

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



JS - 6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CUONG CUU HUA,)	Case No. CV 14-05886 DDP (JEMx)
)	
Plaintiff,)	ORDER GRANTING MOTION TO DISMISS
)	WITH PREJUDICE
v.)	
)	[Dkt. No. 43]
PATRICK R. DONAHOE,)	
POSTMASTER GENERAL , U.S.)	
POSTAL SERVICE,)	
)	
Defendants.)	
_____)	

Presently before the Court is Defendant's Motion to Dismiss the Second Amended Complaint. (Dkt. No. 43.) After considering the parties' submissions, the Court adopts the following Order.

I. BACKGROUND

Plaintiff Cuong Cuu Hua worked for Defendant United States Postal Service ("USPS") from October 1996 to June 2012. (Compl. ¶¶ 3, 13.) Plaintiff "is of Vietnamese de[s]cent" and "speaks and understands very limited English." (Id. ¶ 3.) Plaintiff worked at the Monterey Park Post Office as a letter carrier. (Id.) Throughout the course of Plaintiff's employment, Plaintiff alleges he dealt with harassment and discrimination at the hands of Donna

1 Sosa (the Postmaster at Monterey Park Post Office), Luis Gonzalez
2 (Plaintiff's first level supervisor), Robert Lindbloom (Plaintiff's
3 supervisor), and Raymond Tan (Plaintiff's supervisor). (Id. ¶ 4.)
4 Plaintiff filed several Equal Employment Opportunity ("EEO")
5 complaints in the USPS EEO Commission. (See generally Compl.)

6 This Court has issued two prior Orders in this case, both
7 granting Defendants' motions to dismiss with leave for Plaintiff to
8 amend the complaint as to certain claims and defendants. (See Dkt.
9 Nos. 16, 24.) The Order granting Defendants' motion to dismiss the
10 First Amended Complaint states:

11 For the reasons stated above, Defendants' motion to dismiss
12 is GRANTED as to the named individual defendants, and the
13 individual defendants are DISMISSED WITH PREJUDICE.
14 Defendants' motion to dismiss is GRANTED as to claims
15 alleging discrimination on the basis of race and national
16 origin. Plaintiff's claims of racial and national origin
17 discrimination are DISMISSED WITHOUT PREJUDICE.
18 Plaintiff's cause of action for retaliation may proceed
19 against the USPS Postmaster General.

20 (Order, dkt. no. 24, at 9-10.)

21 In Plaintiff's current Second Amended Complaint ("SAC"),
22 Plaintiff is represented by counsel and alleges three causes of
23 action against the proper defendant, the current Postmaster General
24 of the USPS: (1) discrimination based on national origin; (2)
25 discrimination based on disability; and (3) retaliation based on
26 Plaintiff's prior EEO complaints. Defendant has again moved to
27 dismiss all claims. (Mot. Dismiss, dkt. no. 43.)

28 **II. LEGAL STANDARD**

A 12(b)(6) motion to dismiss requires a court to determine the
sufficiency of the plaintiff's complaint and whether it contains a
"short and plain statement of the claim showing that the pleader is
entitled to relief." Fed. R. Civ. P. 8(a)(2). Under Rule

1 12(b)(6), a court must (1) construe the complaint in the light most
2 favorable to the plaintiff, and (2) accept all well-pleaded factual
3 allegations as true, as well as all reasonable inferences to be
4 drawn from them. See Sprewell v. Golden State Warriors, 266 F.3d
5 979, 988 (9th Cir. 2001), amended on denial of reh'g, 275 F.3d 1187
6 (9th Cir. 2001); Pareto v. F.D.I.C., 139 F.3d 696, 699 (9th Cir.
7 1998).

