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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JAVIER CHACON,)	1:10-cv-2416 AWI GSA
)	
)	
Plaintiff,)	FINDINGS AND RECOMMENDATIONS
)	REGARDING DISMISSAL OF CERTAIN
v.)	CLAIMS WITHOUT LEAVE TO AMEND
)	AND GRANTING PLAINTIFF LEAVE TO
)	AMEND OTHER CLAIMS
HOUSING AUTHORITY OF THE)	
COUNTY OF MERCED and DOES,)	
1 through 10, inclusive,)	(Doc. 1)
)	
Defendants.)	

Plaintiff Javier Chacon (“Plaintiff”), appearing pro se and proceeding in forma pauperis, filed the instant complaint on December 30, 2010. (Doc. 1). He names the Housing Authority of the County of Merced as a Defendant (“Defendant”). Plaintiff alleges violations of Title VII of the Civil Rights Act of 1964, [42 U.S.C. § 2000 et seq](#) (“Title VII”), as well as state law causes of action for wrongful termination/constructive discharge and intentional infliction of emotional distress.

DISCUSSION

A. **Screening Standard**

Pursuant to [28 U.S.C. § 1915\(e\)\(2\)](#), the court must conduct an initial review of the complaint for sufficiency to state a claim. The court must dismiss a complaint or portion thereof if the court determines that the action is legally “frivolous or malicious,” fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune

1 from such relief. [28 U.S.C. § 1915\(e\)\(2\)](#). If the court determines that the complaint fails to state
2 a claim, leave to amend may be granted to the extent that the deficiencies of the complaint can be
3 cured by amendment.

4 A complaint must contain “a short and plain statement of the claim showing that the
5 pleader is entitled to relief” [Fed. R. Civ. P. 8\(a\)\(2\)](#). Detailed factual allegations are not
6 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
7 conclusory statements, do not suffice.” [Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 \(2009\)](#) (citing
8 [Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-65 \(2007\)](#)). Plaintiff
9 must set forth “sufficient factual matter, accepted as true, to ‘state a claim that is plausible on its
10 face.’” [Iqbal, 129 S.Ct. at 1949](#) (quoting [Twombly, 550 U.S. at 555](#)). While factual allegations
11 are accepted as true, legal conclusions are not. [Id. at 1949](#).

12 A complaint, or portion thereof, should only be dismissed for failure to state a claim upon
13 which relief may be granted if it appears beyond doubt that plaintiff can prove no set of facts in
14 support of the claim or claims that would entitle him to relief. See [Hishon v. King & Spalding,](#)
15 [467 U.S. 69, 73 \(1984\)](#), citing [Conley v. Gibson, 355 U.S. 41, 45-46 \(1957\)](#); see also [Palmer v.](#)
16 [Roosevelt Lake Log Owners Ass'n, 651 F.2d 1289, 1294 \(9th Cir. 1981\)](#). In reviewing a
17 complaint under this standard, the Court must accept as true the allegations of the complaint in
18 question, [Hospital Bldg. Co. v. Trustees of Rex Hospital, 425 U.S. 738, 740 \(1976\)](#), construe the
19 pro se pleadings liberally in the light most favorable to the plaintiff, [Resnick v. Hayes, 213 F.3d](#)
20 [443, 447 \(9th Cir. 2000\)](#), and resolve all doubts in the Plaintiff’s favor, [Jenkins v. McKeithen,](#)
21 [395 U.S. 411, 421 \(1969\)](#).

22 B. Plaintiff’s Allegations

23 Plaintiff is a forty-seven-year-old Hispanic male who was employed by the Housing
24 Authority of the County of Merced as a Maintenance Supervisor for more than six years. He
25 alleges that throughout his employment as a Maintenance Supervisor, he requested his own
26 computer at his primary job site located in Dos Palos, California. He contends that despite
27 numerous requests, he was never given exclusive access to a computer, laptop, desktop, or
28 mainframe which were essential to performing his job duties. Instead, he had to share a computer

1 with his supervisor, Debbie Nichols, who needed the computer to complete her own work and,
2 therefore, at times, he was unable to have access to the computer. When the computer was not
3 available, Plaintiff had to drive twenty-one miles to Los Banos, California to gain computer
4 access so that he could perform his job duties. Moreover, Program Director, Gina Thexton, and
5 Executive Director, Rennise Ferrario, insisted that e-mails be sent to Plaintiff that could only be
6 accessed at the Los Banos site.

