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3 UNITED STATES DISTRICT COURT  
4 WESTERN DISTRICT OF WASHINGTON  
5 AT SEATTLE

6 STEVEN GIANESINI,

7 Plaintiff,

8 v.

9 THE BOEING COMPANY,

Defendant.

C21-187 TSZ

ORDER

10 THIS MATTER comes before the Court on a motion to dismiss, docket no. 25,  
11 brought by defendant The Boeing Company (“Boeing”) pursuant to Federal Rule of Civil  
12 Procedure 12(b)(6). Having reviewed all papers filed in support of, and in opposition to,  
13 the motion, the Court enters the following Order.

14 **Background**

15 Plaintiff Steven Gianesini commenced this action against Boeing in King County  
16 Superior Court on February 12, 2021. *See* Compl. (docket no. 1-1). The only claim  
17 asserted in the original complaint was for discrimination on the basis of national origin.  
18 *Id.* at ¶ 4.2. After Boeing removed the action, plaintiff filed an amended complaint in  
19 which he alleged various federal claims, as well as state law claims for discrimination on  
20 the basis of both national origin and disability, wrongful discharge in violation of public  
21 policy, and intentional infliction of emotional distress (“IIED” or outrage). *See* 1st Am.  
22 Compl. at ¶¶ 4.1-4.70 (docket no. 10).

1 In May 2021, the Court granted Boeing's motion to dismiss plaintiff's amended  
2 complaint, ruling that (i) the federal claims were precluded by plaintiff's failure to timely  
3 file a claim with the Equal Employment Opportunity Commission, (ii) the state law  
4 claims alleging disability-based discrimination and failure to accommodate did not relate  
5 back to the sole claim in the original complaint and, as a result, were time barred, and  
6 (iii) even if timely pleaded, the state law claims for national origin discrimination,  
7 wrongful discharge, and outrage did not sufficiently state plausible grounds for relief.  
8 See Order (docket no. 23). The federal and disability-related claims were dismissed with  
9 prejudice, but the other (state law) claims were dismissed without prejudice and with  
10 leave to amend. See id. at 14-15.

11 On June 15, 2021, plaintiff filed a Second Amended Complaint, in which he  
12 restated the allegations relating to his disabilities, namely hearing loss purportedly caused  
13 by an infectious disease transmitted by a co-worker, as well as left-handedness. See 2d  
14 Am. Compl. at ¶¶ 3.3-3.10, 3.12-3.20, 3.22-3.25, & 3.29 (docket no. 24).<sup>1</sup> In his Second  
15 Amended Complaint, plaintiff also repleaded his state law claims for national origin  
16 discrimination, wrongful discharge, and outrage, describing as predicates for those claims  
17 the following adverse employment and/or harassing actions:

- 18 • in 2017, removing plaintiff as SharePoint administrator, id. at ¶¶ 3.32 & 4.5;
- 19 • in 2017 or later, failing to promote plaintiff, id. at ¶¶ 3.32, 3.33, 4.5, & 4.6;

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21 <sup>1</sup> Boeing moves to strike these allegations pursuant to Federal Rule of Civil Procedure 12(f).  
22 Plaintiff concedes the merit of Boeing's Rule 12(f) motion as to all but Paragraphs 3.13 and  
23 3.23-3.25. See Resp. at 25 (docket no. 26).

- 1 • on December 9, 2017, excluding plaintiff from the list for updating security  
2 clearances, as a result of which plaintiff confirmed on February 14, 2018, that  
3 his security clearance would not be renewed, *id.* at ¶¶ 3.21, 3.31, 4.4, 4.11,  
4 4.20, & 4.21;
- 5 • on January 24, 2018, finding “unfounded” plaintiff’s complaint about John  
6 Schultz’s comment, “You know how those Italians are, you gotta get em while  
7 their [sic] weak,” which was allegedly made on January 5, 2018, *id.* at ¶¶ 3.26,  
8 3.27, & 4.20; *see also id.* at ¶¶ 3.11 & 3.13 (accusing Schultz of using the term  
9 “Polish salute” and of calling plaintiff a “liar”); and
- 10 • on or after July 14, 2018, declining to rehire plaintiff after Jay Galloway  
11 commented that plaintiff would likely get the job unless he was “blackballed or  
12 something,” *id.* at ¶¶ 3.39 & 4.8.

