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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JAMES WIGGINS, III,)	2:11-cv-01815-ECR-VCF
)	
Plaintiff,)	<u>Order</u>
)	
vs.)	
)	
COSMOPOLITAN CASINO OF LAS VEGAS,)	
)	
Defendant.)	
)	
)	

This case arises out of allegations that Plaintiff was wrongfully terminated. Now pending before the Court is Defendant's Motion to Dismiss (#8). The motion is ripe and we now rule on it.

I. Background

The Complaint (#5) alleges that Plaintiff, while employed by Defendant, was subjected to harassment and verbal abuse by his co-workers. (Compl. at 1 (#5).) Plaintiff further alleges that his co-workers insulted him in Spanish and threw dishes at his head. (Id. at 2.) Plaintiff claims he was terminated from his employment because his other coworkers falsely accused him of making a racial remark. (Id. at 8-9.)

On July 8, 2011, Plaintiff filed a charge of discrimination with the EEOC, alleging that Defendant discriminated against him on the

1 basis of race, color, sex, age, disability, and in retaliation in
2 violation of Title VII, the Americans with Disability Act ("ADA") and
3 the Age Discrimination in Employment Act ("ADEA"). (Id. at 12.)¹ The
4 EEOC issued a right to sue letter on August 5, 2011. (Id. at 10.)

5 Plaintiff subsequently filed a motion/application for leave to
6 proceed in forma pauperis (#1), with attached complaint, on November
7 10, 2011. On November 18, 2011, we granted (#4) Plaintiff in forma
8 pauperis status and ordered the clerk to file the complaint. The
9 Complaint (#5) was filed on November 18, 2011.

10 On January 27, 2012, Defendant filed a Motion to Dismiss (#8)
11 pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and
12 8. Plaintiff responded (#11) on February 9, 2012, and submitted an
13 addendum (#12) to the response on February 10, 2012.² Defendant
14 replied (#13) on February 21, 2012.

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19 ¹ We consider the documents physically attached to the complaint
20 without converting the motion to dismiss to a motion for summary
21 judgment because their "authenticity is not contested" and "the
22 plaintiff's complaint necessarily relies on them." Lee v. City of Los
23 Angeles, 250 F.3d 668, 668 (9th Cir. 2001).

24 ² Plaintiff filed an additional response (#15) on March 2, 2012.
25 Local Rule 7-2 outlines timing for motions, responses, and replies,
26 as noted by the Court in its January 30, 2012 Order (#9) advising
27 Plaintiff of the consequences of failing to respond to a motion to
28 dismiss. Plaintiff did not request the Court's leave to file an
additional opposition following completion of the briefing on this
matter. The Court therefore strikes Plaintiff's additional response
(#15). The Court admonishes Plaintiff to refrain from filing
excessive or duplicative briefing outside of the scope of permissible
court filings noted in the Local Rules and the Federal Rules of Civil
Procedure.

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II. Legal Standard

A. Federal Rule of Civil Procedure 12(b) (1)

A rule 12(b) (1) motion to dismiss for lack of subject matter jurisdiction may be made in two ways, either as a facial or a factual challenge to the existence of federal jurisdiction. White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000). A facial challenge asserts that the pleadings are insufficient to support subject matter jurisdiction. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). A factual challenge asserts that there is no actual existence of jurisdiction. Id. When a party makes a facial challenge, the court must accept the allegations of the pleadings as true. Id. However, when a party makes a factual challenge, the court is not required to presume the truth of the allegations and may consider other properly presented evidence in the record for the purposes of determining the existence of subject matter jurisdiction. Id. The party who asserts that the court has subject matter jurisdiction has the burden to prove such jurisdiction. In re Dynamic Random Access Memory (DRAM) Antitrust Litig., 546 F.3d 981, 984-85 (9th Cir. 2008).

B. Federal Rule of Civil Procedure 12(b) (6)

Federal Rule of Civil Procedure 8(a) (2) requires only "a short plain statement of the claim showing that the pleader is entitled relief" in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Conley v. Gibson, 255 U.S. 41, 47 (1957). Federal Rule of Civil Procedure 12(b) (6) mandates that a court dismiss a cause of action that fails to state a claim upon which relief can be granted. A motion to dismiss under 12(b) (6)

1 tests the complaint's sufficiency. See N. Star Int'l v. Ariz. Corp.
2 Comm'n, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion
3 to dismiss under Rule 12(b)(6) for failure to state a claim, dismissal
4 is appropriate only when the complaint does not give the defendant
5 fair notice of a legally cognizable claim and the grounds on which it
6 rests. See Bell Atl. v. Twombly, 550 U.S. 544, 555 (2007). In
7 considering whether the complaint is sufficient to state a claim, the
8 court will take all material allegations as true and construe them in
9 the light most favorable to the plaintiff. See NL Indus., Inc. v.
10 Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). The court, however, is not
11 required to accept as true allegations that are merely conclusory,
12 unwarranted deductions of fact, or unreasonable inferences. See
13 Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001).
14 A formulaic recitation of a cause of action with conclusory
15 allegations is not sufficient; a plaintiff must plead facts showing
16 that a violation is plausible, not just possible. Ashcroft v. Iqbal,
17 129 S.Ct. 1937, 1949 (2009) (citing Twombly, 550 U.S. at 555).

