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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

WAYNE NEWSON,)	No. CV-F-09-663 OWW/GSA
)	
)	MEMORANDUM DECISION AND
Plaintiff,)	ORDER DENYING PLAINTIFF'S
)	MOTION TO FILE SIXTH AMENDED
vs.)	COMPLAINT (Doc. 37)
)	
WAL-MART STORES, INC.,)	
)	
Defendant.)	
)	

On November 16, 2009, Plaintiff Wayne Newson, proceeding in *pro per*, filed a motion for leave to file a Sixth Amended Complaint (SAC).

On April 28, 2008, Plaintiff filed a Complaint against Defendant Wal-Mart Stores, Inc. in the Merced County Superior Court. On March 9, 2009, pursuant to state court order, Plaintiff filed a Fifth Amended Complaint. Defendant removed the action to this Court on April 11, 2009, on the ground of diversity of citizenship. Defendant moved to dismiss the Fifth Amended Complaint. Plaintiff did not file a written opposition

1 to the motion to dismiss, but did appear at the hearing. By
2 Memorandum Decision and Order filed on June 23, 2009, (Doc. 13,
3 June 23 Memorandum Decision), the Third Cause of Action for
4 wrongful termination in violation of public policy, the Fourth
5 Cause of Action for violation of California Civil Code § 1714(a),
6 the Seventh Cause of Action for termination of employment for
7 lawful conduct during non-working hours, the Eighth Cause of
8 Action for violation of California Labor Code § 96(k), and the
9 Ninth Cause of Action for breach of the implied covenant of good
10 faith and fair dealing were dismissed with prejudice and without
11 leave to amend. The Sixth Cause of Action for violation of
12 California Civil Code § 1621 was dismissed as redundant to the
13 Fifth Cause of Action for breach of implied contract; however,
14 the June 23 Memorandum Decision noted:

15 At the hearing, Plaintiff requested leave to
16 amend to include the factual allegations
17 supporting the Sixth Cause of Action with
18 those supporting the Fifth Cause of Action in
19 a single cause of action for breach of one
20 implied contract. Plaintiff's request to so
21 amend is GRANTED.

22 Defendant lodged a proposed Order pursuant to the June 23
23 Memorandum Decision on June 24, 2009 (Doc. 14). By Minute Order
24 filed on July 10, 2009, Courtroom Deputy Timken advised that
25 Defendant failed to send the proposed Order to Judge Wanger's
26 order box so that it could be signed and directing Defendant to
27 submit the proposed Order in Word or WordPerfect format to
28 owworders@caed.uscourts.gov. There is nothing on the docket
29 indicating that Defendant complied with the July 10, 2009 minute

1 order. On July 22, 2009, Defendant filed an Answer to the Fifth
2 Amended Complaint. (Doc. 16). On July 23, 2009, Plaintiff filed
3 a Notice of Appeal by which he appealed the June 23 Memorandum
4 Decision to the Ninth Circuit. (Doc. 17). By Order filed on
5 September 15, 2009, the Ninth Circuit dismissed Plaintiff's
6 appeal for lack of jurisdiction. (Doc. 24). By Minute Order
7 filed on September 16, 2009, a scheduling conference was ordered
8 for October 1, 2009. On September 29, 2009, Defendant filed a
9 scheduling report, (Doc. 26), noting that Plaintiff failed to
10 respond to Defendant's efforts to meet and confer to prepare and
11 submit a Joint Report. Because no appearance was made by
12 Plaintiff at the scheduling conference, an Order to Show Cause
13 was filed, directing Plaintiff to appear on November 2, 2009 and
14 show cause why this action should not be dismissed for failure to
15 prosecute and to obey court orders. (Doc. 28) On October 10,
16 2009, Plaintiff filed a Notice of Change of Address, advising
17 that his address had changed as of September 1, 2009. (Doc. 30).
18 Plaintiff was re-served with the Order to Show Cause on October
19 8, 2009. By Minute Order filed on November 2, 2009, the Order
20 to Show Cause was discharged for reasons stated on the record.
21 On November 2, 2009, Plaintiff filed a motion for permission to
22 file a Sixth Amended Complaint, (Doc. 34), and lodged a proposed
23 Sixth Amended Complaint, (Doc. 35). Because Plaintiff is *in pro*
24 *per*, the proposed Sixth Amended Complaint is filed in paper and
25 the docket only sets forth the first page. Plaintiff's motion
26 was not noticed for hearing. Because Plaintiff asserted that he

1 has added an additional cause of action for willful misconduct,
2 for which leave to amend had not been granted, by Order filed on
3 November 6, 2009, Plaintiff was directed to file and serve a
4 notice of motion as to his motion to file the Sixth Amended
5 Complaint. (Doc. 36).

6 Defendant argues that Plaintiff's motion should be denied as
7 untimely because Plaintiff did not file his Sixth Amended
8 Complaint by July 13, 2009, "as ordered by the Court."

