.P.52(b) **(Doc. 528)**;
- Plaintiff's First Motion For Altering or Amending Judgment Pursuant to Fed.R.Civ.P 59(e) **(Doc. 530)**; and
- Plaintiff's First Motion to Vacate Judgment Pursuant to Fed.R.Civ.P.60 **(Doc. 537)**.

Plaintiff Tatyana Drevaleva, who is proceeding *pro se,* sued Defendants for violations of Title VII and the Rehabilitation Act of Section 504. The case was transferred from the Northern District of California ("NDC") on August 13, 2021. Doc. 453. On November 2, 2021, this Court dismissed the lawsuit with prejudice as a sanction, finding that Ms. Drevaleva intentionally and willfully refused to comply with court orders and to follow appropriate procedures applicable to all court litigants, including *pro se* parties. Doc. 526. Final Judgment was entered on November 2, 2021. Doc. 527.

After filing two post-judgment motions (Docs. 528 and 530), Plaintiff filed a Notice of Appeal on November 10, 2021 (Doc. 536). On November 15, 2021, the Tenth Circuit Court of Appeals issued an Order of Abatement pending the Court's consideration of Plaintiff's motion to alter or amend judgment under Rule 59 (Doc. 530), pursuant to Fed. R. App. P. 4(a)(4)(B) which renders a notice of appeal effective "when the district court enters an order disposing of the last such remaining motion is entered." Doc. 536 (Order of Abatement).

The Tenth Circuit's Order of Abatement was specific as to the Court's consideration of Plaintiff's motion in Document 530, but it appears that Plaintiff's two other motions are also included as types of motions that must be disposed of before a notice of appeal becomes effective under Fed.R.App.P.4(a)(4)(A). Plaintiff filed her Motion to Amend Judgment (Doc. 528) and Motion to Vacate (Doc. 537) pursuant to Fed.R.Civ.P.52(b) and Rule 60 (respectively) within 28 days after the judgment was entered, and so this Court has jurisdiction to address both of these motions as well. *See Warren v. Am. Bankers Ins. of FL*, 507 F.3d 1239, 1245 (10th Cir. 2007) ("A notice [of appeal] filed before the filing of one of the specified motions [including a Rule 59(e) motion] . . . is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the court of appeals") (citing Adv. Comm. Notes to Fed.R.App.(a)(4)(A)).

I. First Motion for Amended or Additional Findings (Doc. 528)

Plaintiff argues in this motion that the Court's Memorandum Opinion and Order Imposing Sanction of Dismissal with Prejudice (Doc. 526) (the "Order"), as well as its two prior orders warning her to comply with the Local Rules and Court's orders (Docs. 491 and 522), contained various purported factual errors.

Plaintiff asks that the Court make "additional findings" to correct these errors pursuant to Federal Rule of Civil Procedure 52(b)—and yet again, she has failed to become familiar with the Court's procedural rules before deluging the Court with motions and objections to the Court's rulings. Rule 52(b) "applies only to cases in which a district court issues factual findings following a trial on the merits." *Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1237 (10th Cir. 2007). There has been no trial on the merits or any accompanying factual findings, and so the Court has no basis for "amend[ing] its findings—or mak[ing] additional findings." Fed. R. Civ. P. 52(b); *accord Holmes v. Grant Cty. Sheriff's Dep't*, 772 F. App'x 679, 680 (10th Cir. 2019) ("Rule 52(b) applies only to cases where findings of fact have been made by the district court after a trial; here the district court granted a motion to dismiss as a matter of law and without a trial.").

However, even under a Rule 59(e) analysis, this motion fails. Reconsideration under Rule 59(e) is appropriate where there is (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice. It is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing. *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (citations omitted); *Brumark Corp. v. Samson Res. Corp.*, 57 F.3d 941, 948 (10th Cir. 1995).

The motion lists eight "erroneous facts" amidst pages and pages of extraneous and irrelevant information. None of these facts even remotely hints at "an intervening change in the controlling law, the availability of new evidence, or the need to correct clear error or prevent manifest injustice." The Court provides a few examples to illustrate the frivolous nature of Plaintiff's "objections" to the Court's rulings. In "Erroneous Fact No. 1," Ms. Drevaleva objects

to the Court's noting in its Order that she was declared a vexatious litigant at the U.S. District Court for the Northern District of California ("NDC"). She does not claim that the Court made an inaccurate or erroneous statement, but merely states that she was "improperly" declared a vexatious litigant in the NDC.

