UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BUNNATINE H. GREENHOUSE, Plaintiff,	)	
v.	)	Civil Action No. 07-182 (EGS)
PETE GEREN[1], *et al.*, Defendants.	)	

MEMORANDUM OPINION AND ORDER

The factual and procedural history of this case were set forth in detail by this Court in its Memorandum Opinion of September 2, 2008, and therefore need not be repeated here. *See Greenhouse v. Geren*, 574 F. Supp. 2d 57 (D.D.C. 2008). On September 15, 2008, after this Court granted in part and denied in part defendants' motion for judgment on the pleadings, plaintiff filed a motion for leave to file a supplemental complaint. Defendants opposed the motion on the basis that the inclusion of the proposed claims would be futile. This Court granted plaintiff's motion over defendants' objection, and plaintiff filed her supplemental complaint on November 5, 2008.

Now pending before the Court is Defendant's Motion to Dismiss Plaintiff's Supplemental Complaint in Part. Upon consideration of the motion, responses and replies thereto, the

[1] By operation of Federal Rule of Civil Procedure 25(d)(1), Secretary Geren is automatically substituted as the proper party in place of former Secretary of the Army Francis Harvey.

applicable law, and the entire record, and for the reasons stated below, this Court **GRANTS IN PART AND DENIES IN PART** defendants' motion.

I. Discussion

A. Relevant Background

Plaintiff's supplemental complaint raises claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, that, according to plaintiff, "have become ripe for District Court action since the filing of the original complaint in January 2007." Supplemental Compl. ¶ 1. Specifically, plaintiff alleges that defendants discriminated against her based on her race, gender, age, and past protected activities when they (1) issued an overall performance rating of Level 2, rather than Level 1, to plaintiff in 2006; (2) refused to submit her Top Secret Security Clearance for renewal in January 2007; and (3) intentionally withheld compensatory time from plaintiff, subsequently offered her a credit of 70 hours of leave time, which plaintiff accepted, and then "reneged and refused to implement the settlement." *Id.* ¶¶ 6-8. Based on these allegations, plaintiff claims that she was "subjected to discrimination, a hostile work environment, and retaliation" in violation of Title VII. *Id.* ¶ 10.

Plaintiff filed two administrative complaints with defendants relating to the claims raised in her supplemental

complaint. *See id.* ¶ 3. She first made contact with defendants' Equal Employment Opportunity Office ("EEOO") on February 4, 2007, and filed a formal administrative complaint ("first complaint") on March 21, 2007. *Id.* According to plaintiff's supplemental complaint, she tried to supplement her first complaint on "on or about January 16, 2008," but defendants "treated the supplementation as a separate complaint." *Id.* Defendants completed the investigation of the first complaint on March 20, 2008, and, after plaintiff declined to request an EEOO hearing, issued a final agency decision on September 26, 2008. *Id.* On June 18, 2008, a final agency decision was issued on the second administrative complaint. *Id.*

Defendants do not seek to dismiss plaintiff's claim relating to her 2006 performance evaluation. They do contend, however, that plaintiff's security-clearance claim is subject to dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1), and that her claim relating to the denial of compensatory time is subject to dismissal under both Rules 12(b)(1) and 12(b)(6). These claims will be addressed in turn.

B. Standard of Review

Pursuant to Federal Rule of Civil Procedure 8(a), a pleading stating a claim for relief must contain "'a short and plain statement of the claim showing that the pleader is entitled to relief'" in order to provide to the defendant "fair notice of the

claims against" him. *Ciralsky v. CIA*, 355 F.3d 661, 669, 670 (D.C. Cir. 2004) (quoting Fed. R. Civ. P. 8(a)); *see also Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197, 2200 (2007) (per curiam). "[W]hen a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 n.8 (2007). In considering a 12(b)(6) motion, the Court should construe the complaint "liberally in the plaintiff's favor," "accept[ing] as true all of the factual allegations" alleged in the complaint. *Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 15 (D.C. Cir. 2008) (alteration in original) (quoting *Kassem v. Wash. Hosp. Ctr.*, 513 F.3d 251, 253 (D.C. Cir. 2008)). Plaintiffs are entitled to "the benefit of all inferences that can be derived from the facts alleged." *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994).

On a motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), the plaintiff bears the burden of establishing that the court has jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The Court must give the plaintiff's factual allegations closer scrutiny when resolving a Rule 12(b)(1) motion than would be required for a Rule 12(b)(6) motion because

subject-matter jurisdiction focuses on the Court's power to hear the claim. *Uberoi v. EEOC*, 180 F. Supp. 2d 42, 44 (D.D.C. 2001). In resolving a motion to dismiss for lack of subject-matter jurisdiction, the Court may consider materials outside the pleadings where necessary to determine whether it has jurisdiction. *Alliance for Democracy v. Fed. Election Comm'n*, 362 F. Supp. 2d 138, 142 (D.D.C. 2005).