18 "Generally, a district court may not consider any material beyond
19 the pleadings in ruling on a 12(b)(6) motion. However, material which
20 is properly submitted as part of the complaint may be considered on a
21 motion to dismiss." Hal Roach Studios, Inc. v. Richard Feiner & Co.,
22 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citation omitted).
23 Similarly, "documents whose contents are alleged in a complaint and
24 whose authenticity no party questions, but which are not physically
25 attached to the pleading, may be considered in ruling on a Rule
26 12(b)(6) motion to dismiss" without converting the motion to dismiss

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1 into a motion for summary judgment. Branch v. Tunnell, 14 F.3d 449,
2 454 (9th Cir. 1994). Moreover, under Federal Rule of Evidence 201, a
3 court may take judicial notice of "matters of public record." Mack v.
4 S. Bay Beer Distribs., Inc., 798 F.2d 1279, 1282 (9th Cir. 1986).
5 Otherwise, if the district court considers materials outside of the
6 pleadings, the motion to dismiss is converted into a motion for
7 summary judgment. See Arpin v. Santa Clara Valley Transp. Agency, 261
8 F.3d 912, 925 (9th Cir. 2001).

9 **C. Federal Rule of Civil Procedure 8**

10 Under Rule 8, the plaintiff must submit a "short and plain
11 statement of the claim showing the pleader is entitled to relief." A
12 complaint violates Rule 8 if it is so "verbose, confused and redundant
13 that its true substance, if any, is well disguised." Hearns v. San
14 Bernadino Police Dept., 530 F.3d 1124, 1131 (9th Cir. 2008) (quoting
15 Corcoran v. Yorty, 347 F.2d 222, 223 (9th Cir. 1965)). A complaint
16 must clearly and concisely state which defendants are liable for which
17 wrongs based on which facts. McHenry v. Renne, 84 F.3d 1172, 1178
18 (9th Cir. 1996). However, "verbosity or length is not by itself a
19 basis for dismissing a complaint based on Rule 8(a)." Hearns, 530
20 F.3d at 1131 (citations omitted).

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III. Discussion

23 **A. Motion to Dismiss Plaintiff's Title VII Claims Pursuant to Rule**
24 **12 (b) (1)**

25 Defendant moves to dismiss Plaintiff's Title VII cause of action
26 pursuant to Rule 12(b)(1) on the basis that the Complaint (#5) is
27 untimely and the Court therefore lacks subject matter jurisdiction

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1 over the claim. Specifically, Defendant contends that Plaintiff
2 failed to file suit within ninety days of receiving his Right to Sue
3 letter from the EEOC as required by Title VII.

4 As noted by Defendant, Title VII requires a plaintiff to file
5 suit within ninety days following the plaintiff's receipt of a right-
6 to-sue letter from the EEOC. See 42 U.S.C. §2000e-5(f)(1). The
7 ninety-day filing deadline is strictly construed, and an action is
8 therefore barred when a Title VII claimant fails to file on time.
9 Scholar v. Pac. Bell, 963 F.2d 264, 267-68 (9th Cir. 1992) (dismissing
10 a Title VII claim filed two days after the ninety-day deadline).

11 Plaintiff's right-to-sue letter was mailed on August 5, 2011.
12 However, the ninety-day period begins to run upon a claimant's *receipt*
13 of the letter. See id. at 267 n.2 ("[T]he 90-day period begins to run
14 when claimant receives the right-to-sue letter rather than when the
15 letter is dispatched."). In this case, the only evidence of when the
16 letter was actually received is Plaintiff's apparent notation next to
17 the section on the right-to-sue letter, which Plaintiff attached to
18 the Complaint, explaining the ninety-day deadline and advising
19 Plaintiff to keep a record of his receipt date, indicating that he
20 received the letter on August 13, 2011. (See Compl. (#5) at 11.)
21 Defendant has put forth no other evidence of the receipt date. We
22 therefore find that Plaintiff received the right-to-sue letter on
23 August 13, 2011, thereby starting the ninety-day clock. We therefore
24 now turn to a computation of time.

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1 Federal Rule of Civil Procedure 6 provides the rules for
2 computing time "in any statute that does not specify a method of
3 counting time." FED. R. CIV. P. 6(a).

