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

MICHAEL THORNBROUGH,)
)
Plaintiff,)
)
v.)
)
WESTERN PLACER UNIFIED SCHOOL)
DISTRICT, SCOTT LEAMAN, DAVID)
GIRARD, KATHY ALLEN, ROBERT NOYES,)
and DOES 1-25,)
)
Defendants.)
_____)

2:09-cv-02613-GEB-GGH

ORDER GRANTING DEFENDANT
GIRARD'S MOTION TO DISMISS*

On November 12, 2009, Defendant David Girard filed a motion in which he seeks to dismiss Plaintiff's complaint under Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"). Girard also filed a "special motion to strike" Plaintiff's state law claims under California's "anti-SLAPP" statute, California Civil Code of Procedure Section 425.16. For the reasons stated below, Girard's motion to dismiss is GRANTED and his anti-SLAPP motion is deemed MOOT.

I. LEGAL STANDARD

A motion under Rule 12(b)(6) "challenges a complaint's compliance with . . . pleading requirements." Champlaie v. BAC Home Loans Servicing, LP, No. S-09-1316 LKK/DAD, 2009 WL 3429622, at *1 (E.D. Cal. Oct. 22, 2009). A pleading must contain "a short and plain

* This matter is deemed to be suitable for decision without oral argument. E.D. Cal. R. 230(g).

1 statement of the claim showing that the pleader is entitled to relief
2” Fed. R. Civ. P. 8(a)(2). The complaint must “give the
3 defendant fair notice of what the [plaintiff’s] claim is and the
4 grounds upon which relief rests” Bell Atlantic Corp. V.
5 Twombly, 550 U.S. 544, 555 (2007). “A pleading that offers labels and
6 conclusions or a formulaic recitation of the elements of a cause of
7 action will not do. Nor does a complaint suffice if it tenders naked
8 assertions devoid of further factual enhancement.” Ashcroft v. Iqbal,
9 129 S. Ct. 1937, 1949 (2009).

10 In deciding a motion under Rule 12(b)(6), the material
11 allegations of the complaint are accepted as true and all reasonable
12 inferences are drawn in favor of the plaintiff. See al-Kidd v.
13 Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009). However, neither
14 conclusory statements nor legal conclusions are entitled to a
15 presumption of truth. See Iqbal, 129 S. Ct. at 1949-50. To avoid
16 dismissal, the plaintiff must allege “only enough facts to state a
17 claim to relief that is plausible on its face.” Twombly, 550 U.S. at
18 547. “A claim has facial plausibility when the plaintiff pleads
19 factual content that allows the court to draw the reasonable inference
20 that the defendant is liable for the misconduct alleged.” Iqbal, 129
21 S. Ct. at 1949. Plausibility, however, requires more than “a sheer
22 possibility that a defendant has acted unlawfully.” Id. “When a
23 complaint pleads facts that are merely consistent with a defendant’s
24 liability, it stops short of the line between possibility and
25 plausibility of entitlement to relief.” Id. (quotations and citation
26 omitted).

27 Girard’s motion to dismiss is accompanied by a request for
28 judicial notice of twenty-six documents. Most of these documents

1 cannot be considered in deciding Girard's dismissal motion without
2 converting the motion into one for summary judgment. See Fed. R. Civ.
3 P. 12(d); see also Knieval v. ESPN, 393, F.3d 1068, 1076 (9th Cir.
4 2005) (stating that in general, "when ruling on a motion to dismiss, [a
5 court] must disregard facts that are not alleged on the face of the
6 complaint or contained within documents attached to the complaint.").
7 However, on a motion to dismiss, a court may consider matters properly
8 subject to judicial notice, including "records and reports of
9 administrative bodies." See Mack v. South Bay Beer Distributors,
10 Inc., 798 F.2d 1279, 1282 (9th Cir. 1986), abrogated in part on other
11 grounds by, Astoria Federal Sav. & Loan Ass'n v. Solimino, 501 U.S.
12 104, 111 (1991). Girard argues that administrative proceeding
13 documents involving Plaintiff may be judicially noticed and
14 considered. However, Girard has not demonstrated that these documents
15 are "records and reports of administrative bodies." *Id.* Therefore,
16 Girard's request for judicial notice of these documents is denied.

17 Girard also requests that judicial notice be taken of documents
18 filed in a state court proceeding involving Plaintiff and the Western
19 Placer Unified School District. However, this request is also denied
20 since Girard has not shown that these documents are pertinent to the
21 dismissal motion.

22 **II. BACKGROUND**

23 Plaintiff was hired by the Western Placer Unified School District
24 ("WPUSD") on July 8, 1997 as a maintenance worker and was eventually
25 promoted to the position of Assistant Director of Maintenance.
26 (Compl. ¶ 13.) Plaintiff alleges Girard "was, the [WPUSD's] legal
27 advisor for personnel matters and was responsible for investigating
28

1 personnel matters and advising and directing WPUSD and its
2 administrators.” (Id. ¶ 11.)

3 Plaintiff’s claims concern his allegations that Defendants
4 improperly initiated administrative proceedings against him based upon
5 false charges, and wrongfully terminated him, in retaliation for his
6 complaints of improper spending and mismanagement within the school
7 district. (Id. ¶¶ 14-25.) Specifically, Plaintiff alleges
8 while performing his job responsibilities, he “became aware that [a]
9 construction contractor hired by WPUSD was not providing specified
10 construction materials” as required. (Id. ¶ 14.) Plaintiff alleges
11 he “communicated with [Defendant and WPUSD Superintendent Leaman]
12 about the construction [contractor]. . . problems . . . [as well as]
13 the illegal failure of the contractor to use specified construction
14 materials” (Id. ¶ 15.) Defendant Leaman allegedly requested
15 that Plaintiff give him one year to address Plaintiff’s concerns.
16 (Id.)

17 As a result of expressing concerns over the construction
18 contractor, Plaintiff alleges Defendant Leaman suspended Plaintiff and
19 “had Superintendent Robert Noyes initiate administrative termination
20 proceedings against [him] based on false accusations and without good
21 cause.” (Id. ¶ 16.) Plaintiff alleges the initiation of the
22 administrative termination proceeding “[was] done in concert [by all
23 Defendants] and in retaliation for [Plaintiff’s] prior complaints . .
24 . .” (Id.) Plaintiff further alleges “[Defendants Leaman, Noyes and
25 Girard] conspired and agreed to falsely claim that [Plaintiff] [had]
26 violated California’s and WPUSD’s sexual harassment laws and
27 policies.” (Id. ¶ 17.) Plaintiff alleges these “false charges” were
28 “resolved by settlement.” (Id.)

1 After resolution of the "false charges" against Plaintiff,
2 Plaintiff alleges he took further actions to alert the WPUSD to
3 problems within the district, including sending information and
4 expressing his concerns to the Placer County Grand Jury, the editor of
5 a local newspaper, and the WPUSD Board. (Id. ¶¶ 18-22.) Plaintiff
6 also wrote a letter to Superintendent Kathy Allen to complain about a
7 "change in purchase order procedures of the Maintenance Department."
8 (Id. ¶ 20.)

9 Plaintiff alleges that in response to these actions, Defendant
10 Leaman executed a "Statement of Charges and Recommendations for
11 Dismissal" against Plaintiff, initiating an administrative termination
12 proceeding. (Id. ¶ 24.) An administrative hearing before an officer
13 selected by WPUSD occurred, at which, Plaintiff alleges "Defendants
14 reasserted the false claims that they conjured in the [prior]
15 administrative action." (Id.) At the administrative hearing,
16 Defendant "Leaman [allegedly] testified . . . that he made the
17 decision to terminate [Plaintiff] based on [the Statement of Charges
18 and Recommendations for Dismissal]." (Id.) Plaintiff also alleges
19 Defendant Leaman stated Defendant Girard drafted the "accusations"
20 brought against him in the administrative proceeding. (Id.) WPUSD
21 terminated Plaintiff effective April 29, 2009. (Id. ¶ 26.)

22 Plaintiff filed a complaint in this federal court on September
23 17, 2009, alleging eleven claims under federal and state law against
24 WPUSD, Scott Leaman, David Girard, Kathy Allen, Robert Noyes and
25 twenty-five Doe Defendants. Plaintiff's complaint alleges federal
26 claims under 42 U.S.C. § 1983 and § 1985. Plaintiff's claims under
27 California law include violations of the California Constitution,
28 intentional infliction of emotional distress, negligent infliction of

1 emotional distress, retaliatory discharge in violation of California
2 public policy and violations of the California Education Code and
3 California Labor Code. Plaintiff's complaint alleges all eleven
4 causes of action against all Defendants. The WPUSD and Defendants
5 Noyes, Leaman, and Allen filed an answer to the complaint on November
6 2, 2009.

7 **III. DISCUSSION**

8 **A. Plaintiff's Federal Claims**

9 **1. Plaintiff's First and Sixth Claims Brought Under Section 1983**

10 Girard argues Plaintiff's first and sixth claims fail as a matter
11 of law since Plaintiff cannot establish that Girard was "acting under
12 the color of law." (Mot. to Dismiss 3.) Plaintiff rejoins that "[a]s
13 a private party acting with public officials, Defendant Girard [c]ould
14 . . . be liable for violations of [Plaintiff's] civil rights."
15 (Opp'n. to Mot. to Dismiss 3.)

16 Plaintiff's first and sixth claims allege violations of federal
17 law under 42 U.S.C. § 1983 ("Section 1983"). Plaintiff's first claim
18 alleges Defendants violated his constitutional rights by initiating
19 administrative proceedings against him in retaliation for exercising
20 rights secured under the First Amendment to the United States
21 Constitution. (Compl. ¶ 28.) Plaintiff's sixth claim is labeled
22 "retaliation for federal whistle-blower activities" and alleges
23 Defendants' initiation of "retaliatory and frivolous administrative
24 proceedings" against him violated his "Fourteenth Amendment Rights to
25 Equal Protection and Due Process of Law." (Id. ¶¶ 54, 55.)

26 Section 1983 provides that "every person who, under color of any
27 statute, ordinance, regulation, custom or usage, of any State . . .
28 subjects, or causes to be subjected, any citizen of the United States

1 . . . the deprivation of any rights, privileges, or immunities secured
2 by the Constitution and laws, shall be liable to the party injured in
3 an action at law, suit in equity, or other proper proceeding for
4 redress" 42 U.S.C. § 1983. To state a claim under Section
5 1983, a plaintiff "must establish that [he] was deprived of a right
6 secured by the Constitution or laws of the United States, and that the
7 alleged deprivation was committed under the color of state law."
8 American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49-50 (1999).
9 "The traditional definition of acting under color of state law
10 requires that the defendant in a [Section] 1983 action have exercised
11 power possessed by virtue of state law and made possible only because
12 the wrongdoer is clothed with the authority of state law." West v.
13 Atkins, 487 U.S. 42, 49 (1988) (quotations and citation omitted).
14 Therefore, Section 1983 "excludes from its reach merely private
15 conduct, no matter how discriminatory or wrongful." Sullivan, 526
16 U.S. at 50 (quotations and citation omitted).

17 Plaintiff alleges Girard was the WPUSD's "legal advisor for
18 personnel matters" and "was acting in part as the agent of the WPUSD."
19 (Compl. ¶ 11.) This allegation is insufficient to state a claim under
20 Section 1983. While "a claim may lie against a private party who is a
21 willful participant in joint action with the State or its agents . . .
22 a bare allegation of such joint action will not overcome a motion to
23 dismiss; the plaintiff must allege facts tending to show that [the
24 defendant] acted under color of state law or authority." Degrassi v.
25 City of Glendora, 207 F.3d 636, 647 (9th Cir. 2000).

26 Plaintiff has only alleged in conclusory fashion that Girard
27 "conspired" with Defendants Leaman and Noyes to file "false claims"
28 against him. (Compl. ¶ 17.) This "bare allegation" of "joint action"

1 is insufficient to "overcome [the] motion to dismiss." Degrassi, 207
2 F.3d at 647. Therefore, these claims are dismissed.

3 **2. Plaintiff's Third Claim Under Section 1985 for Conspiracy to**
4 **Violate Constitutional Rights**

5 Girard also argues Plaintiff's claim under 42 U.S.C. § 1985
6 ("Section 1985") must be dismissed since Plaintiff's allegations of a
7 conspiracy are conclusory. (Mot. to Dismiss 13-14.) Plaintiff
8 counters, pointing to his allegations in Paragraphs 16 and 17 of the
9 complaint in which he alleges the initiation of administrative
10 termination proceedings was "done in concert" and Defendants
11 "conspired and agreed to falsely claim that [Plaintiff] had violated
12 California and WPUSD's sexual harassment laws and policies." (Compl.
13 ¶¶ 16-17.)

14 Plaintiff, however, has not stated under which section of Section
15 1985 this claim is alleged. Plaintiff's allegations appear to allege
16 a claim under Section 1985(3). Section 1985(3) - "the Ku Klux Klan
17 Act of 1871 - was enacted by the Reconstruction Congress to protect
18 individuals - primarily blacks - from conspiracies to deprive them of
19 their legally protected rights." Sever v. Alaska Pulp. Corp., 978
20 F.2d 1529, 1536 (9th Cir. 1992). To state a claim under Section
21 1985(3), a plaintiff must allege four elements: "(1) [a] conspiracy;
22 (2) for the purpose of depriving, either directly or indirectly, any
23 person or class of persons of the equal protection of the laws, or of
24 equal privileges and immunities under the laws; (3) an act in
25 furtherance of this conspiracy; (4) whereby a person is either injured
26 in his person or property or deprived of any right or privilege of a
27 citizen of the United States." Id.

1 To satisfy the first element, the plaintiff must "state specific
2 facts to support the existence of the claimed conspiracy." Burns v.
3 County of King, 883 F.2d 819, 821 (9th Cir. 1989). Conclusory
4 allegations of a conspiracy are insufficient. See id. "Claims based
5 on vague and conclusory allegations, which fail to specify each
6 defendant's role in the alleged conspiracy, are subject to dismissal."
7 Cox v. Ashcroft, 603 F. Supp. 2d 1261, 1271-72 (E.D. Cal. 2009).
8 Plaintiff's sole allegation of a conspiracy is the conclusory
9 statement that Girard "conspired and agreed to falsely claim" that
10 Plaintiff had violated sexual harassment laws. (Compl. ¶ 17.)
11 Therefore, Plaintiff's claim under Section 1985(3) fails to set forth
12 facts showing that Girard was engaged in a conspiracy. "Plaintiff
13 cannot rely on conclusory statements to support his allegation of
14 constitutional injury." Cox, 603 F. Supp. 2d at 1272.

15 Further, to meet the second element of a claim under Section
16 1985(3), the "plaintiff must demonstrate a deprivation of [a
17 constitutional right] motivated by some racial or perhaps otherwise
18 class-based, invidiously discriminatory animus behind the conspirators
19 action." Sever, 978 F.2d at 1536. "[S]ection 1985(3) is extended
20 beyond race only when the class in question can show that there has
21 been governmental determination that its members require and warrant
22 special federal assistance in protecting their civil rights." Sever,
23 978 F.2d at 1536 (quotations and citation omitted). Plaintiff does
24 not allege invidious discrimination motivated by racial or class-based
25 animus. Therefore, Plaintiff's Section 1985 claim is dismissed.

26 **3. The Federal Litigation Privilege and Noerr-Pennington Doctrine**

27 Girard argues in the alternative that Plaintiff's federal claims
28 alleged in his first, third and sixth causes of action are barred by

1 the "federal litigation privilege," including the Noerr-Pennington
2 doctrine. However, since Plaintiff's federal claims are dismissed
3 under Rule 12(b)(6), Girard's arguments under the federal litigation
4 privilege and Noerr-Pennington doctrine are not reached.

5 **B. Plaintiff's State Law Claims**

6 Plaintiff's eight claims alleged under California law are now
7 discussed.

8 **1. Plaintiff's Second Claim for Violation of the California**
9 **Constitution**

10 Girard argues Plaintiff's second claim brought under the Free
11 Speech clause of the California constitution must be dismissed since
12 Plaintiff's complaint fails to sufficiently allege Girard is a state
13 actor. Plaintiff rejoins that the same arguments that support his
14 contention that Girard acted "under the color of law" for purposes of
15 Section 1983 demonstrate that there is state action.

16 California's free speech clause predicates a violation upon state
17 action. See Golden Gateway Center v. Golden Gateway Tenants Assn., 26
18 Cal. 4th 1013, 1022 (2001). Therefore, "proper constitutional
19 analysis [of a claim under this clause] requires . . . first
20 address[ing] the threshold issue of whether . . . [the] state action
21 requirement" has been satisfied. Id. (quotations and citation
22 omitted). Since Plaintiff failed to allege that Girard's conduct
23 constituted state action, this claim is dismissed.

24
25 **2. Plaintiff's Fourth Claim for Intentional Infliction of Emotional**
26 **Distress**

27 Girard further argues Plaintiff's claim for intentional
28 infliction of emotional distress should be dismissed since Plaintiff

1 has not pled that Girard engaged in outrageous conduct. (Mot. to
2 Dismiss 15.) Plaintiff counters that the conduct alleged is
3 sufficiently intentional and outrageous to be considered by a jury.
4 (Opp'n. 5-6.)

5 To state a claim for intentional infliction of emotional
6 distress, "a plaintiff must plead . . . that (1) the defendant engaged
7 in outrageous conduct, and (2) the defendant's conduct was not
8 privileged." Cantu v. Resolution Trust Corp., 4 Cal. App. 4th 857,
9 887 (1992). "[L]iability can be found only where the conduct has been
10 so outrageous in character, and so extreme in degree, as to go beyond
11 all possible bounds of decency, and to be regarded as atrocious, and
12 utterly intolerable in a civilized community." Id. at 888.

13 Plaintiff's complaint merely states in a conclusory manner the
14 elements a claim for intentional infliction of emotional distress.
15 The few acts allegedly committed by Girard, even if true, do not rise
16 to the requisite level of outrageousness for maintenance of this
17 claim. Therefore, this claim is dismissed.

18 **3. Plaintiff's Fifth Claim for Negligent Infliction of Emotional**
19 **Distress**

20 Defendant also argues Plaintiff's fifth claim for negligent
21 infliction of emotional distress should be dismissed because Plaintiff
22 "failed to plead that [Girard], as outside counsel for WPUSD, owed him
23 any kind of duty." (Mot. to Dismiss 15.) Plaintiff responds, arguing
24 Girard owed him a duty as he "had a duty to conduct an appropriate
25 investigation and to proceed on allegations that were honest and not
26 arbitrary or pretextual." (Opp'n. to Mot. to Dismiss 7.)

27 Under California law, "the negligent causing of emotional
28 distress is not an independent tort, but the tort of negligence."

1 Burgess v. Superior Court, 2 Cal. 4th 1064, 1072 (1992) (emphasis
2 omitted). Therefore, to state a claim requires alleging the
3 traditional elements of negligence; that is, duty, breach of duty,
4 causation and damages. See id. However, "[t]he existence of a legal
5 duty to use reasonable care in a particular factual situation is a
6 question of law for the court to decide." Vasquez v. Residential
7 Invs. Inc., 118 Cal. App. 4th 269, 278 (2004).

8 Under this claim, Plaintiff alleges "Defendants owed a duty [to
9 him] to act reasonably so as to prevent violation of [his]
10 Constitutional Rights." (Compl. ¶ 50.) However, Plaintiff cites no
11 authority for the proposition that Girard owed a duty of care to
12 Plaintiff in his capacity as "WPUSD's legal advisor" or "agent."
13 Further, Plaintiff's complaint does not indicate what conduct by
14 Girard breach the alleged duty of care. Therefore, this claim is
15 dismissed.

16 **4. Plaintiff's Seventh Claim for Retaliatory Discharge in Violation**
17 **of California Public Policy**

18 Girard further argues Plaintiff's seventh claim for retaliatory
19 discharge in violation of public policy must be dismissed because no
20 employer-employee relationship existed between Plaintiff and Girard.
21 (Mot. to Dismiss 16.) Plaintiff concedes Girard is not liable for
22 this claim. (Opp'n. to Mot. to Dismiss 8.) Therefore, this claim is
23 dismissed with prejudice.

24 **5. Plaintiff's Eighth and Ninth Claims Under the California**
25 **Education Code**

26 Girard also argues Plaintiff's eighth and ninth claims for
27 violation of California Education Code Sections 44114 and 44113 must
28 be dismissed because Plaintiff fails to allege any specific violation
or conduct by Girard. (Mot. to Dismiss 18.) Girard further asserts

1 Plaintiff has not pleaded, as required, that Girard is a "public
2 school employee." (Id.) Plaintiff concedes he cannot state a claim
3 under California Education Code Section 44113 in his ninth claim, but
4 requests leave to amend his eighth claim, brought under Section 4113,
5 to more specifically allege that Girard "acted as an aider and abetter
6 in the violation of Education Code § 44113." (Opp'n. to Mot. to
7 Dismiss 8.) Therefore, Plaintiff's eighth claim is dismissed and his
8 ninth claim is dismissed with prejudice.

9 **6. Plaintiff's Tenth and Eleventh Claims Under the California Labor**
10 **Code**

11 Girard argues Plaintiff's tenth and eleventh claims alleged under
12 the California Labor Code must be dismissed since no employer-employee
13 relationship existed between Plaintiff and Girard. Plaintiff concedes
14 that Girard is not liable under these claims. Therefore, Plaintiff's
15 claims brought against Girard under the California Labor Code are
16 dismissed with prejudice.

17 **7. The Litigation Privilege**

18 Girard alternatively argues Plaintiff's state law claims should
19 be dismissed under California's litigation privilege. However, as
20 Plaintiff's state claims fail to comply with Rule 12(b)(6), Girard's
21 argument under the litigation privilege is not reached.

22 **8. Girard's Anti-SLAPP Motion**

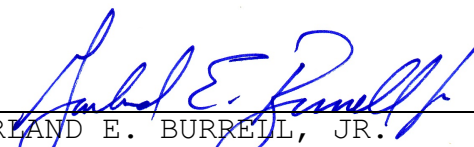
23 Since Girard's Rule 12(b)(6) motion to dismiss is granted, his
24 anti-SLAPP motion is deemed to be moot and not reached. See Verizon
25 Delaware Inc. v. Covad Communications Co., 377 F.3d 1081, 1091 (9th
26 Cir. 2004) (upholding district court's decision to allow amendment of
27 complaint before reaching the anti-SLAPP motion); see also Flores v.
28 Emerich & Fike, No. 1:05-CV-0291 OWW DLB, 2006 WL 2536615, at *10

1 (E.D. Cal. Aug. 31, 2006) (stating that "Verizon suggest[s] that a
2 federal court should hesitate to hear and decide an anti-SLAPP motion
3 to strike prior to affording a plaintiff an opportunity to amend.").

4 **IV. CONCLUSION**

5 For the stated reasons, Girard's Rule 12(b)(6) motion is GRANTED
6 and his special motion to strike brought under California's anti-SLAPP
7 statute is deemed MOOT. Plaintiff, however, is granted leave to amend
8 any claim against Defendant Girard that has not been dismissed with
9 prejudice. Any amended pleading shall be filed within fourteen (14)
10 days of the date on which this order is filed.

11 Dated: December 27, 2009

12 
13 _____
14 GARLAND E. BURRELL, JR.
United States District Judge