

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA

3
4 VELEDA BURTON,
5 Plaintiff,
6 v.
7 SEE'S CANDY INC., et al.,
8 Defendants.

Case No. 20-cv-00564-JCS

**ORDER GRANTING APPLICATION
TO PROCEED IN FORMA PAUPERIS**

**ORDER TO SHOW CAUSE WHY
COMPLAINT SHOULD NOT BE
DISMISSED**

Re: Dkt. Nos. 1, 2

9
10 **I. INTRODUCTION**

11 Plaintiff Velede Burton, pro se, applies to proceed in forma pauperis. See dkt. 2. Good
12 cause having been shown, that application is GRANTED.

13 The Court now reviews the sufficiency of Burton's complaint pursuant to 28 U.S.C.
14 § 1915(e)(2)(B). For the reasons discussed below, Burton is ORDERED TO SHOW CAUSE why
15 her complaint should not be dismissed for failure to state a claim on which relief may be granted.
16 Burton must respond to this order no later than September 14, 2020, by filing either an amended
17 complaint or a response arguing why her current complaint is sufficient. If Burton does not file an
18 amended complaint or a response by that date, this case will be reassigned to a United States
19 district judge with a recommendation that it be dismissed with prejudice.

20 The initial case management conference previously set for July 31, 2020 is CONTINUED
21 to October 30, 2020 at 2:00 PM.

22 Burton, who is not represented by counsel, is encouraged to contact the Federal Pro Bono
23 Project's Pro Se Help Desk for assistance if she continues to pursue this case. Lawyers at the Help
24 Desk can provide basic assistance to parties representing themselves but cannot provide legal
25 representation. Although in-person appointments are not currently available due to the COVID-19
26 public health emergency, Burton may contact the Help Desk at (415) 782-8982 or
27 FedPro@sfbar.org to schedule a telephonic appointment.
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1 **II. ALLEGATIONS OF THE COMPLAINT**

2 Burton brings claims under Title VII of the Civil Rights Act of 1964 (“Title VII”) and the
3 California Fair Employment and Housing Act (“FEHA”), asserting discrimination based on race
4 and retaliation for complaining of discrimination. Compl. (dkt. 1) at 2, 44–49. She names as
5 defendants See’s Candy Inc. (“See’s”); United Food and Commercial Union Local 5 (“Local 5”);
6 the United Food and Commercial Workers International Union (the “UFCWIU,” also referenced
7 in Burton’s complaint as “UNITED FOOD COMMERCIAL INTERNATIONAL UNION
8 INTERNATIONAL UNION”); David Rosenfeld (an attorney, also identified in the complaint as
9 “David Rosenthal”); the law firm Weinberg, Roger & Rosenfeld (“WRR”); and Berkshire
10 Hathaway, Inc. *Id.* at 1–2.

11 The complaint appears to be an unfinished draft. It includes a number of notes Burton
12 wrote to herself and placeholders for information to be added later. *E.g.*, *id.* at 5 (“Plaintiff was
13 previously and/or currently???????? were non -Afro Americans employees, suffered from a
14 pattern and practice of racial discrimination”); *id.* at 16 (“Wage adjustments issues per
15 Memorandum of Understanding as well as the voting process of approving this Memorandum of
16 Understanding. After filing will try and see if i can request and is given a copy of signed
17 memorandum Understanding.”); *id.* at 26 (“Defendants badgered” (ellipsis in original, with
18 nothing further in that paragraph)); *id.* at 27 (“Defendant Attorney Rosenfeld contact Plaintiff pe
19 EEOC with no filing of Mediation/Arbitration. with **EEOC(encl letter/exhibit)**” (no such letter
20 attached)); *id.* at 43 (““Letter states that file withing 90 days from receipt and for the issues of
21 September 24, 2019 and received October 25, 2019 **get the letter and add info see information**
22 **below under the third claim for relief.**”); *id.* at 44 (“Plaintiff incorporates by reference the
23 allegations of paragraphs 1 through **XXX**,^[2] above as thought fully set forth herein.”). Portions of
24 the complaint are not coherent. *E.g.*, *id.* at 16 (“Plaintiffs is informed and believes that afro-
25 Americans employees who perform substantially similar work, with similar or lesser skills and
26 experience.”); *id.* at 25 (“These Acting positions were for an extended period of time whereas one
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28 ¹ All instances of red text in this order are colored as they appear in Burton’s complaint.