In "Erroneous Fact No. 2," Plaintiff objects to the Court's characterization of her filing history as "littering the docket with cumulative irrelevant pleadings which failed to comply with the Court's federal and local rules, including filing frequent notices of appeal." *See* Doc. 528 at 4 (citing to numerous NDC docket entries). And in "Erroneous Fact" 3 and 4, Plaintiff makes various objections to rulings made by United States District Judge William Alsup, who presided over the case while it was litigated in the NDC. Plaintiff simply does not like the rulings made by this Court, or past rulings made by Judge Alsup in the NDC and provides no basis for this Court to revisit or reconsider any of them. Accordingly, this motion is DENIED.

II. First Motion for Altering or Amending Judgment Pursuant to Fed.R.Civ.P.59(e) (Doc. 530)

This next motion appears to be a continuation of Plaintiff's First Motion for Amended or Additional Findings (Doc. 528), presenting "Erroneous Facts" 9 through 11. Also, while Plaintiff styles this motion as one pursuant to Rule 59(e), it actually requests additional factfinding pursuant to Rule 52(b), which as noted above, cannot apply to this case where it was not dismissed on the merits. The Court will not waste its time considering these objections **since they all appear to involve Judge Alsup's rulings made approximately two years ago**.

None of Plaintiff's objections shows any clear error in the Court's orders that would justify a modification. *See, e.g.*, *Eberly v. Manning*, No. CV 04-0977 WJ/RLP, 2006 WL 8443598, at *2 (D.N.M. Oct. 25, 2006) (rejecting a Rule 59(e) motion to set aside sanctions

where the purported errors had no bearing on whether sanctions were warranted under 28 U.S.C. § 1927). Accordingly, this motion is therefore DENIED.

III. Plaintiff's First Motion to Vacate Judgment Pursuant to Fed.R.Civ.P.60 (Doc. 537)

Defendants present short but meritorious substantive arguments as to why this motion fails under either Rule 52(b) or Rule 60(b). However, the Court need not consider the motion on its merits because of Plaintiff's blatant attempt, yet again, to disregard this Court's local rules governing page limitations for motions. Under this Court's local rules, the combined length of a motion and supporting brief "must not exceed twenty-seven (27) double-spaced pages." D.N.M.LR-Civ.7.5. Plaintiff's motion (Doc. 537) is 144 pages, with exhibits starting on page 123. Plaintiff also filed a "Separate Brief" in support of the motion, which is three pages.

There is no record of Plaintiff's request for leave of Court to file a brief exceeding the required limits on number of pages, and so the Court hereby STRIKES Plaintiff's First Motion for Amended or Additional Findings (Doc. 528).

IV. Delivery of Box of Documents to Clerk of Court

As noted on the Court docket, the Clerk's Office recently received a box via FedEx from Plaintiff on November 18, 2021. The box, weighing five pounds and measuring 9 inches by 10 inches, contains a motion with a page count of twenty-four (24), one page proof of service, one page proposed order, a three-page brief and a 467-page "Declaration." This Court's local rule requires that all exhibits "must not exceed a total of fifty (50) pages, unless all parties agree otherwise" and if not, then with leave of Court. *See* D.N.M.LR-Civ. 10.5.

The Court finds that it would be excessively burdensome to scan these documents in order to have them entered on the docket. Moreover, the Court will not further consider this latest document dump by Plaintiff, since it is abundantly clear that in sending this box of

documents to the Clerk's Office, Plaintiff is once again in violation of orders that have already been entered.

The Court has no intention whatsoever of allowing Plaintiff to continue her attempts to commandeer Court personnel and resources with her onslaught of meritless filings, and Plaintiff will be facing filing restrictions in the future should she persist in these vexatious litigation tactics.

The Court hereby DENIES/STRIKES Plaintiff's Motions (Docs. 528, 530 and 537) for the above stated reasons.

IT IS SO ORDERED.

WILLIAM P. JOHNSON
CHIEF UNITED STATES DISTRICT JUDGE

Part 11.