8 In order to survive a 12(b)(6) motion to dismiss, the
9 complaint must "contain sufficient factual matter, accepted as
10 true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 663 (2009) (quoting Bell Atl.
11 Corp. v. Twombly, 550 U.S. 544, 570 (2007)). However,
12 "[t]hreadbare recitals of the elements of a cause of action,
13 supported by mere conclusory statements, do not suffice." Id. at
14 678. Dismissal is proper if the complaint "lacks a cognizable
15 legal theory or sufficient facts to support a cognizable legal
16 theory." Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097,
17 1104 (9th Cir. 2008); see also Twombly, 550 U.S. at 561-63
18 (dismissal for failure to state a claim does not require the
19 appearance, beyond a doubt, that the plaintiff can prove "no set of
20 facts" in support of its claim that would entitle it to relief).
21

22 A complaint does not suffice "if it tenders 'naked
23 assertion[s]' devoid of 'further factual enhancement.'" Iqbal, 556
24 U.S. at 678 (quoting Twombly, 550 U.S. at 556). "A claim has
25 facial plausibility when the plaintiff pleads factual content that
26 allows the court to draw the reasonable inference that the
27 defendant is liable for the misconduct alleged." Id. The Court
28 need not accept as true "legal conclusions merely because they are

1 cast in the form of factual allegations." Warren v. Fox Family
2 Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003).

3 **III. DISCUSSION**

4 **A. National Origin Discrimination**

5 Defendant argues that the Court should dismiss Plaintiff's
6 claim of discrimination based on his national origin. First,
7 Defendant argues that Plaintiff did not exhaust his national origin
8 discrimination claim and so the Court lacks subject matter
9 jurisdiction. (Mot. Dismiss at 4-7.) Second, Defendant argues
10 that if the Court considers the merits of the claim, that Plaintiff
11 has failed to state a claim based on the conclusory facts alleged
12 in the SAC. (Id. at 7-8.)

13 Plaintiff responds that his previous EEOC complaints did
14 exhaust his national origin discrimination claim and that his
15 complaint does allege sufficient facts for such a claim. (Opp'n at
16 3-6.)

17 As explained by this Court in its prior Order, a plaintiff
18 alleging a violation of Title VII must exhaust administrative
19 remedies by filing a timely complaint with the EEOC prior to filing
20 suit in federal district court. 42 U.S.C. § 2000e-5(f)(1); Love v.
21 Pullman Co., 404 U.S. 522, 523 (1972); Sommato v. United States,
22 255 F.3d 704, 707-08 (9th Cir. 2001). One purpose of the
23 exhaustion requirement is to provide notice to the charged party of
24 the complainant's issues. B.K.B. v. Maui Police Dep't, 276 F.3d
25 1091, 1099 (9th Cir. 2002), as amended (Feb. 20, 2002).

26 Due to the remedial purpose of Title VII and the lack of legal
27 training of those initiating complaints, courts in the Ninth
28 Circuit construe a claimant's charge liberally. E.E.O.C. v. Farmer

1 Bros. Co., 31 F.3d 891, 899 (9th Cir. 1994); Green v. Los Angeles
2 Cnty. Superintendent of Schs., 883 F.2d 1472, 1475-76 (9th Cir.
3 1989). Even so, the EEOC must still be afforded a chance to
4 consider disputes before initiation of federal action where the
5 "claims are not so closely related that agency action would be
6 redundant." Brown v. Puget Sound Elec. Apprenticeship & Training
7 Trust, 732 F.2d 726, 730 (9th Cir. 1984).

8 The jurisdictional scope of a Title VII claimant's federal
9 action is therefore limited to "the scope of both the EEOC charge
10 and the EEOC investigation." Farmer Bros. Co., 31 F.3d at 899.
11 Thus, new claims of discrimination that were not included in an
12 EEOC charge may only be considered by a federal court if they are
13 "like or reasonably related to the allegations of the EEOC charge."
14 Brown, 732 F.2d at 729; see also B.K.B., 276 F.3d at 1100. In
15 determining whether an allegation under Title VII is like or
16 reasonably related to allegations contained in a previous EEOC
17 charge, "the court inquires whether the original EEOC investigation
18 would have encompassed the additional charges." Green, 883 F.2d at
19 1476; see also Sommatino, 255 F.3d at 708.