7 Although Plaintiff was deprived of computer access, Plaintiff contends two other
8 Maintenance Supervisors, Mike Shillings and Robert Algiers, were given exclusive access to a
9 computer at their main offices. Both Shillings and Algiers were Caucasian males. Mike
10 Shillings had been employed as a Maintenance Foreman in Merced, California for approximately
11 one and a half years. Robert Algiers was employed in Livingston, California.¹

12 Plaintiff makes several allegations of discrimination in the complaint. First, he contends
13 that his employment was terminated in retaliation for participating in an investigation against
14 Defendant conducted by the Board of Commissioners of the Housing Authority of the County of
15 Merced. Plaintiff also alleges that Program Director, Gina Thexton, made unwanted sexual
16 advances toward Plaintiff. Finally, Plaintiff contends that “discrimination based on religious
17 fervor or lack thereof was committed against [him] in the form of a Men’s Breakfast meeting
18 held during work hours.” (Doc. 1 at pg. 5.)

19 Plaintiff was put on an unpaid leave of absence on or about March 26, 2010. He filed a
20 claim with the Equal Employment Opportunity Commission on or about July 22, 2010, and
21 received a right to sue letter on September 30, 2010. (Doc. 1 at pg. 12.) Defendant has informed
22 Plaintiff that his prior position as Maintenance Foreman cannot be guaranteed and future
23 employment in other positions may be unavailable.

24 As a result of the above, Plaintiff contends he has suffered a continual loss of earnings
25 and emotional distress. He alleges violations of Title VII, wrongful termination/constructive
26 discharge and intentional infliction of emotional distress as causes of action. He seeks lost
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28 ¹ The complaint does not indicate how long Robert Algiers was employed as a Maintenance Foreman.

1 wages, attorney's fees, court costs, and punitive damages.

2 C. Analysis

3 A review of Plaintiff's complaint reveals that while he may be able to state a cognizable
4 claim, the complaint is deficient and needs to be amended for the reasons set forth below. In
5 summary, the causes of action must be more clearly organized and the facts in support of the
6 causes of action must be clearly articulated. Moreover, the common law state law claims are
7 barred. However, Plaintiff will be given an opportunity to amend his complaint. In addition to
8 the following legal standards, Plaintiff is advised that his complaint must contain all necessary
9 allegations for each cause of action.

10 1. *Applicable Legal Standards*

11 In the paragraphs that follow, the court will provide Plaintiff with the legal standards that
12 may apply to his claims. Plaintiff should carefully review the standards and amend only those
13 claims that he believes, in good faith, are cognizable.

14 a. Title VII Claims

15 *Disparate Treatment*

16 Under Title VII of the Civil Rights Act, it is unlawful for an employer to "discriminate
17 against any individual with respect to his compensation, terms, conditions, or privilege of
18 employment because of such individual's race." 42 U.S.C. § 2000e-2(a)(1). To establish a
19 prima facie case of disparate treatment under Title VII Plaintiff must show that: "(1) he is a
20 member of a protected class; (2) he was qualified for his position; (3) he experienced an adverse
21 employment action; and (4) similarly situated individuals outside his protected class were treated
22 more favorably, or other circumstances surrounding the adverse employment action give rise to
23 an inference of discrimination." [Peterson v. Hewlett-Packard Co., 358 F.3d 599, 603 \(9th Cir.](#)
24 [2004\)](#); see also [Raad v. Fairbanks North Star Borough School Dist., 323 F.3d 1185, 1195-96 \(9th](#)
25 [Cir. 2003\)](#) (citing [McDonnell Douglas Corp. v. Green, 411 U.S. 792 \(1973\)](#)).