² The complaint does not include any numbered paragraphs.

1 was demoted which is held accountable to know and held accountable to know Management
2 duties to get any Sales Management Team positions.”). Some parts of the complaint appear to
3 invoke the standard for certification of a class action under Rule 23 of the Federal Rules of Civil
4 Procedure, although Burton does not clearly assert any intent to represent a class of plaintiffs. *See*,
5 *e.g., id.* at 8 (“There are numerous questions of law and fact common to Plaintiff and these
6 questions predominate over individual questions.”).³

7 Although aspects of the complaint are difficult to follow, its basic premise is that Burton,
8 an African American woman, experienced discrimination based on race and retaliation for
9 complaining of discrimination in her work as a candy sales clerk for Defendant See’s in El Cerrito,
10 California. *See id.* at 4–5, 29. According to Burton, See’s disproportionately fails to promote
11 African American employees to management positions and has refused to promote Burton,
12 although she notes that, in what she characterizes as an exception to that general practice, two
13 African American employees at the store where Burton works received promotions. *Id.* at 11, 14–
14 15, 24–25. Burton alleges that she and other African American employees are disciplined more
15 harshly for minor violations than employees of other races, and are given less predictable work
16 schedules with fewer hours and less support from coworkers. *Id.* at 16–18, 23–24, 32. Burton
17 asserts that See’s has given her inaccurate low performance reviews as a pretext to block her
18 advancement at the company and has denied her training opportunities and information about job
19 vacancies. *Id.* at 23, 35–36. Burton also alleges that See’s misstated her job title, citizenship
20 status, and employment start date, and treated Burton as having taken time off work pursuant to
21 the Family and Medical Leave Act when she did not request such leave. *Id.* at 3–5, 7. Burton
22 alleges that Local 5 and the UFCWIU have failed to pursue grievances on her behalf, and that
23 Rosenfeld and WRR, who are attorneys for workers in the unions, have not represented Burton’s
24 interests. *See id.* at 25–27.

25 Burton asserts that she timely filed an administrative claim and, on October 25, 2019,
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27 ³ Because, as a general rule, only a lawyer admitted to practice before the Court may represent the
28 interests of other parties, Burton would not be able to represent a class of plaintiffs without an
attorney.

1 received a right-to-sue letter from the Equal Opportunity Employment Commission (“EEOC”)
2 dated September 24, 2019. *Id.* at 46. The EEOC letter, which is included as an attachment to
3 Burton’s complaint, states that the EEOC was “unable to conclude that the information obtained
4 establishes violations of the statutes” and that Burton could bring a Title VII claim in Court within
5 ninety days of receiving the letter. *Id.* at 54 (page number assigned by the Court’s ECF filing
6 system). The letter includes two notices of rights to sue—one pertaining to charges against See’s,
7 and one pertaining to charges against Local 5. *See id.* at 54–55.

8 **III. ANALYSIS**

9 **A. Legal Standard for Review Under 28 U.S.C. § 1915(e)(2)(B)**

10 Where a plaintiff is found to be indigent under 28 U.S.C. § 1915(a)(1) and is granted leave
11 to proceed in forma pauperis, courts must engage in screening and dismiss any claims which:
12 (1) are frivolous or malicious; (2) fail to state a claim on which relief may be granted; or (3) seek
13 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B); *see*
14 *Marks v. Solcum*, 98 F.3d 494, 495 (9th Cir. 1996). Rule 8(a)(2) of the Federal Rules of Civil
15 Procedure provides that a pleading must contain a “short and plain statement of the claim showing
16 that the pleader is entitled to relief.” A complaint that lacks such statement fails to state a claim
17 and must be dismissed.