The December 02, 2021 Order of the U.S. District Court for the District of New Mexico in case
No. 1:21-cv-00761-WJ-JFR
(Doc. No. 564)
that prohibited the Clerk to accept any filings from me.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

TATYANA EVGENIEVNA DREVALEVA,

Plaintiff,

vs. No. 21-cv-761 WJ-JFR

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER DENYING / STRIKING PLAINTIFF'S MOTIONS FILED AFTER FILING OF NOTICE OF APPEAL and ORDER RESTRICTING FURTHER CERTAIN FILINGS IN THIS CASE

THIS MATTER comes before the Court upon the following motions filed by Plaintiff:

- First Motion for Leave to Amend My Joint Status Report and Provisional Discovery Plan, filed November 22, 2021 **(Doc. 545);**
- First Motion for Leave to File the First Motion for Injunction Pending Appeal, filed November 24, 2021 **(Doc. 550);**
- Second Motion for Amended or Additional Findings, Second Motion to Amend the Judgment, Second Motion for Altering or Amending Judgment, Second Motion to Vacate the Judgment, filed November 24, 2021 **(Doc. 552);**
- First Motion to Transfer Lawsuits from the U.S. District Court for the Northern District of California to the U.S. District Court for the District of New Mexico, filed November 26, 2021 **(Doc. 553);**
- Motion to Vacate, filed November 29, 2021**(Doc. 555);**
- Second Motion for Permission for the Electronic Case Filing, filed November 29, 2021 **(Doc. 557);**
- Second Motion to Appoint an Attorney, filed November 29, 2021 **(Doc. 558);**
- Motion-Request for Permission to File Supplemental Brief in Support to First Motion to Vacate, filed November 29, 2021 **(Doc. 559);** and

- First Motion for Order that (vacates the phrase in the September 14, 2021 Order (Doc. 491) that struck all my post-July 11, 2019 judgment supplemental briefs 2) that retroactively grants me with permission to file all my post-July 11, 2019 judgment supplemental briefs 3) that orders the real defendants the U.S. Department of Veterans Affairs and its Secretary Mr. Denis Richard McDonough (as opposed to AUSA Ms. Lyman) to respond on the merits of all my post-July 11, 2019 judgment's supplemental briefs and on the merits of all motions to vacate the judgment, filed November 29, 2021 **(Doc. 560)**.

BACKGROUND

Plaintiff Tatyana Drevaleva, who is proceeding *pro se,* sued Defendants for violations of Title VII and the Rehabilitation Act of Section 504. The case was transferred from the Northern District of California ("NDC") on August 13, 2021. Doc. 453. On November 2, 2021, this Court dismissed the lawsuit with prejudice as a sanction, finding that Ms. Drevaleva intentionally and willfully refused to comply with court orders and to follow appropriate procedures applicable to all court litigants, including *pro se* parties. Doc. 526. Final Judgment was entered on November 2, 2021. Doc. 527.

The above motions were filed after Plaintiff filed a Notice of Appeal on November 10, 2021 (Doc. 532) and after the Tenth Circuit issued an Order of Abatement (Doc. 536) directing this Court to address motions filed by Plaintiff that were filed within 28 days of the Judgment and came under Fed. R. App. P. 4(a)(4)(B).[1] On November 19, 2021, the Court addressed the first round of motions filed by Plaintiff pursuant to Fed.R.App.P.4(a)(4)(B). The motions were either denied or stricken. Doc. 544. The Court considered the motions to be either frivolous and/or in violation of this Court's orders or rules, and issued a warning to Plaintiff:

> The Court has no intention whatsoever of allowing Plaintiff to continue her attempts to commandeer Court personnel and resources with her onslaught of meritless filings, and Plaintiff will be facing filing restrictions in the future should she persist in these vexatious litigation tactics.

[1] Motions that are filed pursuant to Fed. R. App. P. 4(a)(4)(B) within 28 days of Judgment render the Notice of Appeal ineffective until the motions are disposed of by the district court. Judgment was entered in this case on November 2, 2021 (Doc. 527).

Doc. 544 at 6.