26 Adverse employment action is broadly defined. [Ray v. Henderson, 217 F.3d 1234, 1241](#)
27 [\(9th Cir. 2000\)](#); see also [Brooks v. City of San Mateo, 229 F.3d 917, 928 \(9th Cir. 2000\)](#)
28 (collecting cases). Adverse employment action exists where an employer's action negatively

1 affects an employee's compensation. See, [Little v. Windermere Relocation, Inc., 301 F.3d 958,](#)
2 [970 \(9th Cir. 2002\)](#) (holding that a reduction in base monthly pay was an adverse employment
3 action even though with commission and bonuses it might have equaled the same net pay); cf.
4 [University of Hawaii Prof'l Assembly v. Cayetano, 183 F.3d 1096, 1105-06 \(9th Cir. 1999\)](#)
5 (holding that receiving pay even a couple of days late can seriously affect an employee's financial
6 situation and constitutes substantial impairment under the Contracts Clause). Plaintiff should
7 keep in mind that Title VII does not provide a cause of action for damages against supervisors or
8 fellow employees. [Holly D. v. California Institute of Technology, 339 F.3d 1158 \(9th Cir. 2003\).](#)

9 The crux of Plaintiff's claim is that he was not provided with the same access to
10 computers as other white males with lower seniority in the agency. He implies that as a result, he
11 was unable to complete his work and was terminated.² However, the facts are not clear from the
12 complaint. Plaintiff needs to more clearly specify what occurred and how the disparate
13 conditions affected his work performance and the eventual change in his employment status.
14 Additionally, although Plaintiff states that Title VII is the basis of this Court's jurisdiction and he
15 makes a reference to this statute in the pleading, the only causes of action listed are for
16 intentional infliction of emotional distress and wrongful termination/constructive discharge.
17 Plaintiff must allege facts and state a separate cause of action under Title VII in order to pursue
18 this claim.

19 *Religious Claims*

20 Additionally, Plaintiff makes reference to the fact that he suffered religious
21 discrimination because he did not participate in a Men's Breakfast meeting held during work
22 hours. Plaintiff needs to explain the circumstances of this meeting, whether he was excluded
23 from this activity, how it relates to his religion, and how this affected his work conditions.
24 Plaintiff is advised that the protected class showing that is required in a traditional race or sex
25 discrimination claim may not apply to a reverse discrimination claim because it is the religious
26 beliefs of the employer, and the fact that the employee does share them, that constitutes the basis

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28 ² It is not clear from the complaint whether Plaintiff was actually terminated or just put on administrative
leave.

1 of religious discrimination. Noyes v. Kelley Services, 488 F. 3d 1163, 1168-1169 (9th Cir.
2 2007).

3 *Hostile Work Environment*

4 Plaintiff alleges that he experienced unwanted sexual advances from his supervisor. In
5 order to establish a prima facie case for a hostile work environment based on sexual harassment,
6 Plaintiff must establish that (1) Plaintiff was subjected to verbal or physical conduct of a sexual
7 nature; (2) the conduct was unwelcome; and (3) the conduct was sufficiently severe or pervasive
8 to alter the conditions of employment and create an abusive working environment. Porter v.
9 California Department of Corrections, 419 F. 3d 885, 894 (9th Cir. 2005).

10 Although Plaintiff alleges that there was some appearance of sexual harassment on the
11 part of his supervisor, he does not explain the conduct with specificity. Plaintiff is advised that
12 mere legal conclusions, without more, do not suffice. As previously noted, “[t]hreadbare recitals
13 of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”
14 Ashcroft v. Iqbal, 129 S.Ct. at 1949 (citing Twombly, 550 U.S. at 555). Plaintiff must set forth
15 “sufficient factual matter, accepted as true, to ‘state a claim that is plausible on its face.’” Iqbal,
16 129 S.Ct. at 1949 (quoting Twombly, 550 U.S. at 555). While factual allegations are accepted as
17 true, legal conclusion are not. Id. at 1949. In this instance, Plaintiff has done nothing more than
18 make a conclusory statement that he was sexually harassed. This is insufficient. Plaintiff must
19 provide more facts in order to state a claim for this cause of action.