20 This Court's prior Order dismissing the First Amended
21 Complaint held that Plaintiff's claims of race and national origin
22 discrimination were not exhausted because the claims were "not like
23 or reasonably related to, and are not reasonably expected to grow
24 out of the investigation into, his exhausted EEOC charges."
25 (Order, dkt. no. 24, at 9.) This Court found that none of
26 Plaintiff's EEOC complaints alleged race or national origin
27 discrimination and nothing in the complaints would indicate to the
28 EEOC that such a claim could have been raised. (Id.) The EEOC

1 complaints instead alleged "retaliation and disability
2 discrimination in the form of letters of warning, being ordered to
3 leave work, being placed on suspension or emergency placement,
4 being restricted from speaking to other postal workers, and being
5 issued notice of termination." (Id. at 8 n.5.)

6 Plaintiff's Opposition and SAC do not point to any new EEOC
7 complaint or part of the EEOC complaints that were not before the
8 Court in its prior Order. Plaintiff's argument here is that these
9 three sentences included in an EEOC complaint should have put the
10 EEOC on notice that there was a national origin discrimination
11 claim so as to exhaust the claim now:

12 She did not allow my shop steward to read through so called
13 a bundle of unknown document[s] as well. [. . .] I have [a]
14 reasonable double [sic] that I am not being treated with
respect and dignity. [. . .] This is my first time being
treated like a slave by this management.

15 (Opp'n at 4 (citing Ex. 1 p.29 to Def. Mot. Dismiss).) These same
16 allegations are included in Plaintiff's SAC. (SAC ¶ 8.) Plaintiff
17 argues that these statements "speak of a claim of national origin
18 and in being Vietnamese and needed an interpreter and being taken
19 advantage of by Postmaster, MS. SOSA." (Opp'n at 4.)

20 Plaintiff further argues that Defendant should be estopped
21 from arguing that such an inference should have been drawn by the
22 EEOC because "it was the USPS's own EEO department who was
23 responsible to frame the issues for an non-English speaking
24 employee." (Id. at 4-5.) According to Plaintiff, the underlying
25 issue in all the EEOC complaints is Plaintiff's problems
26 communicating with USPS management. (Id. at 5.) Lastly, referring
27 to the relations between Plaintiff and USPS management, Plaintiff
28 states that "[i]t can only be presumed all of this aggressive

1 activity was a result of national origin discrimination." (Id. at
2 6.)¹

3 However, all of these allegations do not change the Court's
4 prior holding that the EEOC did not have notice of such a claim.
5 The language relied on by Plaintiff quoted above does not include
6 any allegation about Plaintiff's national origin or discrimination
7 that is based on Plaintiff's national origin. There is no mention
8 that Plaintiff is Vietnamese or that the actions taken against
9 Plaintiff had anything to do with Plaintiff being from Vietnam.
10 The EEOC had no reason to presume any discrimination based on
11 Plaintiff's national origin. Therefore, the Court dismisses with
12 prejudice Plaintiff's claim of national origin discrimination
13 because the claim is not exhausted.

14 **B. Disability Discrimination**

15 Defendant argues first that Plaintiff's allegations are
16 improperly brought under the Americans with Disabilities Act
17 ("ADA") because Plaintiff is a federal government employee, so any
18 disability discrimination claim by him against the federal
19 government must be brought under the Rehabilitation Act. (Mot.
20 Dismiss at 9.) Further, Defendant claims that even converting the
21 ADA claim to a claim under the Rehabilitation Act, the claim is
22 still time barred. (Id. at 9-10.) Lastly, Defendant argues that

23
24

25 ¹ Plaintiff also argues in his opposition that a supervisor
26 called Plaintiff "an animal" on May 1, 2012. (Opp'n at 6.)
27 Plaintiff's position is that this is "an equivalent name calling as
28 'gook.'" (Id.) Plaintiff admits that this was not pled in the SAC,
but even if it had been, the Court does not find that this
statement is sufficient at this stage to make a claim for national
origin discrimination, and the statement was not alleged to be in
an EEOC complaint and so is not exhausted either.