C. Security-Clearance Claim

Defendants argue that plaintiff's claim relating to its refusal to submit her Top Secret Security Clearance for renewal in January 2007 must be dismissed because the decision to deny or revoke a security clearance is an unreviewable decision committed to the Executive branch. Defs.' Mem. at 6 (citing *Ryan v. Reno*, 168 F.3d 520, 523-24 (D.C. Cir. 1999), in support of the argument that this claim "is barred as a matter of law based upon the discretionary nature of [security-clearance] decisions, and because of the exclusive authority that the Executive Branch has over matters concerning national security"). Plaintiff acknowledges the caselaw cited by defendants, but contends that because she is challenging the "supervisory decision on whether to submit her request to continue her clearance," her claim is distinguishable from cases in which courts have rejected claims arising from the actual denial or revocation of a clearance. In its reply, defendants respond that plaintiff's position is

untenable, because she "is challenging a precatory step to determine whether she is entitled to a Top Secret Security Clearance, which is a review of the ultimate decision itself, regardless of how she attempts to characterize it." Defs.' Reply at 6.

In *Ryan*, the D.C. Circuit applied the Supreme Court's decision in *Department of the Navy v. Egan*, 484 U.S. 518 (1988) – in which the Court held that courts lack the necessary expertise to review an Executive branch official's decision to grant or deny a security clearance, *id.* at 529-30 – and concluded that "an adverse employment action based on denial or revocation of a security clearance is not actionable under Title VII." 168 F.3d at 524. The *Ryan* court reasoned that where the plaintiff seeks to challenge an agency's denial of a security clearance, "a court cannot clear the second step of *McDonnell Douglas* without running smack up against *Egan*." *Id.* In other words, the determination of whether the agency's proffered reason for denying plaintiffs' security clearances was legitimate or pretextual would necessarily require the court to assess the merits of the decision to deny the clearance – precisely the assessment prohibited by the Supreme Court's holding in *Egan*. *See id.* ("[T]he merit of such decisions simply cannot be wholly divorced from a determination of whether they are legitimate or pretextual.").

Although defendants may ultimately prevail in their argument that *Egan* and *Ryan* bar plaintiff's claim from proceeding to a determination on the merits, the Court concludes that dismissal would be inappropriate without an opportunity for some discovery. Plaintiff complains about defendants' failure to "provide her with technical performance standards" necessary to support the continuation of a Top Secret Security Clearance, and without further factual development of the record, plaintiff's contention that defendants' determination may have been entirely unrelated to any security-sensitive considerations is plausible.

For example, the record does not make clear who made the decision not to submit plaintiff's security clearance for renewal, or whether that decision was based on any "predictive judgments" relating to plaintiff's ability to protect sensitive information. *See Jones v. Ashcroft*, 321 F. Supp. 2d 1, 8 (D.D.C. 2004) (rejecting, on a motion to dismiss, defendant's argument that plaintiff's failure-to-hire claim against the FBI was barred as a matter of law by the Title VII provision that permits requirements imposed in the interest of national security; and concluding that *Ryan* was distinguishable because "unlike *Ryan*, there is nothing in the record before this Court to indicate that the FBI's suitability determination was made with any 'predictive judgment' about whether hiring plaintiff would implicate national security concerns"). Because at this time there is "no evidence

before this Court to indicate that the government, at any time prior to the commencement of this lawsuit, considered national security as a basis for its decision" not to renew plaintiff's security clearance, *id.*, defendants' motion to dismiss this claim is **DENIED.**

D. Compensatory-Time Claim

Defendants next argue that plaintiffs' claim relating to the alleged withholding of compensatory time and refusal by defendants to give some agreed-upon credit must be dismissed for lack of subject matter jurisdiction and failure to state a claim. Specifically, defendants assert that dismissal is required because (1) plaintiff has explicitly alleged that there was a valid settlement agreement between the parties, the existence of which bars review by this Court under the doctrines of accord-and-satisfaction and *res judicata*; (2) "[t]o the extent that Plaintiff's Supplemental Complaint can be read to allege a breach of a settlement agreement regarding her compensatory time claim," such a claim must be dismissed for failure to notify the EEOO director in writing of the alleged breach; and (3) assuming there was no settlement agreement, plaintiff failed to exhaust her administrative remedies with respect to any potentially valid compensatory-time claim. Defs.' Mem. at 12.

A review of plaintiff's supplemental complaint makes clear that the Court need only address one of these arguments.

Although there is an obvious factual dispute over whether the parties actually entered into a settlement agreement regarding plaintiff's compensatory-time claim, at this stage the Court must accept as true plaintiff's allegation that such an agreement did in fact exist. *See* Suppl. Compl. ¶ 8; Pl.'s Opp'n at 5 (reiterating plaintiff's position that the "supplemental complaint alleges a settlement agreement"). Once plaintiff's allegation is assumed to be true, it necessarily follows that plaintiff's compensatory-time claim is subject to dismissal for failure to exhaust her administrative remedies. Indeed, as explained below, despite claiming that (1) the parties entered into a settlement agreement with respect to the compensatory-time claim, and (2) defendants breached that agreement by refusing to credit her the requisite 70 hours of compensatory time, plaintiff concedes that she never notified the EEO director of the alleged breach as required by 29 C.F.R. § 1614.504.