20 *Retaliation*

21 Title VII prohibits an employer from discriminating against an employee for opposing an
22 unlawful employment practice, such as filing a complaint alleging sexual orientation harassment
23 and hostile work environment. To establish a prima facie case, the employee must show that he
24 engaged in a protected activity, he was subsequently subjected to an adverse employment action,
25 and that a causal link exists between the two. Dawson v. Entek Intern, 630 F. 3d 928, 926 (9th
26 Cir. 2011) (citing Jordan v. Clark, 847 F.2d 1368, 1376 (9th Cir. 1988)). The causal link can be
27 inferred from circumstantial evidence such as the employer's knowledge of the protected
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1 activities and the proximity in time between the protected activity and the adverse action. Id. If
2 a plaintiff establishes a prima facie case of unlawful retaliation, the burden shifts to the defendant
3 employer to offer evidence that the challenged action was taken for legitimate, non-
4 discriminatory reasons. See Nidds v. Schindler Elevator Corp., 113 F.3d 912, 917 (9th Cir.
5 1996). If the employer provides a legitimate explanation for the challenged decision, the plaintiff
6 must show that the defendant's explanation is merely a pretext for impermissible discrimination.
7 See Ray v. Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000).³

8 It appears that Plaintiff's retaliation claim relates more to Defendant's conduct in
9 response to Plaintiff participation in an investigation rather than based on Plaintiff's membership
10 in a protected class. Accordingly, this standard may not apply to Plaintiff's case. However,
11 California Labor Code § 1102.5 states that an employer cannot retaliate against an employee "for
12 disclosing information to a government or law enforcement agency, where the employee has
13 reasonable cause to believe that the information discloses a violation of state or federal statute [or
14 regulation]. Cal. Labor Code § 1102.5. Plaintiff is advised that in Campbell v. Regents of the
15 Univ. of Cal., 35 Cal.4th at 317, 329 (2005), the California Supreme Court held that under §
16 1102.5, a plaintiff is required to exhaust all administrative remedies before proceeding to suit.
17 Thus, in order to state a claim under this provision of law, Plaintiff must establish that he has
18 exhausted his administrative remedies pursuant to the California Tort Claims Act which is
19 described in more detail below. He must also establish that he has exhausted the administrative
20 remedies with the Labor Commission pursuant to California Labor Code § 98.7 which requires
21 that he file a complaint with the Labor Commission within six months after the occurrence of the
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23 ³ Similarly, under California's anti-retaliation provision it is unlawful for "any employer, labor
24 organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person
25 because the person has opposed any practices forbidden under this part or because the person has filed a complaint,
26 testified, or assisted in any proceeding under this part." Cal. Gov.Code 12940(h). "The law protects an employee
27 from discrimination 'because' the employee has opposed what he reasonably believes to be an unlawful practice." La
28 Strape v. E & J Gallo Winery, 2008 WL 2509203 (E.D.Cal., Jun.23, 2008); Manatt v. Bank of America, 339 F.3d
792 (9th Cir.2003) (construing Title VII). To state a claim under this provision, plaintiff must establish (1)
involvement in a protected activity, (2) an adverse employment action and (3) a causal link between the two. Manatt
v. Bank of America, 339 F. 3d at 800.

1 violation. Cal. Labor Code § 98.7. Bowman v. Yolo County, 2008 WL 3154691, *1-2
2 (E.D.Cal.2008) (exhaustion of administrative remedies pursuant to section 98.7 is required under
3 section 1102.5 in addition the California Tort Claims Act); see also Hall v. Apartment Inv. and
4 Mgmt. Co., 2008 WL 5396361 (N.D.Cal.2008) (exhaustion of the administrative remedies
5 prescribed in section 98.7 applies to section 1102.5).

