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8 UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA  
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11 JUSTIN ALTIMUS,

12 Plaintiff,

13 v.

14 SAINT-GOBAIN CORP. OF NORTH  
15 AMERICA,

16 Defendant.

No. 1:17-cv-01271-DAD-EPG

ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT'S  
MOTION TO DISMISS

(Doc. No. 17)

17 This matter came before the court on March 6, 2018, for hearing on defendant's motion to  
18 dismiss the first amended complaint, and in the alternative, motion for a more definite statement.  
19 (Doc. No. 17). Plaintiff appeared telephonically on his own behalf. Attorney Kelsey A. Webber  
20 appeared telephonically on behalf of defendant.<sup>1</sup> At the conclusion of the hearing, the matter was  
21 taken under submission. For the reasons set forth below, the court grants in part and denies in  
22 part defendant's motion to dismiss.

23 **BACKGROUND**

24 **A. First Amended Complaint**

25 The first amended complaint alleges as follows. Plaintiff began working for defendant on  
26 or around July 2014. (Doc. No. 15 at ¶ 1.) Beginning in or around January 2015 through at least

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28 <sup>1</sup> Defendant Certaineed Corporation asserts that it is erroneously sued herein as "Saint-Gobain Corporation of North America."

1 February 2016, plaintiff was verbally reprimanded and/or wrongly “written up” by his supervisors  
2 for various job-related infractions, including tardiness, taking more time than allowed on breaks,  
3 “talking too much,” and not wearing ear plugs as required on the job. (*Id.* at ¶¶ 4–7, 10–13.)

4 On or around August 1, 2015, the “B Team” supervisor “intentionally/maliciously spread  
5 rumors” to other employees that he had witnessed plaintiff “bent over in a sexual manner with  
6 another employee” during an overnight shift. (*Id.* ¶ 14.) On or around August 3, 2015, plaintiff  
7 reported the rumor, which he perceived as sexual harassment, to his immediate supervisor. (*Id.* at  
8 ¶ 15.) In response, plaintiff’s immediate supervisor laughed and stated that he would talk to the  
9 “B Team” supervisor. (*Id.*) Plaintiff’s immediate supervisor subsequently took retaliatory  
10 actions against plaintiff for reporting the claimed sexual harassment, including denying plaintiff  
11 training opportunities in favor of less senior employees. (*Id.* at ¶¶ 16, 17.)

12 In or around January 2016, plaintiff requested leave to attend a family member’s funeral.  
13 (*Id.* ¶ 19.) Plaintiff’s request for leave was denied. (*Id.*) In or around February 2016, plaintiff  
14 took leave from work due to workplace related stress and the recent death in the family. (*Id.* ¶  
15 20.) While on leave, plaintiff periodically contacted defendant’s human resources department,  
16 requesting vacation time or disability benefits. (*Id.* ¶ 21–22.) Plaintiff alleges that it was not until  
17 November 2016, when he left a voicemail for human resources demanding his vacation time, that  
18 human resources finally acquiesced. (*Id.*)

19 On January 18, 2017, plaintiff received a letter indicating that he was being terminated.  
20 (*Id.* at ¶ 23.) Plaintiff called defendant’s human resources department to ask why he was being  
21 fired, and alleges that defendant denied having terminated him, but refused to answer whether  
22 plaintiff was still employed. (*Id.* at ¶ 25.) Defendant’s human resources department then asked  
23 plaintiff to submit an updated note from plaintiff’s doctor authorizing continued medical leave  
24 due to stress, which plaintiff did. (*Id.*)

25 In February 2017, plaintiff reached out to the other employee implicated in the alleged  
26 sexually harassing statement. (*Id.* ¶ 26.) The other employee indicated that no one had  
27 approached him to investigate plaintiff’s allegations. (*Id.*) Plaintiff filed a charge of

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1 discrimination with the Equal Employment Opportunity Commission (“EEOC”) in April 2017.  
2 (*Id.* ¶ 29.) The same month, the EEOC issued plaintiff a notice of right to sue. (*Id.*)

3 On or around May 2017, plaintiff alleges that he received a letter from defendant  
4 “harassing him of his employment status.” (*Id.* at ¶ 30.) Plaintiff alleges that human resources  
5 had become aware of the EEOC complaint, and had sent a letter to plaintiff claiming that plaintiff  
6 had abandoned his employment. (*Id.*) Plaintiff asserts that, as of the filing of his amended  
7 complaint in this action, he is still uncertain what his employment status is with defendant, and  
8 that defendant has not reached out to him to coordinate the return of personal property left in his  
9 workplace locker. (*Id.* at ¶ 31–32.)

## 10 **B. Procedural History**

11 On November 22, 2017, this court granted defendant’s motion to dismiss with respect to  
12 certain causes of action and granted defendant’s motion for a more definite statement with respect  
13 to other causes of action. (Doc. No. 13.) Specifically, the court dismissed plaintiff’s claims  
14 under the Occupational Safety and Health Act and the National Labor Relations Act with  
15 prejudice, and dismissed plaintiff’s claim under defendant’s Hourly Employee Handbook with  
16 leave to amend. (*Id.*) The court further granted defendant’s motion for a more definite statement  
17 with respect to plaintiff’s claims under Title VII of the Civil Rights Act of 1964 (“Title VII”),  
18 California Government Code §§ 12940–12950.1, and California Civil Code §§ 45–47. (*Id.*) The  
19 court granted plaintiff thirty days to file an amended complaint.

20 Plaintiff filed his first amended complaint on December 29, 2017. (Doc. No. 15.)  
21 Defendant filed a motion to dismiss the first amended complaint, and in the alternative, motion  
22 for more definite statement, on January 12, 2018. (Doc. No. 17.) Plaintiff filed his opposition on  
23 February 15, 2018 (Doc. No. 22), and defendant filed its reply on February 27, 2018 (Doc. No.  
24 23).

## 25 **LEGAL STANDARD**

26 The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the legal  
27 sufficiency of the complaint. *N. Star Int’l v. Ariz. Corp. Comm’n*, 720 F.2d 578, 581 (9th Cir.  
28 1983). A dismissal may be warranted where there is “the lack of a cognizable legal theory or the

1 absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police*  
2 *Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). A plaintiff must allege “enough facts to state a claim to  
3 relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A  
4 claim is plausible on its face “when the plaintiff pleads factual content that allows the court to  
5 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v.*  
6 *Iqbal*, 556 U.S. 662, 678 (2009).

7 In evaluating whether a complaint states a claim on which relief may be granted, the court  
8 accepts as true the allegations in the complaint and construes the allegations in the light most  
9 favorable to the plaintiff. *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984); *Love v. United*  
10 *States*, 915 F.2d 1242, 1245 (9th Cir. 1989). However, the court will not assume the truth of legal  
11 conclusions cast in the form of factual allegations. *United States ex rel. Chunie v. Ringrose*, 788  
12 F.2d 638, 643 n.2 (9th Cir. 1986). While Rule 8(a) does not require detailed factual allegations,  
13 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory  
14 statements, do not suffice.” *Iqbal*, 556 U.S. at 676. A complaint must do more than allege mere  
15 “labels and conclusions” or “a formulaic recitation of the elements of a cause of action.”  
16 *Twombly*, 550 U.S. at 555.

17 In ruling on such a motion, the court is permitted to consider material that is properly  
18 submitted as part of the complaint, documents that are not physically attached to the complaint if  
19 their authenticity is not contested and the plaintiff’s complaint necessarily relies on them, and  
20 matters of public record. *Lee v. City of Los Angeles*, 250 F.3d 668, 688–89 (9th Cir. 2001).

## 21 ANALYSIS

22 Plaintiff’s amended complaint alleges claims under: (1) Title VII; (2) California Civil  
23 Code §§ 45–47; (3) California Government Code §§ 12945.2, 12946, 12950, and 12950.1; and (4)  
24 the CertainTeed Hourly Employee Handbook. (Doc. No. 15.) Plaintiff filed his amended  
25 complaint on December 29, 2017, after the 30-day deadline ordered by the court in its November  
26 22, 2017 order had expired. (Doc. No. 13 at 9.) Although plaintiff’s amended complaint was  
27 untimely filed, in the interest of fairness and justice, and in consideration of plaintiff’s *pro se*

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1 status, the court will not dismiss plaintiff's case on that basis alone, and will instead address the  
2 arguments presented in defendant's motion to dismiss.

3 **A. Title VII**

4 Defendant argues that plaintiff's Title VII cause of action should be dismissed because  
5 plaintiff fails to state a claim and fails to provide notice of what legal theories he wishes to  
6 pursue. (Doc. No. 17 at 7.) Plaintiff's opposition, however, clarifies that "sexual harassment is  
7 sex discrimination" under Title VII. (Doc. No. 23 at 6.) Moreover, at the March 6, 2018 hearing  
8 on the pending motion, plaintiff confirmed that his Title VII cause of action was based on an  
9 allegation of sexual harassment, and his subsequent termination in retaliation for reporting the  
10 sexual harassment. With that clarification, the court finds that plaintiff has given fair notice to  
11 defendant of the nature of his Title VII claim, and defendant's motion to dismiss plaintiff's Title  
12 VII cause of action will therefore be denied.

13 **B. California Civil Code §§ 45–47**

14 Defendant next moves to dismiss plaintiff's causes of action brought pursuant to  
15 California Civil Code §§ 45, 46, and 47.

16 1. Civil Code § 45

17 Defendant argues that dismissal of plaintiff's cause of action for libel under Civil Code §  
18 45 is warranted because plaintiff fails to state a claim. (Doc. No. 17 at 7.) Civil Code § 45  
19 defines libel as a "false and unprivileged publication by writing, printing, picture, effigy, or other  
20 fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or  
21 obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in  
22 his occupation." In opposition to defendant's motion to dismiss, plaintiff identifies "number 7,  
23 page 2, line 21" of his amended complaint as sufficient to state a claim under Civil Code § 45.  
24 (Doc. No. 22 at 6–7.) There is, however, no "number 7" appearing on page 2 of plaintiff's  
25 amended complaint. Moreover, at line 21 of page 2 of the amended complaint it is alleged that,  
26 before an employee switches from a twelve-hour work day to an eight-hour work day, the  
27 employee must sign a new contract to receive the new pay grade. (Doc. No. 15 at ¶ 5.) That  
28 allegation does not, on its face, state a claim for libel.

1 In his opposition to the pending motion plaintiff states that he seeks further leave to  
2 amend the complaint should the present allegations be found insufficient to state a claim under  
3 Civil Code § 45. (Doc. No. 22 at 6–7.) However, the court has already provided an opportunity  
4 for plaintiff to amend his complaint in this regard. After careful consideration of plaintiff’s  
5 arguments at the hearing on the pending motion and in his written opposition thereto, the court  
6 concludes that the granting of further leave to amend in this regard would be futile. *See Klamath-*  
7 *Lake Pharm. Ass’n v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1293 (9th Cir. 1983) (holding  
8 that while leave to amend should be freely given, the court does not have to allow futile  
9 amendments). Here, the deficiencies with respect to his claim under Civil Code § 45 were fully  
10 explained in the court’s prior order dismissing plaintiff’s original complaint (*see* Doc. No. 13),  
11 and plaintiff has provided no indication that he is capable of remedying those deficiencies.

12 2. Civil Code § 46

13 Defendant further argues that plaintiff has failed to specify the alleged defamatory  
14 statement at issue, and thus, his slander claim under Civil Code § 46 must be dismissed. (Doc.  
15 No. 17 at 8.) Pursuant to Civil Code § 46, slander is defined as:

16 [A] false and unprivileged publication, orally uttered, and also  
17 communications by radio or any mechanical or other means which:

18 1. Charges any person with crime, or having been indicted,  
19 convicted, or punished for crime;

20 2. Imputes in him the present existence of an infectious, contagious,  
21 or loathsome disease;

22 3. Tends directly to injure him in respect to his office, profession,  
23 trade or business, either by imputing to him general disqualification  
24 in those respects which the officer or other occupation peculiarly  
25 requires, or by imputing something with reference to his office,  
26 profession, trade, or business that has a natural tendency to lessen its  
27 profits;

28 4. Imputes to him impotence of a want of chastity; or

5. Which, by natural consequence, causes actual damage.

Under California law, to state a claim for slander, a plaintiff must allege and ultimately establish  
“the intentional publication of a statement of fact that is false, unprivileged, and has a natural  
tendency to injure or which causes special damage.” *Smith v. Maldonado*, 72 Cal. App. 4th 637,

1 645 (1999). “Publication” in this context means “communication to a third person who  
2 understands the defamatory meaning of the statement and its application to the person to whom  
3 reference is made.” *Id.*

4 In his amended complaint, his opposition to the pending motion, and in his argument at  
5 the hearing, plaintiff has sufficiently identified that the claimed defamatory statement is the  
6 allegedly false statement by his Team B supervisor to other employees that he had witnessed  
7 plaintiff “bent over in a sexual manner with another employee” during an overnight shift. The  
8 court finds that this allegation is sufficient at the pleading stage to state a claim for slander.  
9 Accordingly, defendant’s motion to dismiss the claim for slander under Civil Code § 46 will be  
10 denied.

### 11 3. Civil Code § 47

12 Defendant also moves to dismiss plaintiff’s claim under Civil Code § 47, which defines  
13 when a privileged publication or broadcast is made. (Doc. No. 17 at 8.) Plaintiff’s complaint  
14 makes no allegations that a privileged publication or broadcast was made. It is moreover unclear  
15 how a claim under § 47 would relate to plaintiff’s claims for libel and slander, which must be  
16 based on *unprivileged* publications. *See* Civil Code §§ 45, 46 (defining libel and slander as an  
17 unprivileged publication). Finally, because plaintiff’s opposition fails to respond to defendant’s  
18 motion in this regard, the court will dismiss plaintiff’s claim brought under Civil Code § 47 with  
19 prejudice.

### 20 C. California Government Code §§ 12945.2, 12946, 12950, and 12950.1

21 Defendant next moves to dismiss plaintiff’s causes of action pursuant to California  
22 Government Code §§ 12945.2, 12946, 12950, and 12950.1. (Doc. No. 17 at 8–10.)

#### 23 1. Government Code § 12945.2

24 Government Code § 12945.2 pertains to family care and medical leave, and contains  
25 subsections (a) through (t), with even more subsections nested therein. Defendant argues that it is  
26 unclear what legal theory plaintiff wishes to pursue in advancing this claim, and that this claim  
27 should therefore be dismissed with prejudice. (*Id.* at 8.) Section 12945.2 identifies various  
28 unlawful employment practices with respect to family care and medical leave. Although

1 plaintiff's amended complaint alleges that he was denied leave to attend a family member's  
2 funeral, he does not allege with any specificity in what way that denial was in violation of §  
3 12945.2. At the hearing on the pending motion, plaintiff stated that the denial of his request to  
4 attend a funeral was the only factual allegation undergirding this cause of action. The court  
5 concludes that plaintiff has not alleged sufficient facts to provide defendant fair notice of what  
6 legal theory he intends to pursue with respect to this claim, and that his conclusory allegation is  
7 otherwise insufficient to state a claim under this statute. The court will therefore dismiss  
8 plaintiff's claim pursuant to § 12945.2.

9           2. Government Code § 12946

10           Government Code § 12946 provides that it shall be an unlawful practice for employers:

11                     to fail to maintain and preserve any and all applications, personnel,  
12                     membership, or employment referral records and files for a minimum  
13                     period of two years after the records and files are initially created or  
14                     received, or for employers to fail to retain personnel files of  
                      applicants or terminated employees for a minimum period of two  
                      years after the date of the employment action taken.

15           The only allegations in the complaint relating to records are that plaintiff asked defendant's  
16           human resources department "for his employee records and write ups be emailed to him," and  
17           that "Plaintiff received on or around December 2017, emails of a pay-stub is ready [sic] to be  
18           viewed from defendants but no access is being granted to that pay-stub." (Doc. No. 15 at ¶¶ 25,  
19           31.) Even assuming the truth of these allegations, there are no factual allegations in plaintiff's  
20           amended complaint to suggest that defendant failed to maintain and preserve applications,  
21           personnel, membership, or employment referral records and files for the minimum statutory  
22           period, or that defendant failed to retain personnel files of applicants or terminated employees for  
23           the minimum statutory period. For this reason, plaintiff's claim brought pursuant to § 12946 will  
24           be dismissed.

25           3. Government Code § 12950

26           Government Code § 12950 provides that "every employer shall act to ensure a workplace  
27           free of sexual harassment by implementing the following minimum requirements," including  
28           displaying a poster, provided by the Department of Fair Employment and Housing ("DFEH"),



1 with information on discrimination in employment and the illegality of sexual harassment. Cal.  
2 Gov. Code § 12950(a)(1). Each employer must also obtain from DFEH an information sheet on  
3 sexual harassment to be distributed to employees, unless the employer provides equivalent  
4 information in another form. Cal. Gov. Code § 12950(b). Defendant moves to dismiss this cause  
5 of action on the basis that plaintiff has failed to provide fair notice of what legal claims he wishes  
6 to pursue under this provision, and that plaintiff has otherwise failed to plead any facts that would  
7 support a claim under that statute. (Doc. No. 17 at 9–10.) Though the court disagrees that  
8 plaintiff’s allegations in support of this claim fail to provide fair notice to defendant, the court  
9 does find that there are no factual allegations in the amended complaint to suggest a plausible  
10 violation of this provision. Plaintiff’s claim brought pursuant to § 12950 will therefore be  
11 dismissed.

12 4. Government Code § 12950.1

13 Government Code § 12950.1 sets forth minimum training and education requirements for  
14 supervisory employees regarding sexual harassment, prevention of abusive conduct, and  
15 harassment based on gender identity, gender expression, and sexual orientation. Cal. Gov. Code  
16 §§ 12950.1(a)–(c). Defendant again moves to dismiss this cause of action on the basis that  
17 plaintiff has failed to provide fair notice of what legal claims he wishes to pursue under this  
18 section, and that plaintiff has otherwise failed to plead any facts that would support a claim under  
19 this section. (Doc. No. 17 at 10.)

20 The court again disagrees with defendant’s contention that plaintiff’s stated cause of  
21 action fails to provide defendant with fair notice of the claim, but nonetheless concludes that there  
22 are no factual allegations in the amended complaint to suggest a plausible violation of this  
23 provision. Plaintiff’s claim pursuant to § 12950.1 will therefore also be dismissed.

24 5. Leave to Amend

25 The court previously granted plaintiff leave to amend his cause of action alleging  
26 violations of a wide range of provisions under the Government Code. (Doc. No. 13 at 7–8.)  
27 Although plaintiff’s amended complaint now identifies specific provisions under the Government  
28 Code, the court finds that the amended complaint still lacks any factual allegations supporting a

1 plausible violation of those provisions. Plaintiff has presented nothing to indicate that he is  
2 capable of remedying the noted deficiencies. The granting of any further leave to amend  
3 plaintiff's claims under Government Code §§ 12945.2, 12946, 12950, and 12950.1 would  
4 therefore be futile. *See Klamath-Lake Pharm. Ass'n*, 701 F.2d at 1293. These claims will  
5 therefore be dismissed with prejudice.

#### 6 **D. Employee Handbook**

7 Plaintiff's final cause of action is pursuant to defendant's "Hourly Employee Handbook."  
8 (Doc. No. 15 at 8.) Plaintiff's complaint claims that, on numerous occasions, defendant violated  
9 policies included its own employee handbook. (*See, e.g., id.* at ¶¶ 3–8.) Defendant contends that  
10 this claim should be dismissed because plaintiff fails to allege that the handbook constituted an  
11 express or implied contract that restricted defendant's right to terminate plaintiff. (Doc. No. 17 at  
12 11.)

13 The court previously dismissed this cause of action with leave to amend, inviting plaintiff  
14 to allege additional facts indicating that the handbook operated as a contract between the parties.  
15 (Doc. No. 13 at 6–7.) The amended complaint offers no such factual allegations. Having already  
16 granted plaintiff leave to amend, the court finds that the granting of further leave to amend this  
17 cause of action would be futile. *See Klamath-Lake Pharm. Ass'n*, 701 F.2d at 1293. Lacking any  
18 allegations as to what policies defendant purportedly violated, and lacking any factual allegations  
19 that the employee handbook operated as a contract, this claim will be dismissed with prejudice.

#### 20 **CONCLUSION**

21 For these reasons the court grants in part and denies in part defendant's motion to dismiss  
22 (Doc. No. 17) as follows:

- 23 1. Defendant's motion to dismiss is denied as to plaintiff's Title VII and Civil Code § 46  
24 causes of action;

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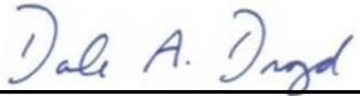
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- 1 2. Defendant's motion to dismiss is granted as to plaintiff's remaining causes of action under  
2 Civil Code §§ 45 and 47, Government Code §§ 12945.2, 12946, 12950, and 12950.1, and  
3 pursuant to the employee handbook; and  
4 3. Further leave to amend as to the dismissed causes of action is denied.

5 IT IS SO ORDERED.

6 Dated: **June 20, 2018**

7   
UNITED STATES DISTRICT JUDGE