DISCUSSION

Plaintiff continues her onslaught of meritless filings. For the sake of efficiency, the Court divides the motions into two categories:

(1) motions that were filed 28 days of Judgment and come under Fed.R.App.P.4(a)(4)(B) which must be addressed by the Court before the Notice of Appeal becomes effective; and

(2) motions that do not come within Fed.R.App.4(a)(4)(B) and so do not abate the Notice of Appeal.

The Court has no jurisdiction over the second category of motions because Plaintiff has filed a Notice of Appeal. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (notice of appeal is an event of jurisdictional significance, conferring jurisdiction on the Court of Appeals and divesting the district court of control over those aspects of the litigation involved in the appeal); *Stewart v. Donges*, 915 F.2d 572, 574 (10th Cir. 1990) (filing of timely notice of appeal generally divests trial court of jurisdiction and confers jurisdiction upon the court of appeals); *U.S. v. Mavrokordatos,* 933 F.2d 843, 846 (10th Cir. 1991) (accord). Thus, the Court will not address this second group of motions because they concern matters pending on appeal (that is, the dismissal of Plaintiff's lawsuit as a sanction).[2]

I. Motions Which Do Not Abate Plaintiff's Notice of Appeal

The Court dismissed Plaintiff's lawsuit in its entirety, not on the merits but as a sanction for Ms. Drevaleva's egregious litigation conduct. Doc. 526. Seven out of the nine motions filed

[2] The Government has responded to two of Plaintiff's motions (Docs. 550 and 552), but the Court finds no need to wait for a response to the other motions in light of their frivolous nature.

by Plaintiff were not brought under any of the procedural rules listed in Fed.R.App.4(a)(4)(B) requiring the district court's attention before a notice of appeal becomes effective, as follows:

- First Motion for Leave to Amend My Joint Status Report and Provisional Discovery Plan, filed November 22, 2021 **(Doc. 545);**
- First Motion for Leave to File the First Motion for Injunction Pending Appeal, filed November 24, 2021 **(Doc. 550);**
- First Motion to Transfer Lawsuits from the U.S. District Court for the Northern District of California to the U.S. District Court for the District of New Mexico, filed November 26, 2021 **(Doc. 553);**
- Motion to Vacate, filed November 29, 2021**(Doc. 555);**
- Second Motion for Permission for the Electronic Case Filing, filed November 29, 2021 **(Doc. 557);**
- Second Motion to Appoint an Attorney, filed November 29, 2021 **(Doc. 558);**
- First Motion for Order that vacates the phrase in the September 14, 2021 Order (Doc. 491) that struck all my post-July 11, 2019 judgment supplemental briefs 2) that retroactively grants me with permission to file all my post-July 11, 2019 judgment supplemental briefs 3) that orders the real defendants the U.S. Department of Veterans Affairs and its Secretary Mr. Denis Richard McDonough (as opposed to AUSA Ms. Lyman) to respond on the merits of all my post-July 11, 2019 judgment's supplemental briefs and on the merits of all motions to vacate the judgment, filed November 29, 2021 **(Doc. 560)**.

The above motions raise matters that are pending on appeal before the Tenth Circuit Court of Appeals which now has jurisdiction to consider them. This Court is divested of jurisdiction to consider them and so declines to do so.[3]

II. Motions Filed Pursuant to Fed.R.App.4(a)(4)(B)

Two of the nine motions listed above were filed within 28 days of the Judgment, and both reference rules of civil procedure triggering the provisions of

[3] The Court further notes that the Government views these motions as a continuation of Ms. Drevaleva's filing of non-compliant motions and "vexatious litigation tactics" which the Court specifically warned Plaintiff to stop. see Doc. 554, Resp. to Doc. 552). The Court certainly agrees with this assessment, and would disposed of these motions by striking them if the Court did have jurisdiction over them.

Fed.R.App.4(a)(4)(B) which require that the district court must dispose of the motions before a notice of appeal become effective:

- Second Motion for Amended or Additional Findings, Second Motion to Amend the Judgment, Second Motion for Altering or Amending Judgment, Second Motion to Vacate the Judgment, filed November 24, 2021 **(Doc. 552);** and

- Motion-Request for Permission to File Supplemental Brief in Support to First Motion to Vacate, filed November 29, 2021 **(Doc. 559)**.