6 **b. State Common Law Claims**

7 Plaintiff has alleged two state law claims : intentional infliction of emotional distress and
8 wrongful termination/constructive discharge. Although the nature of the wrongful termination
9 claim is unclear, Plaintiff appears to be attempting to plead a common law tort claim for
10 wrongful termination of employment in violation of public policy. See, Williams v. Housing
11 Authority of the City of Los Angeles, 121 Cal.App.4th 708, 713 n. 2 (2004) (stating that public
12 policy violations premised on wrongful termination, wrongful constructive termination, and
13 wrongful demotion are all common law tort causes of action); See also, Rojo v. Kliger 523 Cal.
14 3d 65, 88-89 (1992) (wrongful termination in violation of public policy is nonstatutory common
15 law tort claim). However, Defendants are immune from suit for these claims.

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17 As a preliminary matter, Plaintiff is advised that The California Tort Claims Act, Cal.
18 Gov't Code §§ 900 et seq. (“CTCA”) requires, as a condition precedent to suit against a public
19 entity, the timely presentation of a written claim and the rejection of the claim in whole or in part.
20 See Mangold v. California Pub. Utilities Comm'n, 67 F.3d 1470, 1477 (9th Cir.1995) (citing
21 Snipes v. City of Bakersfield, 145 Cal.App.3d 861, 193 Cal.Rptr. 760 (1983)). Under California
22 law, failure to allege facts either demonstrating or excusing compliance with the CTCA subjects
23 a complaint to dismissal for failure to state a claim. See, California v. Superior Ct. (Bodde), 32
24 Cal.4th 1234, 1245, 13 Cal.Rptr.3d 534, 90 P.3d 116 (2004). Therefore, prior to alleging a state
25 law cause of action for intentional infliction of emotional distress, wrongful termination in
26 violation of public policy, or retaliation pursuant to California Labor Code § 1102.5, Plaintiff
27 must have complied with the California Tort Claims Act and it appears that he has not done so.

28 Furthermore, California Government Code § 815(a) provides that a “public entity is not

1 liable for an injury, whether such injury arises out of an act or omission of the public entity or a
2 public employee or any other person,” “[e]xcept as otherwise provided by statute.” “Public
3 Entities” include counties, public agencies , and any other public entity or a public employee or
4 any other political subdivision or public corporation of the State. Cal. Gov’t Code § 811.2.

5 Certain statutes provide expressly for public entity liability in circumstances that are
6 somewhat parallel to the potential liability of private individuals and entities, but the Claims
7 Act’s intent “is not to expand the rights of plaintiffs in suits against governmental entities, but to
8 confine potential governmental liability to rigidly delineated circumstances.” Brown v. Poway
9 Unified School Dist., 4 Cal.4th 820, 829 (1993); see Becerra v. County of Santa Cruz, 68
10 Cal.App.4th 1450, 1457 (1998) (“in absence of some constitutional requirement, public entities
11 may be liable *only* if a statute declares them to be liable”); Michael J. v. Los Angeles County
12 Dept. of Adoptions, 201 Cal.App.3d 859, 866 (1988) (“Under the Act, governmental tort liability
13 must be based on statute; all common law or judicially declared forms of tort liability, except as
14 may be required by state or federal Constitution, were abolished.”)

15 A court first determines whether a statute “imposes direct liability” on a defendant public
16 entity. Munoz v. City of Union City, 120 Cal.App.4th 1077, 1111 (2004). “[D]irect tort liability
17 of public entities must be based on a specific statute declaring them to be liable, or at least
18 creating some specific duty of care, and not on the general tort provisions of [California] Civil
19 Code section 1714.” Eastburn v. Regional Fire Protection Authority, 31 Cal.4th 1175, 1183
20 (2003). “In the absence of a constitutional requirement, public entities may be held liable only if
21 a statute (not including a charter provision, ordinance or regulation) is found declaring them to be
22 liable. . . . [T]he practical effect of this section is to eliminate any common law governmental
23 liability for damages arising out of torts.” Thompson v. City of Lake Elsinore, 18 Cal.App.4th
24 49, 62 (1993).