9 However, as noted, because Defendant did not submit the
10 Order granting the motion to dismiss the Fifth Amended Complaint
11 with leave to amend, the Court never signed, filed or served
12 Defendant's proposed Order containing the July 13, 2009 filing
13 date. Plaintiff asserts that he checked with the Clerk's Office
14 and was told that no Order had been filed.

15 Although Plaintiff has not acted expeditiously in the
16 prosecution of this action, Defendant's failure to comply with
17 Court procedures for lodging orders for review and signature,
18 even after being advised to do so by the Courtroom Deputy,
19 negates any claim that Plaintiff's motion is untimely. Defendant
20 is more responsible for the present circumstances.

21 Rule 15(a), Federal Rules of Civil Procedure, provides that
22 "leave [to amend] shall be freely given when justice so
23 requires." "The purpose of pleading is 'to facilitate a proper
24 decision on the merits' ... and not erect formal and burdensome
25 impediments to the litigation process. Unless undue prejudice to
26 the opposing party will result, a trial judge should ordinarily

1 permit a party to amend its complaint." *Howey v. United States*,
2 481 F.2d 1187, 1990 (1973). However, "[t]his strong policy
3 toward permitting the amendment of pleadings ... must be tempered
4 with considerations of 'undue delay, bad faith or dilatory motive
5 on the part of the movant, repeated failure to cure deficiencies
6 by amendments previously allowed, undue prejudice to the opposing
7 party by virtue of allowance of the amendment, futility of
8 amendment, etc.'" *Foman v. Davis*, 371 U.S. 178, 182 ... (1962)."
9 *Schlacter-Jones v. General Telephone of California*, 936 F.2d 435,
10 443 (9th Cir. 1991). "These factors, however, are not of equal
11 weight in that delay, by itself, is insufficient to justify
12 denial of leave to amend." *DCD Programs*, 833 F.2d at 186; see
13 also *Jones*, 127 F.3d at 847 n.8. "[I]t is the consideration of
14 prejudice to the opposing party that carries the greatest weight
15 ... Absent prejudice, or a strong showing of any of the remaining
16 *Foman* factors, there exists a presumption under Rule 15(a) in
17 favor of granting leave to amend." *Eminence Capital, LLC v.*
18 *Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir.2003). "The party
19 opposing leave to amend bears the burden of showing prejudice."
20 *Serpra v. SBC Telecommunications, Inc.*, 318 F.Supp.2d 865, 870
21 (N.D.Cal.2004).

22 Defendant argues that leave to amend to add the cause of
23 action for willful misconduct on the grounds that delay in
24 asserting this cause of action will prejudice Defendant, the
25 amendment is legally futile, and Plaintiff failed to comply with
26 the Local Rules of Practice.

1 Before discussing the merits of Plaintiff's motion, it is
2 noted that the proposed Sixth Amended Complaint contains
3 citations of authority, a section captioned "Defendant's
4 Argument," and a memorandum of points and authorities, all in
5 violation of Rule 8, Federal Rules of Civil Procedure. The June
6 23 Memorandum Decision specifically stated:

7 Plaintiff did not file a written opposition
8 to the motion to dismiss as required by Rule
9 78-230(b), Local Rules of Practice.
10 Plaintiff appeared at oral argument, stating
11 that his economic situation prevented him
12 from filing a timely opposition. Plaintiff
13 is advised that Rule 83-183(a), Local Rules
14 of Practice, provides:

15 Any individual representing himself
16 ... without an attorney is bound by
17 the Federal Rules of Civil ...
18 Procedure and by these Local Rules.
19 All obligations placed on 'counsel'
20 by these Local Rules apply to
21 individuals appearing in propria
22 persona. Failure to comply
23 therewith may be ground for
24 dismissal ... or any other sanction
25 appropriate under these Rules.

26 Because Plaintiff is granted leave to file a
Sixth Amended Complaint, see *discussion*
infra, Plaintiff is advised that Rule
8(a)(2), Federal Rules of Civil Procedure,
requires that a pleading set forth a short
and plain statement of the claim showing that
the pleader is entitled to relief. Under
Rule 8(a)(2), a pleading must give fair
notice and state the elements of the claim
plainly and succinctly. *Jones v. Community*
Redevelopment Agency, 733 F.2d 646, 649 (9th
Cir. 1984). A complaint that is verbose,
conclusory and confusing does not comply with
Rule 8(a)(2). *Nevijel v. North Coast Life*
Ins. Co., 651 F.2d 671, 674 (9th Cir. 1981).
Plaintiff must allege only those *facts* which
are necessary to allege the required elements
of the claims for relief he is alleging

1 against the Defendant; narrative, background
2 non-essential evidentiary allegations or
3 citations to or quotations from statutes or
4 cases are not authorized. Claims dismissed
5 without leave to amend cannot be reasserted
6 in the Sixth Amended Complaint.