18 In determining whether a plaintiff fails to state a claim, the court assumes that all factual
19 allegations in the complaint are true. *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th
20 Cir. 1995). However, “the tenet that a court must accept a complaint’s allegations as true is
21 inapplicable to legal conclusions” and to “mere conclusory statements.” *Ashcroft v. Iqbal*, 556
22 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The pertinent
23 question is whether the factual allegations, assumed to be true, “state a claim to relief that is
24 plausible on its face.” *Id.* (citing *Twombly*, 550 U.S. at 570). Thus, to meet this requirement, the
25 complaint must be supported by factual allegations. *Id.*

26 Where the complaint has been filed by a pro se plaintiff, as is the case here, courts must
27 “construe the pleadings liberally . . . to afford the petitioner the benefit of any doubt.” *Hebbe v.*
28 *Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) (citations omitted). “A district court should not dismiss a

1 pro se complaint without leave to amend unless ‘it is absolutely clear that the deficiencies of the
2 complaint could not be cured by amendment.’” *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir.
3 2012) (quoting *Schucker v. Rockwood*, 846 F.2d 1202, 1203–04 (9th Cir. 1988) (per curiam)).

4 **B. Legal Standard for Claims Under Title VII**

5 **1. Discrimination**

6 Title VII prohibits employers and labor unions from discriminating against employees and
7 members based on race, among other protected categories. In the context of summary judgment,
8 which this case has not yet reached, courts “analyze plaintiffs’ Title VII claims through the
9 burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 . . . (1973),”
10 under which a plaintiff must first present a prima facie case of discrimination, the burden then
11 shifts to the defendant “to articulate some legitimate, nondiscriminatory reason for the challenged
12 action,” and if the defendant does so, the plaintiff “must then raise a triable issue of material fact
13 as to whether the defendant’s proffered reasons . . . are mere pretext for unlawful discrimination.”
14 *Hawn v. Exec. Jet Mgmt., Inc.*, 615 F.3d 1151, 1155 (9th Cir. 2010) (citations and internal
15 quotation marks omitted); *see also Beck v. United Food & Commercial Workers Union, Local 99*,
16 506 F.3d 874, 882 (9th Cir. 2007) (“The standard burden-shifting framework established by the
17 Supreme Court in *McDonnell Douglas* . . . applies to a Title VII action against a union.”). “To
18 establish a prima facie case, plaintiffs must offer evidence that gives rise to an inference of
19 unlawful discrimination,” which they may do with “circumstantial evidence by showing: (1) that
20 they are members of a protected class; (2) that they were qualified for their positions and
21 performing their jobs satisfactorily; (3) that they experienced adverse employment actions; and
22 (4) that similarly situated individuals outside their protected class were treated more favorably, or
23 other circumstances surrounding the adverse employment action give rise to an inference of
24 discrimination.” *Id.* at 1156 (citations, internal quotation marks, and brackets omitted).

25 The *McDonnell Douglas* framework does not apply at the pleading stage. *Austin v. Univ.*
26 *of Oregon*, 925 F.3d 1133, 1137 (9th Cir. 2019) (considering a claim for sex discrimination in
27 education under Title IX, which applies the same standard). The Supreme Court so held in
28 *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 511 (2002), and the Ninth Circuit has reaffirmed that

1 rule after the Supreme Court’s decisions in *Iqbal* and *Twombly* setting forth the “plausibility”
2 pleading standard, most recently last year in *Austin*. See 925 F.3d at 1136–37. Notably, the
3 rejection of *McDonnell Douglas* at the pleading stage is not limited to its burden-shifting
4 framework, which is plainly inapplicable, but *Swierkiewicz* and *Austin* also hold that a plaintiff’s
5 allegations need not track *McDonnell Douglas*’s elements of a prima facie case. See *id.* (quoting
6 *Swierkiewicz*, 534 U.S. at 511). That said, a plaintiff’s complaint still must include “sufficient,
7 nonconclusory allegations plausibly linking the [adverse] action to discrimination” or retaliation.
8 *Id.* at 1138.

9 2. Retaliation

10 Title VII prohibits an employer from “discriminat[ing] against any of [its] employees . . .
11 because [the employee] has opposed any practice made an unlawful employment practice by [Title
12 VII], or because [the employee] has made a charge, testified, assisted, or participated in any
13 manner in an investigation, proceeding, or hearing under [Title VII].” 42 U.S.C. § 2000e-3(a). In
14 general, employers’ “unlawful employment practices” under Title VII encompass discrimination
15 and harassment based on “race, color, religion, sex, or national origin.” See *id.* § 2000e-2(a).