1 the claim is unsupported by factual allegations sufficient to state
2 a claim. (Id. at 10-11.)

3 Plaintiff admits that he should have brought his claim under
4 the Rehabilitation Act. (Opp'n at 6.) However, Plaintiff asks the
5 Court for leave to amend so he can correct this mistake. Id.
6 Plaintiff further argues that his claim is timely and there are
7 sufficient facts to support the claim. (Id. at 6-8.) Plaintiff
8 states that the claim alleged now relates back to the facts alleged
9 in the original complaint. (Id. at 7-8)

10 **1. Correct Cause of Action**

11 As Plaintiff acknowledges, this claim for disability
12 discrimination must be brought under the Rehabilitation Act; thus,
13 the claim should be dismissed for this reason alone. See 29 U.S.C.
14 § 791 (Rehabilitation Act); Boyd v. U.S. Postal Serv., 752 F.2d
15 410, 412-13 (9th Cir. 1985). To determine if the dismissal should
16 be with or without prejudice, the Court examines below Defendant's
17 other arguments regarding timeliness and sufficiency of the
18 pleading.

19 **2. Time Bar**

20 According to Defendant, Plaintiff's disability discrimination
21 claim is only timely if it relates back to Plaintiff's original
22 complaint. (Mot. Dismiss at 10.) Plaintiff does not dispute that
23 his disability discrimination claim was raised for the first time
24 in this SAC, which would not be timely absent relation back to the
25 original complaint. (Opp'n at 7.) Thus, the crucial question is
26 whether the claim for disability discrimination relates back to the
27 allegations in the original pleading. See Fed. R. Civ. Pro.
28 15(c)(1)(B).

1 Plaintiff's original pro se complaint raised claims for
2 retaliation under Title VII of the Civil Rights Act, referring to
3 his EEO complaints in 2009 and 2011, as well as a claim of wrongful
4 termination. (Compl., dkt. no. 1, pp. 6-10.) Plaintiff argues
5 that his current disability discrimination claim relates back to
6 his wrongful termination on June 11, 2012. (Opp'n at 7.)
7 Plaintiff alleges he was injured on November 14, 2011, took a leave
8 from work until April 24, 2012, and then resumed work with the need
9 for accommodation because "he could not stand for longer than 2
10 hours, or walk more than 2 hours a day." (Id. at 8.)

11 After this time, Plaintiff claims, he was suspended and then
12 fired, which shows "a direct causal connection between [his]
13 disability beginning in November, 2011, which continued up to his
14 termination, including the filing of a grievance, an EEO Complaint
15 concerning going to the post office business premises to present
16 medical certification of his disability." (Id.) Thus, according
17 to Plaintiff, because the same facts underlie his wrongful
18 termination and his disability discrimination claims, the
19 disability discrimination claim in the SAC should be held to relate
20 back to Plaintiff's original complaint. Further, Plaintiff points
21 out that he raised his disability discrimination claim in his prior
22 EEOC complaints, so the USPS had several ways to be on notice of
23 his claim. (Id.)

24 Defendant argues that there is no connection between the
25 allegations in the two pleadings. (Mot. Dismiss at 10.)
26 Defendant claims that the disability discrimination cause of action
27 "would rely on operative facts related to whether Plaintiff was
28 disabled and whether he was otherwise qualified, including whether

1 he could perform the essential functions of his position, under the
2 applicable statutory standards." (Id.) This is "irrelevant to the
3 original Complaint's claims for retaliation and wrongful
4 termination, which do not depend on any proof related to a
5 disability." (Id.)