A. Second Motion for Amended or Additional Findings; Second Motion to Amend Judgment (Rule 52(b); Second Motion for Altering or Amending Judgment (Rule 59(e); Second Motion to Vacate Judgment (Rule 60) (Doc. 552)

Ms. Drevaleva brings this motion under Rules 52(b), 59(e) and 60 of the Federal Rules of Civil Procedure, objecting to the Court's denial/striking of her motions in a recent Order. *See* Doc. 544. The motion is best construed as a motion for reconsideration pursuant to Rule 59(e), despite her references to other procedural rules.[4] The Government has responded to the motion, offering valid reasons why the motion should be denied.

First, Plaintiff argues that the Court cited a case pre-dating amendments to Rule 52(b), rendering the Court's reliance on that case legally incorrect. However, contrary to Plaintiff's assertions, these amendments only changed the deadline for filing the motion and made clarifying edits. They did not abrogate *Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1237 (10th Cir. 2007), which noted that a Rule 52(b) motion "applies only to cases in which a district court issues factual findings following a trial on the merits." The Tenth Circuit relied on this holding in *Trentadue* as recently as 2019. *See Holmes v. Grant Cty. Sheriff's Dep't*, 772 F.App'x 679, 680

[4] The motion weaves Rule 52(b) into the discussion which is actually a request for reconsideration of the Court's prior rulings. *See* Doc. 552 at 1. To the extent the motion is construed as one brought under Rule 60(b), Plaintiff has not shown entitlement to relief based on "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; or (3) fraud." *Kirven v. Stanfill*, No. CIV 18-1204 WJ/GJF, 2020 WL 5976809, at *1 (D.N.M. Oct. 8, 2020). "Rule 60(b) relief is extraordinary and may only be granted in exceptional circumstances." *Beugler v. Burlington N. & Santa Fe Ry.*, 490 F.3d 1224, 1229 (10th Cir. 2007) (internal quotation marks and citation omitted). In fact, Ms. Drevaleva's recitation of this Court's purported "errors" only demonstrates that the Court was correct to dismiss her case as a sanction for her contumacious litigation conduct—Plaintiff's recent motions are just more of the same.

(10th Cir. 2019) (noting that "Rule 52(b) applies only to cases where findings of fact have been made by the district court after a trial," citing *Trentadue*, 501 F.3d at 1237). Thus, the Court's previous rulings on Plaintiff's motions brought pursuant to Rule 52(b) are still legally correct: Rule 52 still clearly applies only to "an action tried on the facts without a jury or with an advisory jury." Fed. R. Civ. P. 52(a). Because no such trial occurred in this case, the Court did not have any occasion to "find the facts specially," *id.,* and absent any findings, there is no basis for the Court to "amend its findings . . . or make additional findings. *Id.;* Rule 52(b).

Second, Plaintiff makes various objections to the Court's reliance on *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000), in which the Tenth Circuit set forth the three grounds for relief under Rule 59(e): "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." According to Plaintiff, this standard applies only to a motion for reconsideration, ignoring the fact that the Tenth Circuit construed the motion for reconsideration in that case as a motion under Rule 59(e). *See id.* Plaintiff also argues that this case postdates amendments to Rule 59. However, Plaintiff again fails to show that these amendments abrogated the Tenth Circuit's case law interpreting Rule 59(e). *See Alpenglow Botanicals, LLC v. United States*, 894 F.3d 1187, 1203 (10th Cir. 2018) (quoting the Rule 59(e) factors set forth in *Servants of the Paraclete*, 204 F.3d at 1012); *see also Nelson*, 921 F.3d at 930 (reiterating that *Servants of the Paraclete* prohibits parties from filing a second Rule 59(e) motion that rehashes arguments made in a prior Rule 59(e) motion).

Last, Plaintiff takes issue with the Court's assessment of the "erroneous facts" upon which she based her most recent post-judgment motions and contends that she "did not intentionally violate the Court's order and the Court's rule." Doc. 552 at 19. Ms. Drevaleva

misreads the Court's ruling, which denied her motion on the ground that it asked the Court to "revisit issues already addressed in prior filings." *Fawley*, 2020 WL 2395926, at *2. As the Tenth Circuit has repeatedly explained, "parties cannot invoke Rule 59(e) to regurge or elaborate on arguments already decided in earlier Rule 59(e) proceedings." *Nelson*, 921 F.3d at 930.