16 “To succeed on a retaliation claim, [a plaintiff] must first establish a prima facie case [by]
17 demonstrat[ing] (1) that she was engaging in a protected activity, (2) that she suffered an adverse
18 employment decision, and (3) that there was a causal link between her activity and the
19 employment decision.” *Trent v. Valley Elec. Ass’n, Inc.*, 41 F.3d 524, 526 (9th Cir. 1994). The
20 Ninth Circuit has long held that “a plaintiff does not need to prove that the employment practice at
21 issue was in fact unlawful under Title VII,” but instead “must only show that she had a
22 ‘reasonable belief’ that the employment practice she protested was prohibited under Title VII.” *Id.*
23 Making an internal “complaint that a supervisor has violated Title VII may constitute protected
24 activity for which the employer cannot lawfully retaliate.” *EEOC v. Go Daddy Software, Inc.*, 581
25 F.3d 951, 963 (9th Cir. 2009); see also *Trent*, 41 F.3d at 526 (“We have held that when an
26 employee protests the actions of a supervisor such opposition is a ‘protected activity.’”). A
27 plaintiff must ultimately prove but-for causation, or in other words, “that the unlawful retaliation
28 would not have occurred in the absence of the alleged wrongful action or actions of the employer.”

1 *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013).

2 **C. Burton’s Complaint Does Not Present a Short and Plain Statement of Her Claim**

3 Rule 8(a) of the Federal Rules of Civil Procedure provide that a “pleading that states a
4 claim for relief must contain . . . a short and plain statement of the claim.” Fed. R. Civ. P. 8(a).
5 Courts have routinely dismissed complaints that are convoluted and difficult to follow for failure
6 to comply with that rule. *E.g., McHenry v. Renne*, 84 F.3d 1172, 1179–80 (9th Cir. 1996)
7 (“Prolix, confusing complaints such as the ones plaintiffs filed in this case impose unfair burdens
8 on litigants and judges.”); *Roundtree v. Phoenix Suns LP*, No. CV-14-00929-PHX-DGC, 2014
9 WL 1951177 (D. Ariz. May 15, 2014) (“The rambling and lengthy factual allegations do not
10 comply with Rule 8’s requirement of a short and plain statement of the claim.”); *see also Knapp v.*
11 *Hogan*, 738 F.3d 1106, 1110 (9th Cir. 2013) (noting that a plaintiff’s complaint had been
12 previously dismissed multiple times for failure to comply with Rule 8(a)).

13 As noted above, Burton’s fifty-two page complaint is difficult to follow, and appears in at
14 least some places to be an unfinished draft. Under the Federal Rules of Civil Procedure, the role
15 of a complaint is not only to place the defendants on notice of the allegations and claims at issue,
16 but also to frame the defendants’ answers and set the course of the case. Each defendant must
17 respond with an answer specifically admitting or denying each factual allegation of the complaint.
18 *See* Fed. R. Civ. P. 12(b). It would be difficult for a defendant to provide such a response to
19 Burton’s current complaint. Burton is therefore ORDERED TO SHOW CAUSE why her
20 complaint should not be dismissed for failure to state a claim in compliance with the “short and
21 plain statement” requirement of Rule 8(a), by filing a response to this order or an amended
22 complaint.

23 This is not to say that the Court demands legal precision in a complaint, much less from
24 unrepresented plaintiffs. To the contrary, Burton is encouraged to file an amended complaint
25 presenting the particular *facts* underlying her claims in plain language and in chronological order,
26 to place Defendants on notice of the factual basis for Burton’s claims and allow them to admit or
27 deny those allegations as required by Rule 12.

28 Because the convoluted nature of the current complaint likely requires amendment, this

1 order does not reach all possible defects of Burton’s current pleading—including whether the
 2 complaint includes sufficient factual allegations, as opposed to legal conclusions, to support an
 3 inference of discrimination. The Court nevertheless addresses two other issues below, so that
 4 Burton may “use[] the opportunity to amend effectively.” *See Akhtar*, 698 F.3d at 1212 (quoting
 5 *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992)).