- 4 When the period is stated in days or a longer unit of time:
- 5 (A) exclude the day of the event that triggers the
6 period;
 - 7 (B) count every day, including intermediate Saturdays,
8 Sundays, and legal holidays; and
 - 9 (C) include the last day of the period, but if the
10 last day is a Saturday, Sunday, or legal holiday,
11 the period continues to run until the end of the
12 next day that is not a Saturday, Sunday, or legal
13 holiday.

14 FED. R. CIV. P. 6(a)(1). Accordingly, we therefore take judicial notice
15 of the 2011 calendar, and, using the start date of August 13, 2011 and
16 the method prescribed by Rule 6, find that Plaintiff's deadline to
17 file suit fell on November 14, 2011 because the ninetieth day,
18 November 11, was a Friday and a Veterans Day, a federal legal holiday.

19 Defendant, somewhat disingenuously, argues that Plaintiff missed
20 the deadline because the Complaint (#5) was not filed until November
21 18, 2011. While this is technically the case, Plaintiff actually
22 instituted the suit by filing a motion/application for leave to
23 proceed in forma pauperis (#1), with the complaint attached, on
24 November 10, 2011. We therefore find that Plaintiff timely filed suit
25 and has carried the burden of proving jurisdiction. Defendant's
26 12(b)(1) motion to dismiss Plaintiff's Title VII claim for lack of
27 subject matter jurisdiction must be denied.

28 **B. Motion to Dismiss Plaintiff's § 1983 Claim Pursuant to Rule
12(b)(6)**

Defendant moves to dismiss Plaintiff's section 1983 claim
pursuant to Rule 12(b)(6) for failure to state a claim upon which

1 relief can be granted. Specifically, Defendant argues that
2 Plaintiff's claim fails to allege state action.

3 "[Title] 42 U.S.C. § 1983 provides a remedy to individuals whose
4 constitutional rights have been violated by persons acting under color
5 of state law." Burke v. Cnty. of Alameda, 586 F.3d 725, 731 (9th Cir.
6 2009) (quoting Caballero v. City of Concord, 956 F.2d 204, 206 (9th
7 Cir. 1992)). To sustain an action under § 1983, a plaintiff must
8 prove that (1) the defendant acted under color of state law; and (2)
9 the conduct deprived the plaintiff of a right secured by the
10 Constitution or laws of the United States. See Johnson v. Knowles,
11 113 F.3d 1114, 1117 (9th Cir. 1997).

12 Plaintiff has not alleged that Defendant acted under color of
13 state law, nor has Plaintiff otherwise alleged any state action in the
14 Complaint. Rather, Plaintiff seeks to sue his former employer, a
15 private actor, for his termination and for a hostile work environment.
16 Accordingly, Plaintiff's section 1983 claim fails as a matter of law
17 and must be dismissed.

18 **C. Motion to Dismiss the Complaint Pursuant to Rule 8**

19 The Court agrees with Defendant that, while Plaintiff's
20 allegations are fairly clear, it is unclear which causes of action
21 Plaintiff seeks to assert. "No peace on the job," "dish throwing and
22 name calling," and "selective slavery" are not recognized causes of
23 action. However, the Complaint (#5) can fairly be read to include a
24 Title VII hostile work environment claim, a state law wrongful
25 termination claim, and a state law negligent hiring claim.
26 Furthermore, the EEOC filings attached to the complaint also seem to

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1 assert age discrimination, disability discrimination, and retaliation
2 claims. If Plaintiff wishes to include these causes of action or any
3 others, he may do so in an amended complaint, as Defendant is entitled
4 to know which claims it must defend against. Should Plaintiff choose
5 to amend, he is advised to properly label his causes of action, and
6 include the facts, in a short plain statement, that support each cause
7 of action, whether it be a Title VII hostile work environment claim,
8 an age discrimination claim, a wrongful termination claim, or any
9 other asserted cause of action.

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IV. Conclusion

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Plaintiff's Title VII claim was timely filed in this Court, and this Court therefore has subject matter jurisdiction over the claim. Plaintiff's section 1983 claim alleges no state action and must therefore be dismissed. Finally, because Plaintiff's remaining legal claims are largely indecipherable, Plaintiff's Complaint (#5) will be dismissed, but with leave to amend. Plaintiff is advised that his case may be dismissed if he fails to file an amended complaint within the time allowed by the Court.

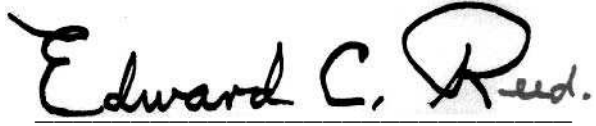
IT IS, THEREFORE, HEREBY ORDERED that Defendant's Motion to Dismiss (#8) pursuant to Rule 8 is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff shall have twenty-eight (28) days within which to file an amended complaint stating proper causes of action.

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IT IS FURTHER ORDERED that the Clerk shall strike Plaintiff's second Response (#15) to Defendant's Motion to Dismiss (#8).

DATED: August 15, 2012.



UNITED STATES DISTRICT JUDGE