As a federal employee alleging employment discrimination under Title VII, plaintiff was required to timely exhaust her administrative remedies before filing an action in this Court. *See, e.g.*, *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 832 (1976). Administrative time limits are not jurisdictional bars to bringing suit, but they nevertheless operate like statutes of limitations to bar claims not timely raised before the employer agency. *See Bowden v. United States*, 106 F.3d 433, 437 (D.C.

Cir. 1997). As with other Title VII claims against an employer agency, "[a] plaintiff's failure to follow [the required] procedure will deprive a federal court of subject matter jurisdiction over any claims involving a settlement agreement with a federal agency." *Herron v. Veneman*, 305 F. Supp. 2d 64, 71 (D.D.C. 2004).

EEO regulations provide a detailed mechanism for bringing an administrative claim for an alleged breach of a settlement agreement reached during the administrative complaint process:

> If the complainant believes that the agency has failed to comply with the terms of a settlement agreement or decision, the complainant shall notify the EEO Director, in writing, of the alleged noncompliance within 30 days of when the complainant knew or should have known of the alleged noncompliance. The complainant may request that the terms of [sic] settlement agreement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point processing ceased.

29 C.F.R. § 1614.504(a). Courts have recognized that a plaintiff must comply with this requirement before bringing a claim for breach of a settlement agreement to federal court. *See, e.g.*, *Bowden*, 106 F.3d at 438 (concluding that the plaintiff's claim that the agency breached a settlement agreement was untimely under 29 C.F.R. § 1613.217(b) (1991) – the regulatory precursor to § 1614.504(a) – where he wrote a letter to the agency after the thirty-day time limit, but holding that equitable tolling applied because the agency had failed to promptly raise the untimeliness defense); *Herron*, 305 F. Supp. 2d at 71-72

(dismissing plaintiffs' claim for breach of an administrative-class settlement for failure to comply with § 1614.504(a) where the EEO director was never notified in writing of alleged noncompliance with the agreement).

Plaintiff's supplemental complaint is unambiguous in raising a claim for breach of a settlement agreement:

> During the course of defendants' investigation, defendants conveyed a settlement offer to plaintiff on [the compensatory-time] issue. Defendants offered plaintiff a credit of 70 hours of leave time. Plaintiff accepted that offer. *Defendants reneged and refused to implement the settlement*. Defendants instead issued an FAD dismissing plaintiff's claim about her compensatory time.

Supplemental Compl. ¶ 8 (emphasis added); *see also id.* ¶ 11(d) (seeking as a remedy "enforcement of the accepted settlement"). Plaintiff does not, however, allege or argue that defendants' EEO director was ever notified in writing or otherwise about the alleged breach of such an agreement. Indeed, except for the conclusory statement in plaintiff's opposition that she "certainly acted timely in raising the issue of defendant's reneging on the agreement," Pl.'s Opp'n at 6, plaintiff utterly fails to address defendants' argument that the compensatory-time claim must be dismissed because she failed to comply with § 1614.504(a). This Court agrees with defendants that, at the very latest, plaintiff "knew or should have known of the alleged noncompliance" on June 18, 2008, when the EEOO dismissed her compensatory-time claim. Because plaintiff has failed to provide

any evidence that she gave timely written notice to the EEO director of defendants' noncompliance with the settlement agreement, her compensatory-time claim must be dismissed for failure to exhaust administrative remedies.[2] *See Herron*, 305 F. Supp. 2d at 72. Defendants' motion to dismiss this claim is therefore **GRANTED.**

II. Conclusion

For the reasons set forth above, it is by the Court hereby

ORDERED that defendants' motion to dismiss is **GRANTED IN PART AND DENIED IN PART;** and it is

FURTHER ORDERED that plaintiff's supplemental complaint is **DISMISSED** insofar as it raises a claim against defendants for withholding of compensatory time; and it is

FURTHER ORDERED that the parties shall meet and confer and submit a proposed scheduling order by no later than **August 17, 2009.**

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[2] This Court recognizes, of course, that the exhaustion requirement "is not absolute or insurmountable, and should be considered in light of the purposes of the exhaustion rule." *Herron*, 305 F. Supp. 2d at 72. But plaintiff's only attempt to argue that exhaustion should be excused in this case appears to be her contention that the compensatory-time claim is reasonably related to her removal from the PARC position in 2005. Plaintiff fails to provide any explanation of how the compensatory-time claim "is a natural outgrowth" of defendants' 2005 decision to remove her from her position. Pl.'s Opp'n at 7. This Court finds no support in the law or the record for the conclusion that the compensatory-time claim is "like or reasonably related to" that decision. *See Park v. Howard Univ.*, 71 F.3d 904, 907 (D.C. Cir. 1995) (explaining that Title VII claims are limited to those that are "like or reasonably related to the allegations of the [EEO] charge and growing out of such allegations"). In the absence of any other proffered reason for excusing plaintiff's failure to exhaust, this Court declines to consider the issue any further.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
July 27, 2009