The Court would also add that while Plaintiff professes to file these motions under Rule 59(e), they have no valid legal basis. Rather, Ms. Drevaleva is unhappy with the Court's rulings and apparently is under the misguided impression that if she asks for the same thing enough times, courts will capitulate and grant whatever it is she is seeking.

As examples: Plaintiff asks the Court to revisit the denial of her request to allow her to e-mail the Court another "document dump" of 500 pages (as accurately described by Defendant) to upload onto CM/ECF a "First Motion for a Direct Verdict" pursuant to Rule 50(b)(3). *See* Doc. 552 at 22. The Court has repeatedly admonished Ms. Drevaleva about her refusal to become familiar with the rules that will govern the case. *See, e.g.,* Doc. 491 at 6, 14; Doc. 522 at 6. She has steadfastly refused to do so—and refuses here yet again. She attempts to file a "First Motion for a Direct Verdict" in a case that was not dismissed on the merits but as a sanction, and in addition, she continues to refuse to comply with the Court's local rule regarding page limitations for briefs.

In another motion (*see* discussion above re: Doc. 557), Plaintiff asks the Court to revisit its ruling denying her electronic filing privileges. The Court initially denied the request "based on her past and current abusive filing conduct." *See* Doc. 491 at 5; Doc. 526 at 2. Given that Ms. Drevaleva has not curbed this conduct in the least (in fact it has escalated), it is somewhat incredulous that she would ask the Court to change its mind. Plaintiff's recent motions are of the same ilk, showing the kind of conduct that led to the case's dismissal as a sanction.

B. Motion-Request for Permission to File Supplemental Brief in Support to First Motion to Vacate, filed November 29, 2021 (Doc. 559)

Plaintiff filed this motion purportedly pursuant to Rules 59(e) and 60, but the motion has little to do with either rule—it is simply a request to file a supplemental brief to her first motion to vacate (Doc. 555).

The request is DENIED. First, as noted above, this Court has no jurisdiction to address the merits of the motion. Second, Plaintiff's penchant for filing supplements has become part and parcel of her abusive litigation tactics, as has been well-documented in this Court's Orders and the request would also be denied for that reason even if the Court did have jurisdiction. *See* Doc. 491 at 3-5, 11.

III. Imposition of Filing Restrictions

In this Order, the Court has addressed the last of Plaintiff's motions that could be filed pursuant to Fed. R. App. P. 4(a)(4)(B) since 28 days have passed since Judgment was entered in this case. *See* Doc. 527 (Judgment, Nov. 2, 2021). Further, as mentioned above, this Court also no longer has jurisdiction over any motions that involve matters pending on appeal.

Even after she filed her Notice of Appeal on November 10, 2021, Ms. Drevaleva's filing assault on this Court did not stop. *See* Doc. 532. Instead of allowing the Tenth Circuit to consider the appeal which she chose to file, Plaintiff continues to assail the Court with a continuous stream of meritless filings—and the Court is certain this pattern of harassment would continue without the imposition of filing restrictions.

The Court's last Order warned Plaintiff that she would be "facing filing restrictions in the future should she persist in these vexatious litigation tactics." Doc. 544 at 6. Plaintiff is not entitled to pepper the docket in this case with all sorts of abusive filings and the Court is not required to allow it to continue. *See, e.g.*, *Cruz v. New Mexico*, No. 1:18-CV-00204-WJ-KK, 2020 WL 1514622, at *2 (D.N.M. Mar. 30, 2020) (finding "that filing restrictions are appropriate so that the Court does not expend valuable resources addressing future such cases.").

The Court hereby ORDERS that:

THE CLERK OF COURT SHALL NOT ACCEPT ANY FURTHER FILINGS BY PLAINTIFF IN THIS CASE OTHER THAN THOSE FILINGS THAT ARE NECESSARY TO PERFECT HER APPEAL. NO OTHER FILINGS IN THIS CASE WILL BE ACCEPTED BY THE CLERK OF COURT. UNACCEPTED FILINGS WILL BE HELD IN RECORDS UNTIL THE TENTH CIRCUIT COURT OF APPEALS ISSUES A DECISION IN THIS CASE.

IT IS SO ORDERED.

WILLIAM P. JOHNSON
CHIEF UNITED STATES DISTRICT JUDGE