6 The Court holds that the disability discrimination claim does
7 relate back to Plaintiff's original complaint. The original
8 complaint, filed when Plaintiff was pro se, is sparse on factual
9 allegations but does allege that Plaintiff suffered retaliation
10 based on activity that resulted in EEOC complaints and wrongful
11 termination in 2012. Under Rule 15, the amendment to the pleading
12 must "assert[] a claim or defense that arose out of the conduct,
13 transaction, or occurrence set out – or attempted to be set out –
14 in the original pleading." Fed. R. Civ. Pro. 15(c)(1)(B). Here,
15 arguably Plaintiff's disability discrimination claim arises out of
16 the same occurrences attempted to be set out in Plaintiff's
17 original complaint. Plaintiff argues that his termination, the
18 other disciplinary actions taken against him, and his EEOC
19 complaints include conduct related to disability discrimination.
20 Therefore, Plaintiff's claim relates back to the original pleading.

21 **3. Failure to State a Claim**

22 Defendant argues that if this Court considers Plaintiff's
23 disability discrimination claim on the merits, then the claim
24 should be dismissed because the SAC "fails to plead facts that, if
25 true, would establish a claim for disability discrimination."
26 (Mot. Dismiss at 11.) Defendant argues that Plaintiff's
27 allegations do not "show that he was terminated or subjected to any
28 other adverse actions because of his disability." (Id.)

1 Plaintiff argues, as described above, that his termination and
2 the other adverse employment actions against him are related to
3 disability discrimination. The SAC alleges that Plaintiff has a
4 disability caused by an injury on May 24, 2011, to his left foot.
5 (SAC ¶ 19.) Plaintiff also injured his knee on November 14, 2011,
6 resulting in a leave of absence from work from November 14, 2011,
7 to April 24, 2012. (Id. ¶ 20.) Plaintiff alleges that he was
8 required to provide proof of his continued eligibility for
9 disability during January 2012 but that supervisors at USPS
10 prevented him from entering the premises, leading to Plaintiff
11 filing an EEOC complaint. (Id. ¶ 21.) After that, Plaintiff
12 returned to work on "a limited basis" until May 15, 2012, when
13 Plaintiff was suspended. (Id. ¶ 20.)

14 However, the SAC then goes on for several paragraphs about a
15 mediation, a settlement allowing Plaintiff to return to the post
16 office, and several incidents where Plaintiff was alleged to have
17 acted out against USPS supervisors and was disciplined, none of
18 which are connected to his disability at all as pled. (Id. ¶¶ 22-
19 30.) Plaintiff allegedly "spoke in a loud manner and lunged at Mr.
20 GONZALEZ," one of Plaintiff's supervisors. (Id. ¶ 24.) Mr.
21 Gonzalez allegedly reminded Plaintiff of the settlement outcome of
22 the EEO complaint, but also reminded Plaintiff that he had to
23 follow instructions and not talk back or lunge threateningly. (Id.
24 ¶ 25.) Further, Ms. Sosa, another supervisor, alleged that
25 Plaintiff "made a gesture to her of masturbation" in the parking
26 lot, which led to an investigation at which Plaintiff alleged he
27 did not understand what was going on but resulted in his "30 day
28 emergency suspension as being 'injurious to self and others.'"

1 (Id. ¶ 26.) All of this, Plaintiff alleges, eventually resulted
2 in Plaintiff's termination on June 11, 2012. (Id. ¶ 28.)

3 A plaintiff must plead specific facts that show (1) the
4 plaintiff had a disability; (2) the plaintiff could perform his or
5 her job with reasonable accommodations; and (3) the plaintiff was
6 discriminated against because of this disability. See Kaplan v.
7 City of N. Las Vegas, 323 F.3d 1226, 1229 (9th Cir. 2003)
8 (describing elements of claim under the Americans with Disabilities
9 Act, which is the same standard for injuries under the
10 Rehabilitation Act).