6 **D. Only Burton’s Employer and Union May Be Named as Defendants**

7 Title VII governs the conduct of “employer[s],” “employment agenc[ies],” and “labor
 8 organization[s].” 42 U.S.C. § 2000e-2(a)–(c). The statute does not permit a claim against
 9 individuals, even if they acted as agents of an employer or labor union, and the Court is not aware
 10 of any authority permitting a Title VII claim against a defendant labor union’s law firm. *See*
 11 *Craig v. M & O Agencies, Inc.*, 496 F.3d 1047, 1058 (9th Cir. 2007) (“We have long held that
 12 Title VII does not provide a separate cause of action against supervisors or co-workers.”). The
 13 same is true of claims under FEHA. *See Reno v. Baird*, 18 Cal. 4th 640, 643 (1998) (“We
 14 conclude that the FEHA, like similar federal statutes, allows persons to sue and hold liable their
 15 employers, but not individuals.”).

16 Burton therefore cannot proceed on discrimination or retaliation claims against Defendants
 17 Rosenfeld and WRR. It is also not clear whether Burton intends to allege that she was an
 18 employee of Defendant Berkshire Hathaway, which her complaint appears to treat as an alter ego
 19 of Defendant See’s. Any amended complaint should assert these claims only against Burton’s
 20 employer and/or union.⁴

21 **E. Burton Has Not Alleged Administrative Exhaustion of Her FEHA Claim**

22 Burton alleges administrative exhaustion in that she filed a charge with the EEOC and a
 23 received a right-to-sue letter from that federal agency. Such letters generally permit a plaintiff to
 24 bring a claim under Title VII, but do not satisfy the separate requirement under California law that
 25 in order to bring a claim under FEHA, a plaintiff must generally receive a right-to-sue letter from
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 28 ⁴ State law claims based on inadequate representation by a union, including claims under FEHA,
 may in some instances be preempted by federal law. *See Hardine v. Office & Prof’l Employees*
Int’l Union, 475 F. App’x 103, 105 (9th Cir. 2012). This order does not reach that issue.

1 the California Department of Fair Employment and Housing (“DFEH”). A right-to-sue letter from
 2 the EEOC is not a substitute for a right-to-sue letter from the DFEH for the purpose of state law
 3 claims under FEHA. *Martin v. Lockheed Missiles & Space Co.*, 29 Cal. App. 4th 1718, 1726
 4 (1994).

5 Based on cross-filing agreements between the EEOC and the DFEH, an administrative
 6 charge filed with the EEOC might in at least some circumstances also place the DFEH on notice
 7 of a plaintiff’s claims. *See Reed v. UBS Sec., LLC*, No. C 09-5237 MHP, 2010 WL 3119200, at
 8 *2–4 (N.D. Cal. Aug. 3, 2010). Even so, California law allows the DFEH a period of one year
 9 before it is required to act on such a claim, *id.* at *4, and Burton has not alleged either that she
 10 received a right-to-sue letter from the DFEH or that a year passed without the DFEH taking action
 11 on her claim. If Burton wishes to pursue her claim under FEHA, her amended complaint should
 12 address the circumstances of her administrative complaint in more detail, including whether she
 13 received a right-to-sue letter from the DFEH.

14 **IV. CONCLUSION**

15 For the reasons discussed above, Burton is ORDERED TO SHOW CAUSE why her
 16 complaint should not be dismissed, by filing either an amended complaint addressing the
 17 deficiencies addressed above or a response to this order arguing that her current complaint is
 18 sufficient, no later than September 14, 2020. **If Burton does not respond to this order by that**
 19 **date, the case will be reassigned to a United States district judge with a recommendation that**
 20 **it be dismissed with prejudice.**

21 Any amended complaint must include the caption and civil case number used in this order
 22 (20-cv-00564) and the words FIRST AMENDED COMPLAINT on the first page. Because an
 23 amended complaint completely replaces the previous complaint, any amended complaint may not
 24 incorporate claims or allegations of Burton’s original complaint by reference, but instead must
 25 include all of the facts and claims Burton wishes to present and all of the defendants she wishes to
 26 sue. *See Ferdik*, 963 F.2d at 1262. If Burton files an amended complaint, she may also wish to

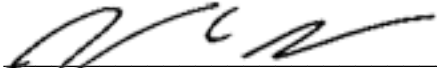
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1 attach copies of the administrative claim or claims that she filed with the EEOC and/or the DFEH.

2 **IT IS SO ORDERED.**

3 Dated: July 28, 2020

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6 JOSEPH C. SPERO
7 Chief Magistrate Judge

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United States District Court
Northern District of California