13 Boeing moves to dismiss plaintiff’s claims as either barred by the applicable statute of  
14 limitations or insufficiently pleaded.

### 15 Discussion

16 A complaint might be lacking because it fails to state a cognizable legal theory or  
17 because it fails to state sufficient facts under a cognizable legal theory. *See Robertson v.*  
18 *Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984). A claim that is time  
19 barred is not cognizable. Each of plaintiff’s state law claims are subject to a three-year  
20 limitations period. *See* Order at 7 (docket no. 23) (citing RCW 4.16.080(2); *Antonius v.*  
21 *King County*, 153 Wn.2d 256, 261-62, 103 P.3d 729 (2004); *Barnett v. Sequim Valley*  
22 *Ranch, LLC*, 174 Wn. App. 475, 485, 302 P.3d 500 (2013); *Cox v. Oasis Physical*  
23 *Therapy, PLLC*, 153 Wn. App. 176, 192, 222 P.3d 119 (2009)). Because plaintiff  
initiated this action on February 12, 2021, the conduct giving rise to plaintiff’s claims  
must have occurred on or after February 12, 2018. Plaintiff admits that any claims based  
on (i) his removal as SharePoint administrator in 2017, (ii) the failure to promote him in

1 2017, or (iii) the January 2018 decision concerning John Schultz’s derogatory comments  
2 are untimely. *See* Resp. at 16-17 (docket no. 26). Those claims are DISMISSED with  
3 prejudice.

4 With respect to plaintiff’s exclusion from the list for updating security clearances,  
5 which also occurred outside the limitations period, plaintiff argues that his claim is timely  
6 because it was brought within three years after he confirmed his security clearance would  
7 not be renewed and he resigned. Plaintiff’s analysis is flawed. According to his own  
8 pleading, the adverse employment action at issue occurred on December 9, 2017, and  
9 neither his confirmation concerning the consequences of the adverse action nor his  
10 resignation in light of such consequences reset the clock for purposes of bringing this  
11 lawsuit. To the extent plaintiff’s remaining state law claims (*i.e.*, disparate treatment,  
12 disparate impact, hostile work environment, wrongful discharge, and outrage) are  
13 premised on plaintiff’s exclusion from the list for updating security clearances, they are  
14 DISMISSED with prejudice as time barred.

15 As to the decision not to rehire plaintiff, which appears to have been made within  
16 the three years preceding plaintiff’s filing of this case, plaintiff has not sufficiently stated  
17 a plausible claim of national-origin discrimination or outrage.<sup>2</sup> At most, plaintiff’s  
18 operative pleading alleges that he did not receive the job because he was blackballed.  
19 Given that “blackball” means simply “to vote against” or “to exclude socially,” *see*

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20  
21 <sup>2</sup> By definition, a refusal to hire cannot form the basis of a claim for wrongful discharge, and  
22 thus, plaintiff’s claim for wrongful discharge, which has no factual footing within the limitations  
23 period, is DISMISSED with prejudice.

1 WEBSTER’S THIRD NEW INT’L DICTIONARY 225 (2002) [hereinafter “WEBSTER’S”],<sup>3</sup> the  
2 Second Amended Complaint does not even suggest that “a substantial factor” for the  
3 adverse employment action was plaintiff’s national origin. See Mackay v. Acorn Custom  
4 Cabinetry, Inc., 127 Wn.2d 302, 310, 898 P.2d 284 (1995) (adopting the “substantial  
5 factor” standard); see also 6A WASH. PRAC., WPI 330.01 (7th ed. 2019) (setting forth the  
6 elements of a disparate treatment claim).

7 In this refusal-to-hire context, and in the absence of any direct evidence of  
8 national-origin discrimination, to establish a prima facie case, plaintiff must show that  
9 (i) he is a member of a protected class, (ii) he applied and was qualified for a job for  
10 which Boeing sought candidates, (iii) he was rejected, and (iv) the position remained  
11 open and Boeing continued to seek applicants with plaintiff’s qualifications. See  
12 Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cnty., 189 Wn.2d 516, 529, 404 P.3d 464  
13 (2017) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). The  
14 McDonnell Douglas standard allows a person who is “a member of a racial minority  
15 group that has traditionally suffered workplace discrimination” to initially dispel two of  
16 the most common reasons an employer might use to reject an applicant, namely “an  
17 absolute or relative lack of qualifications” and “the absence of a vacancy in the job  
18 sought.” See Perry v. Woodward, 199 F.3d 1126, 1139 (10th Cir. 1999) (quoting Int’l  
19 Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977)); see also Mikkelsen,

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21 <sup>3</sup> The term “blackball” originated from the practice of “casting an adverse vote” against a  
22 person’s membership in an organization by “putting a black ball into a ballot box or urn.”  
23 WEBSTER’S at 225.

1 189 Wn.2d at 531-32 (citing *Perry*). The Second Amended Complaint does not contain  
2 the factual allegations necessary to state a prima facie case under the *McDonnell Douglas*  
3 test, and Boeing's Rule 12(b)(6) motion is GRANTED in part as to plaintiff's claim that  
4 Boeing refused to rehire him because of his national origin.

5 The Second Amended Complaint also fails to articulate the type of "extreme and  
6 outrageous conduct" required to state an outrage claim. *See Snyder v. Med. Serv. Corp.*  
7 *of E. Wash.*, 145 Wn.2d 233, 242, 35 P.3d 1158 (2001). Moreover, even if plaintiff could  
8 identify a Boeing employee who, in connection with plaintiff's application for rehiring,  
9 engaged in the type of "atrocious" and "utterly intolerable" behavior that would support  
10 an IIED claim, plaintiff could not proceed against Boeing on a respondeat superior theory  
11 because such intentionally tortious behavior cannot form the basis of vicarious liability  
12 on the part of an employer. *Id.* at 242-43. Plaintiff's outrage claim is DISMISSED with  
13 prejudice.

14 Plaintiff's attorney states that she intended, but failed, to include the following  
15 language in the Second Amended Complaint: "upon information and belief Boeing had  
16 hired a similarly qualified person in place of Plaintiff during the July 2018 application to  
17 re-hire." *See* Jones Decl. at ¶ 2 (docket no. 27). Counsel's declaration is treated as a  
18 request for leave to again amend the operative pleading, and such motion is GRANTED  
19 as follows. Plaintiff may electronically file a Third Amended Complaint within fourteen  
20 (14) days of the date of this Order. Such pleading shall be limited to asserting a state law  
21 claim of discrimination on the basis of national origin with respect to plaintiff's July 14,  
22 2018, application for employment. The revised complaint shall not repeat or recite any  
23

1 allegations that relate to claims already dismissed with prejudice. Plaintiff and his lawyer  
2 are REMINDED of their obligations under Federal Rule of Civil Procedure 11. If a Third  
3 Amended Complaint is not timely filed, the Court will enter judgment in favor of Boeing  
4 and against plaintiff. With regard to any amended pleading, the deadlines set forth in  
5 Federal Rule of Civil Procedure 15(a)(3) shall apply.

6 **Conclusion**

7 For the foregoing reasons, the Court ORDERS:

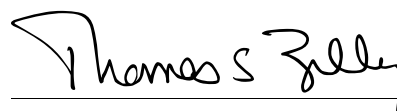
8 (1) Boeing's motion to dismiss, docket no. 25, is GRANTED in part and  
9 DENIED in part. All claims set forth in plaintiff's Second Amended Complaint, docket  
10 no. 24, are DISMISSED with prejudice, EXCEPT for plaintiff's claim under the  
11 Washington Law Against Discrimination alleging that he was not rehired because of his  
12 national origin, which is DISMISSED without prejudice and with leave to amend within  
13 fourteen (14) days of the date of this Order.

14 (2) Boeing's motion, docket no. 25, to strike portions of the Second Amended  
15 Complaint pursuant to Rule 12(f), and Boeing's motion, see Reply at 12 (docket no. 29),  
16 to strike certain extrinsic evidence, are DENIED as moot.

17 (3) The Clerk is directed to send a copy of this Order to all counsel of record.

18 IT IS SO ORDERED.

19 Dated this 10th day of August, 2021.

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22 Thomas S. Zilly  
23 United States District Judge