11 None of the allegations in the SAC relate to Plaintiff's foot
12 or knee disability. It is insufficient for Plaintiff to plead that
13 his work was terminated "due to the retaliatory conduct of the
14 management of POST OFFICE, as well as the fact that he was disabled
15 and on limited duty due to injuries to his ankle and knee from
16 November, 2011 until his removal on June 11, 2012." (Id. ¶ 30.)
17 Plaintiff has to support his legal allegations by pleading
18 underlying factual allegations that connect his disability to an
19 adverse employment action. This is Plaintiff's third complaint,
20 this time represented by counsel. The fact that Plaintiff has been
21 unable to allege facts that would satisfy these elements
22 demonstrates that leave to amend would be futile in this case as
23 there are no facts that connect Plaintiff's disability to any
24 adverse employment action or discrimination. Therefore,
25 Plaintiff's second cause of action for disability discrimination is
26 dismissed with prejudice.

27 ///

28 ///

1 **C. Retaliation**

2 Defendant argues that the SAC fails to allege sufficient facts
3 to support a retaliation claim, and what facts are alleged in the
4 SAC do not show the needed "but for" causation between the
5 protected activity and the termination of Plaintiff's employment.
6 (Mot. Dismiss at 11-13.)

7 Plaintiff responds that there is a clear case for retaliation
8 here: Plaintiff filed several EEOC complaints, and then he was
9 fired. (Opp'n at 8-9.) This is further connected to his
10 disability because Plaintiff returned from a six month absence due
11 to his disability right before Plaintiff incurred disciplinary
12 action and then termination. (Id. at 9.)

13 A claim of retaliation under Title VII requires a plaintiff to
14 show: "(1) he engaged in a protected activity; (2) he suffered an
15 adverse employment decision; and (3) there was a causal link
16 between the protected activity and the adverse employment
17 decision." Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054,
18 1064 (9th Cir. 2002). In Villiarimo, the court found that the
19 plaintiff had engaged in protected activity under Title VII because
20 the plaintiff had filed an internal complaint about sexual
21 harassment at work. Id. However, the court held that the
22 plaintiff had not shown the necessary "but for" causation between
23 this protected activity and his termination from work because all
24 he alleged was that his termination was after he filed the
25 complaint. Id. at 1064-65.

26 Here, the Court holds that the SAC does not allege a case for
27 retaliation. Plaintiff filed numerous EEOC complaints about his
28 treatment at the USPS, and he suffered adverse employment actions

1 leading up to suspension and termination. However, Title VII only
2 protects against retaliation for certain protected conduct, as does
3 the Rehabilitation Act. Making employment complaints unrelated to
4 disability, race, national origin, sex, gender, color, or religious
5 discrimination is not a protected activity under Title VII or the
6 Rehabilitation Act. Plaintiff has failed to specifically allege
7 facts (and not just legal conclusions) in the SAC that constitute
8 discrimination on the basis of Plaintiff's disability or other
9 protected class. Plaintiff would need to plead that these alleged
10 instances of discrimination were raised in his EEOC complaints and
11 thus causally connected to his employment termination, which
12 Plaintiff alleges was caused by his filing the EEOC complaints.

13 The SAC states that Plaintiff was fired "due to retaliation
14 for his prior EEO activity, complaints, and in particular, MR.
15 HUA'S win at the April 26, 2012 mediation." (SAC ¶ 43.) This
16 statement does not provide indication of what discrimination based
17 on a protected class Plaintiff complained about, and the preceding
18 paragraphs in the SAC do not indicate that any of the EEOC
19 complaints were related to disability discrimination or national
20 origin discrimination, the only two protected classes in the SAC's
21 causes of action. Because none of the complaints are tied to any
22 colorable claim of discrimination on the basis of disability or
23 national origin discrimination, there is no causal connection
24 between any discrimination and the adverse employment action.
25 Therefore, the Court holds that Plaintiff's retaliation cause of
26 action is dismissed with prejudice.

27 ///


28 ///

1 **IV. CONCLUSION**

2 For the reasons stated above, Defendant's Motion to Dismiss is
3 GRANTED. Plaintiff's Second Amended Complaint is DISMISSED WITH
4 PREJUDICE.

5
6 IT IS SO ORDERED.

7
8 Dated: December 18, 2015


9 DEAN D. PREGERSON
United States District Judge

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28