7 As Defendant notes, Plaintiff has been provided with five
8 opportunities to amend his complaint and state a proper cause of
9 action. Defendant asserts that, "[a]t this point Plaintiff must
10 be required to proceed with the remaining fifth cause of action
11 in the Fifth Amended Complaint so that the parties can began
12 [sic] moving towards a resolution in this case." Defendant cites
13 *In re Fritz Companies Securities Litigation*, 282 F.Supp.2d 1105,
14 1109 (N.D.Cal.2003): "District court's discretion over an
15 amendment is 'especially broad' where the court has already given
16 plaintiff one or more opportunities to amend the complaint." See
17 also *Chodos v. West Publishing Co.*, 292 F.3d 992, 1003 (9th
18 Cir.2002):

19 Here, Chodos sought leave to amend his
20 previously amended complaint to add a claim
21 of fraud against West, contending that he had
22 learned new facts that supported that claim
23 shortly before the close of discovery. The
24 district court denied the motion, finding
25 that those 'new' facts had been available to
26 Chodos even before the first amendment to his
27 complaint. Given this finding, the district
28 court's conclusion that the motion to amend
29 was made after undue delay did not constitute
30 an abuse of discretion.

31 Defendant argues:

32 If any additional facts are included in the
33 proposed Sixth Amended Complaint, Defendant
34 maintains that such facts were well known to
35 Plaintiff when the six [sic] prior complaints
36 were filed as the breach of implied contract

1 cause of action is based on facts that
2 occurred no later than January 2007, which is
3 three years ago.

4 As to the proposed cause of action for willful misconduct,
5 Defendant contends:

6 Plaintiff asserted causes of action for
7 intentional tort in the Second and Third
8 Amended Complaints and possibly also the
9 Fifth Amended Complaint, however, never
10 specifically alleged willful misconduct.
11 Despite not asserting willful misconduct in
12 the previously six [sic] filed complaints,
13 Plaintiff now seeks to allege this seemingly
14 new cause of action ... When the Court
15 granted Plaintiff leave to amend on June 23,
16 2009, it was for the limited purpose of
17 including the factual allegations 'supporting
18 the Sixth Cause of Action with those
19 supporting the Fifth Cause of Action in a
20 single cause of action for breach of one
21 implied contract.' ... Moreover, the facts
22 asserted in support of the willful misconduct
23 cause of action were well known to Plaintiff
24 when the prior six [sic] complaints and more
25 than fourteen causes of action were filed as
26 the facts occurred no later than January
2007.

Defendant asserts that the proposed amendment is futile
because the only obvious addition from the Fifth Cause of Action
in the Fifth Amended Complaint to Plaintiff's cause of action for
breach of implied contract in the proposed Sixth Amended
Complaint is that Plaintiff quotes from the Arrested Associates
Policy, which is unnecessary because the Arrested Associates
Policy was attached as an exhibit to the Fifth Amended Complaint.
Defendant further argues that the cause of action for willful
misconduct "fails to allege a cognizable legal theory ... Willful
misconduct in and of itself is not a valid cause of action and

1 Plaintiff fails to cite a statute which would support such a
2 cause of action."

3 Defendant's contention is well-taken. There is no tort
4 recovery for breach of an implied employment contract. As
5 explained in Guz v. Bechtel National, Inc., 24 Cal. 4th 317,
6 352353 (2000):

7 [A]s we explained in *Foley*, the remedy for
8 breach of an employment agreement, including
9 the covenant of good faith and fair dealing
implied by law therein, is *solely*
contractual.

10 Therefore, Plaintiff's allegations in the Second Cause of Action
11 add nothing to this action and is futile.

12 In addition, as Defendant notes, Plaintiff failed to comply
13 with the Local Rules of Practice. A copy of the proposed Sixth
14 Amended Complaint was not attached to Plaintiff's motion as
15 required by the rules (although a copy was lodged, but because
16 Plaintiff is *in pro per*, only the first page was scanned and the
17 original has been lost; the copy submitted with this memorandum
18 was obtained by Defendant. Further, Plaintiff failed to lodge a
19 proposed order granting the motion to amend. Although these
20 deficiencies would not require denial of Plaintiff's motion, they
21 are yet another example of Plaintiff's continued unwillingness to
22 comply with the Local Rules of Practice.

23 In any event, at the hearing, Plaintiff withdrew his motion
24 to file the proposed Sixth Amended Complaint and stated that he
25 elected to proceed in this action pursuant to the Fifth Amended
26 Complaint, to which Defendant has filed an Answer.

1 For the reasons stated in open court at the hearing and in
2 this Memorandum Decision and Order, Plaintiff's motion to file
3 the Sixth Amended Complaint is DENIED. Pursuant to Plaintiff's
4 statement at the hearing and in accordance with the June 23, 2009
5 Memorandum Decision, the parties shall proceed to litigate this
6 action solely as to the Fifth Cause of Action for breach of
7 implied contract in the Fifth Amended Complaint filed on April
8 28, 2008 in the Merced County Superior Court and removed to this
9 Court on April 10, 2009.

10 IT IS SO ORDERED.

11 Dated: April 20, 2010

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE