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

ANI CHOPOURIAN,

Plaintiff,

vs.

No. CIV S-09-2972 KJM KJN

CATHOLIC HEALTHCARE WEST,
et al.,

Defendants.

ORDER

Plaintiff has filed a motion for leave to file a third amended complaint. After consideration of the parties' briefing, the court denies the motion.¹

I. BACKGROUND

On July 31, 2009, plaintiff filed a first amended complaint in San Francisco County Superior Court, alleging that plaintiff, an Armenian-American who was employed as a physician's assistant in two of defendants' hospitals, was subjected to sexual and ethnic comments from co-workers and supervisors. ECF No. 2 at ¶¶ 11, 13. She also alleged that "primarily in 2008, Defendants, through its agents, harassed Plaintiff and subjected her to unwarranted accusations and discipline in response to her complaints about illegal harassment

¹ The court ordered the motion submitted on the briefs. L.R. 230(h).

1 and treatment of patients by the surgeons.” *Id.* at 10 ¶ 21. She continued that “[t]hroughout her
2 tenure, Plaintiff has repeatedly complained to management employees, including Human
3 Resources about behavior of surgeons that violated anti-discrimination laws and put patients at
4 risk.” *Id.* at 11 ¶ 24. In addition, she contended that she “repeatedly complained about issues
5 regarding patient care particularly resulting from Dr. Kaplon’s treatment of the patients and staff
6 during surgery and of the failure to have an M.D. assist[ant] at all times as required by law.” *Id.*
7 ¶ 27. She included nine causes of action in the amended complaint: hostile work environment
8 based on gender and national origin discrimination and harassment, 42 U.S.C. § 2000e;
9 harassment and discrimination based on national origin, 42 U.S.C. § 1981; retaliation, 42 U.S.C.
10 § 2000e-3(a); retaliation, 42 U.S.C. § 1981; wrongful termination in violation of public policy;
11 intentional infliction of emotional distress; failure to provide adequate meal and rest periods,
12 Cal. Labor Code §§ 226.7 and 512; interference with prospective economic relations; and
13 defamation. *Id.* at 13-23.

14 The case was transferred to this district on October 23, 2009. ECF No. 14.
15 Plaintiff filed a second amended complaint on February 16, 2010. ECF No. 19. It repeated the
16 allegations of inappropriate remarks based on plaintiff’s gender and ethnicity. *Id.* at 6-7 ¶¶ 13-
17 16. It also alleged that in September 2007, plaintiff was given a verbal warning about a parking
18 practice that others engaged in without reprimand and “five months later, after Plaintiff had
19 made additional complaints about ethnic and sexual comments as well as patient care,
20 Defendants first wrote up Plaintiff for the parking issue that occurred in September.” *Id.* at 7 ¶
21 17. The complaint also repeated the contention that defendant and its agents harassed and
22 disciplined plaintiff “in response to her complaints about illegal harassment and treatment of
23 patients by surgeons.” *Id.* ¶ 21. In addition, it alleged that “throughout her tenure, Plaintiff has
24 repeatedly complained to management employees, including Human Resources about behavior
25 of surgeons that . . . put patients at risk” and repeated the claim that plaintiff “repeatedly
26 complained about issues regarding patient care particularly resulting from Dr. Kaplon’s

1 treatment of the patients and staff during surgery and of the failure to have an M.D. assist[ant] at
2 all times as required by law.” *Id.* at 8 ¶¶ 24, 27. She raised the same nine causes of action. *Id.*
3 at 10-20.

4 On February 26, 2010, this court issued a pretrial scheduling order, providing that
5 no amendments to pleadings would be permitted after June 2010 “except with leave of Court,
6 good cause having been shown.” ECF No. 20 at 1. It also set February 18, 2011 as the
7 discovery cut-off, April 18, 2011 as the last hearing date for motions, and a final pretrial
8 conference for June 20, 2011. *Id.* at 2-3.

9 Current counsel took over the case in July 2010 and additional counsel was
10 associated in February 2011. ECF Nos. 22, 25. This court approved two stipulated
11 modifications of the pretrial scheduling order, extending the deadlines for discovery and for
12 motions and made minor modifications to the discovery portion of the scheduling order at
13 plaintiff’s behest, following a hearing in June. ECF No. 27, 30, 57.

14 Plaintiff filed the instant motion to amend the complaint on June 21, 2011.

15 II. ANALYSIS

16 Plaintiff seeks to amend the complaint to add a cause of action for retaliation
17 under California Health and Safety Code § 1278.5, which allows a person to seek reinstatement,
18 reimbursement for lost wages and work benefit, as well as attorney’s fees from any health
19 facility that discriminates or retaliates against the employee, if he or she has “presented a
20 grievance, complaint or report to the facility” concerning “suspected unsafe patient care and
21 conditions.” The statute also establishes a rebuttable presumption that any adverse action taken
22 against an employee within 120 days of such a report is retaliatory. Plaintiff also proposes to
23 delete her claims for discrimination and retaliation on the basis of national origin/ethnicity. ECF
24 No. 53-2 at 6 ¶ 18. She argues that under Federal Rule of Civil Procedure 15(a), leave to amend
25 “shall be freely given when justice so requires” but that if the request is controlled by Rule

26 ////

1 16(b), she has satisfied the rule's good cause standard by timely seeking to amend after she
2 uncovered the basis of the claim during discovery. ECF No. 53-1 at 3-4.

3 Defendant counters that the Rule 16 standard applies because the pretrial
4 scheduling order set a deadline of June 2010 for amendments to pleadings and that plaintiff did
5 not act diligently to ascertain the basis of this claim. ECF No. 64 at 4-6.

6 Under Rule 16(b) of the Federal Rules of Civil Procedure, a pretrial scheduling
7 order shall not be modified except upon a showing of good cause. *Johnson v. Mammoth*
8 *Recreations, Inc.*, 975 F.2d 604, 607-08 (9th Cir. 1992). Only if the court determines that the
9 party seeking amendment has shown good cause will it consider whether amendment is
10 appropriate under Rule 15. *Id.* at 608; *Hood v. Hartford Life and Accident Ins. Co.*, 567
11 F.Supp.2d 1221, 1224 (E.D. Cal. 2008).

12 In *Johnson*, the Ninth Circuit described Rule 16(b)'s good cause standard as
13 focusing on "the diligence of the party seeking the amendment." It recognized that while "the
14 existence or degree of prejudice to the party opposing the modification might supply additional
15 reasons to deny a motion, the focus is upon the moving party's reasons . . . If that party was not
16 diligent, the inquiry should end." *Id.* at 609 (citation omitted); *see also Ultimex Cement*
17 *Manufacturing Corp. v. CTS Cement Manufacturing*, 587 F.3d 1339, 1354 (9th Cir. 2010)
18 ("'good cause' has been defeated by undue delay in moving to amend . . .").

19 Plaintiff's counsel alleges that when he first substituted into the case, he met
20 informally with defendant's counsel and deferred discovery on opposing counsel's agreement to
21 produce witnesses to allow him to evaluate the merits of his client's case. ECF No. 53-2 ¶ 3
22 (Decl. of Lawrence Bohm). Defendant's counsel disputes this characterization, averring that
23 while she indeed met informally with plaintiff's counsel and offered to present key witnesses to
24 allow him to undertake an informal evaluation of the case, she did not hinder plaintiff's
25 opportunity to prepare her case. ECF No. 64-3 ¶ 5 (Decl. of Judith Clark Martin). Opposing
26 counsel avers in September 2010 she made available Renee Dodge, Jim Andersen and Patti

1 DiPinto to plaintiff's counsel for three hours of interviews. *Id.* ¶ 6. Plaintiff's counsel agrees
2 that he met with witnesses on September 2, 2010, but claims they were available "for so short a
3 period of time" that he was unable "to adequately investigate the merits of Plaintiff's claims"
4 and that one, Jean Scrafton, did not appear at all. ECF No. 53-2 ¶ 5. He does not describe what
5 topics he pursued or was prevented from pursuing at that meeting.

6 As they did at the court's earlier hearing to amend the discovery deadlines, the
7 parties dispute who was at fault for the subsequent failure to schedule a second informal meeting
8 before January 2011, when plaintiff served nine notices of deposition, as well as interrogatories,
9 requests for production and requests for admission. ECF No. 64-3 ¶ 7; ECF No. 53-2 ¶ 9.
10 Plaintiff's counsel was not able to schedule many of the depositions he sought before June 2011
11 because defendant's lead counsel, who at that point insisted on being present at the depositions,
12 was in trial. *Id.*

13 On June 3, 2011, plaintiff's counsel took the deposition of Jim Anderson, from
14 defendant's Human Resources Department (HR). Anderson admitted he received one complaint
15 about patient safety from plaintiff on July 3, 2008. On June 6, 2011, counsel deposed Renee
16 Dodge, Director of Cardiac Surgery, who said she received complaints from plaintiff in June
17 2008. ECF No. 53-2 ¶ 11. Counsel has not provided excerpts from these depositions in support
18 of the pending motion. With the reply, however, he has filed portions of the depositions of Jim
19 Anderson and Renee Dodge. These excerpts show that Anderson said only that in June or July
20 2008 he became aware plaintiff was having problems working with Dr. Kaplon, he then allowed
21 her to raise all of her concerns in an hour-long meeting, and he later spoke to Renee Dodge.
22 Anderson does not detail what he learned from Dodge. ECF No. 66-2 at 3-5. Dodge testified
23 that one time plaintiff said something about Dr. Kaplon's "creating an unsafe environment for
24 the patient," but that "it was an anger response . . ." ECF No. 66-3 at 3-4. Dodge also testified
25 that she never saw any written complaint about patient safety, although HR had asked plaintiff to
26 prepare a written complaint about Dr. Kaplon. ECF No. 66-3 at 5.

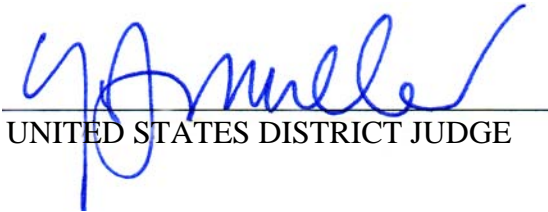
1 As noted above, however, in the First Amended Complaint and also in the Second
2 Amended Complaint plaintiff asserts she had raised concerns about patient safety issues in 2008,
3 and she apparently produced some written complaints on this subject dating from 2007 in
4 discovery. *See* ECF No. 53-3 at 13. While these complaints were apparently made outside the
5 120 day window giving rise to a rebuttable presumption that adverse employment action was
6 taken in retaliation for a complaint about patient safety, Cal. Health & Safety Code
7 § 1278.5(d)(1), they suggest that counsel had the facts supporting the claimed retaliation before
8 taking the depositions in this case.

9 On the record before the court, plaintiff's explanation does not show diligence.
10 As the first and second amended complaints demonstrate, plaintiff knew she had complained
11 about patient safety and presumably knew to whom she had complained, yet counsel does not
12 explain why he did not explore this topic with Anderson and Dodge during the informal
13 interviews in September 2010. While counsel does complain that Jean Scrafton was not made
14 available for informal interviews, he does not suggest she later provided information supporting
15 the proposed new cause of action. In addition, although there were problems scheduling
16 depositions because of Ms. Martin's schedule, plaintiff's counsel has not suggested he was
17 unable to develop the claim through interrogatories and requests for admission or production;
18 that he may have preferred to conduct depositions is not sufficient. *See Photomedex, Inc. v.*
19 *Irwin*, 2007 WL 2238359, at *2 (S.D. Cal. Aug. 2, 2007) (strategic decisions do not always
20 demonstrate diligence or good cause). Finally, counsel fails to explain why he could not seek
21 amendment earlier, particularly in light of his concession that the issue is apparent from the face
22 of the Second Amended Complaint: "when the party seeking amendment knows . . . of the facts
23 upon which the proposed amendment is based but fails to include them in the original complaint,
24 the motion to amend may be denied." *DeSaracho v. Custom Food Machinery, Inc.*, 206 F.3d
25 874, 878 (9th Cir. 2000) (quoting *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1324 (9th
26 Cir.), *vacated on other grounds*, 459 U.S. 810 (1982); *Wells Fargo Bank, N.A. v. Renz*, 2010 WL

1 2867615, at *3 (N.D. Cal. July 20, 2010). The court need inquire no further to conclude that
2 plaintiff's motion should be denied.

3 IT IS THEREFORE ORDERED that plaintiff's motion for leave to file a third
4 amended complaint (ECF No. 53) is denied.

5 DATED: August 26, 2011.

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8 UNITED STATES DISTRICT JUDGE
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