25 Therefore, as a matter of law, Plaintiff is unable to pursue the state common law claims
26 for wrongful termination in violation of public policy and intentional infliction of emotional
27 distress claims against Defendant. Accordingly, this Court will recommend that these claims be
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1 dismissed without leave to amend.

2 **c. California Fair Employment and Housing Act**

3 Although Plaintiff has not raised claims under the Fair Employment and Housing Act
4 (“FEHA”) per se, he is advised that under California statutory law, an employer may not
5 discriminate against an individual seeking, obtaining, or holding employment based on that
6 employee’s race. Cal. Gov’t Code § 12920. The FEHA makes it an unlawful employment
7 practice for an employer to discriminate against, harass, or discharge an employee because of
8 race, national origin, or sex. Cal. Gov.Code, § 12940, subs.(a), (j).) Claims of employment
9 discrimination under the FEHA are analyzed under the same framework as those brought under
10 Title VII. Brooks v. City of San Mateo, 229 F. 3d 917 (9th Cir. 2000); Beyda v. City of Los
11 Angeles, 65 Cal. App. 4th 511, 517 (1998).

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13 However, an employee who experiences such an unlawful practice must file a complaint
14 with the Department of Fair Employment and Housing (“DFEH”); the complaint must be filed
15 within one year after the date on which the unlawful practice occurred. (Gov.Code, § 12960,
16 subs.(b), (d).) “Under the FEHA, the employee must exhaust the administrative remedy
17 provided by the statute by filing a complaint with the [DFEH] and must obtain a notice of right to
18 sue from the [DFEH] in order to be entitled to file a civil action in court based on violations of
19 the FEHA. The timely filing of an administrative complaint is a prerequisite to the bringing of a
20 civil action for damages under the FEHA” Romano v. Rockwell Internat., Inc. 14 Cal.4th 479,
21 492 (1996). Therefore, Plaintiff must establish that he exhausted the appropriate state
22 administrative remedies in order to properly state a claim under this provision of California law.

23 **RECOMMENDATIONS**

24 For the reasons set forth above, the Court RECOMMENDS that Plaintiff’s claims for
25 intentional infliction of emotional distress and wrongful termination/constructive discharge be
26 DISMISSED WITHOUT LEAVE TO AMEND. Plaintiff’s shall be given leave to amend the
27 complaint to properly allege his claims under Title VII of the Civil Rights Act and other
28 California law claims if appropriate.

1 Plaintiff is advised that when filing an amended complaint he should consider the
2 instructions contained in this order. The amended complaint shall indicate that the required
3 administrative remedies were met for each cause of action. Plaintiff SHALL file an amended
4 complaint within thirty (30) days of the date of service of this order. Plaintiff is also advised
5 that, if he fails to timely file a First Amended Complaint, the Court will recommend that this
6 action be dismissed with prejudice on the grounds set forth above and for failure to diligently
7 prosecute this action.

8 The Findings and Recommendations regarding dismissal of Plaintiff's common law state
9 claims of intentional infliction of emotional distress and wrongful termination/constructive
10 discharge will be submitted to the Honorable Anthony W. Ishii, pursuant to the provisions of
11 [Title 28 U.S.C. § 636\(b\)\(1\)](#). Within thirty (30) days after being served with these Findings and
12 Recommendations, Plaintiff may file written objections with the Court. The document should be
13 captioned "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is
14 advised that failure to file objections within the specified time may waive the right to appeal the
15 District Court's order. [Martinez v. Ylst, 951 F.2d 1153 \(9th Cir. 1991\)](#).

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23 IT IS SO ORDERED.

24 **Dated: June 29, 2011**

/s/ Gary S. Austin
25 UNITED STATES MAGISTRATE JUDGE