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

RUTH LaTOURELLE,
Plaintiff,

No. CIV S-10-2667-MCE-CMK

vs.

FINDINGS AND RECOMMENDATIONS

TERRY BARBER, et al.,
Defendants.

_____/

Plaintiff, who is proceeding pro se, brings this civil rights action. Pending before the court are: (1) defendants’ motion to dismiss (Doc. 21); and (2) plaintiff’s motion for leave to amend (Doc. 19). is defendants’ motion to dismiss (Doc. 5). A hearing was held before the undersigned on July 7, 2011, in Redding, California. Philip B. Price, Esq., appeared for defendants. Plaintiff appeared pro se. After considering the arguments of the parties, the matters were submitted.

I. BACKGROUND

A. Plaintiff’s Allegations

In the original complaint, plaintiff named the following as defendants: Terry Barber, Wayne Virag, the County of Siskiyou, and the Siskiyou County Board of Supervisors.

1 According to plaintiff, in April 2006 she discovered that defendant Virag, who at
2 the time was the director of the Siskiyou County Planning Department, had “multiple conflicts of
3 interest with citizens who were engaged in planning activities. . .” with the county. More
4 specifically, plaintiff contends that defendant Virag had failed to disclose “over one dozen
5 properties that he owned, partnerships that he had formed, and property sales that he had
6 completed.” Plaintiff next alleges that she accepted a position with the Siskiyou County
7 Planning Department on May 8, 2006, as an Assistant Planner.¹ She worked in this position full-
8 time as a permanent employee. Her employment was subject to a union contract which provided,
9 among other things, that plaintiff could only be disciplined for “just cause.”

10 Based on plaintiff’s belief that defendant Virag had violated his disclosure duties,
11 plaintiff filed a complaint on May 24, 2006, with the California Fair Political Practices
12 Commission and the California Attorney General’s Office. She states that she informed
13 defendant Virag of her complaints the next day – May 25, 2006. According to plaintiff,
14 “[i]mmediately thereafter, Mr. Virag created a hostile work environment and began harassing and
15 retaliating against Ms. LaTourelle.” Plaintiff claims that defendant Virag’s conduct was “hostile,
16 intimidating, demeaning, vicious, vindictive, and callous towards Ms. LaTourelle.”

17 Plaintiff claims that, in response to her complaints, defendant Virag was placed on
18 paid administrative leave on June 14, 2006. According to plaintiff, on August 6, 2006,
19 defendants Virag and Barber, who was the interim director of the Planning Department, were
20 sitting outside the Siskiyou County Board of Supervisors chambers waiting for a hearing on the
21 matter. Plaintiff alleges that “Mr. Virag told Ms. Barber that an employee had to be fired and
22 that he would do so after his meeting with the Board of Supervisors.” Plaintiff adds: “Ms.
23 Barber agreed with Mr. Virag, stating that ‘she’ was the only planner left and that the employee
24

25 ¹ Plaintiff states she accepted the position on May 24, 2008. In the context of
26 plaintiff’s other allegations, however, it appears that she in fact began working for the Planning
Department in May 2006.

1 would never be promoted.” Plaintiff claims that, at the time of this conversation, she was the
2 only female planner.

3 Plaintiff claims that defendant Virag was called into the hearing on August 6,
4 2006, and “terminated from employment on the spot” “based on the results of an investigation”
5 in which, known to Virag, plaintiff had participated. According to plaintiff, after Virag’s
6 termination, “Ms. Barber harassed Ms. LaTourelle and was hostile, intimidating, demeaning, and
7 callous towards her.”

8 Next, plaintiff claims that she applied for the position of Assistant Director on
9 September 1, 2006. She states that this position would have brought a substantial pay increase.
10 Plaintiff claims that she was denied the promotion by Barber “in retaliation for Ms. LaTourelle’s
11 complaints about Mr. Virag. . . .” Plaintiff claims that she also applied for the position of
12 Associate Planner on September 6, 2006, and that Barber denied this promotion in retaliation.
13 According to plaintiff, Barber instead hired Rowland Hinkle, a younger person with less
14 experience than plaintiff. Plaintiff states that she filed a claim with the California Department of
15 Fair Housing and Employment (“DFEH”) “on or before August 10, 2008,” alleging gender and
16 age discrimination. She also states that she filed complaints with the DFEH and United States
17 Equal Opportunity Employment Commission (“EEOC”) on October 6, 2008, alleging gender and
18 age discrimination. Plaintiff states that she was terminated March 7, 2009.

19 Plaintiff claims that, between September 2006 and March 2009, she made
20 numerous requests for training that were denied by Barber. She also claims that between August
21 2006 and March 2009 “Ms. Barber continually harassed Ms. LaTourelle, created a hostile work
22 environment, and intimidated and demeaned Ms. LaTourelle in retaliation for Ms. LaTourelle’s
23 complaints about Mr. Virag and her discrimination complaints”

24 Plaintiff alleges that Barber was promoted in November 2006 and that, between
25 August 2006 and July 2008 Barber served plaintiff with two letters of reprimand. In particular, a
26 July 9, 2008, “Notice of Proposed Disciplinary Action” recommended that plaintiff be suspended

1 for three days without pay. A hearing on the recommendation was held on December 16, 2008,
2 before the Siskiyou County Board of Supervisors. Plaintiff claims that she was denied due
3 process because she was not allowed “pre-hearing access to the ‘evidence’ the county would
4 present against her. . . .” She alleges that this violated the county’s policies, state law, as well as
5 the collective bargaining agreement. She also claims that Barber disclosed plaintiff’s
6 confidential medical information during the hearing, which was open to the public. The Board
7 of Supervisors upheld the three-day suspension on January 6, 2009.

8 In another incident, plaintiff claims that, sometime in February 2009, Barber
9 falsely accused plaintiff of harassing a co-worker plaintiff had previously visited at home during
10 the lunch hour. According to plaintiff, Barber also “solicited a complaint against Ms. LaTourelle
11 from Rowland Hinkle.” Plaintiff states that she was served with another disciplinary notice in
12 February 2009, this time recommending that plaintiff be terminated. Plaintiff was terminated on
13 March 7, 2009, by defendant Barber.

14 Plaintiff states that she received “right-to-sue” letters from DFEH and EEOC on
15 September 30, 2009. This action was filed on September 30, 2010.

16 In the original complaint, plaintiff asserted that these facts give rise to the
17 following ten claims:

- | | | |
|----|-----------|--|
| 18 | 1st Claim | Discrimination and harassment in violation of Title VII of the Civil Rights Act of 1964 (alleged against defendant County of Siskiyou only). |
| 19 | | |
| 20 | 2nd Claim | Discrimination and harassment in violation of the Section 4 of the Age Discrimination in Employment Act of 1967 (alleged against defendant County of Siskiyou only). |
| 21 | | |
| 22 | 3rd Claim | Discrimination and harassment in violation of California’s Fair Employment and Housing Act (alleged against defendant County of Siskiyou only). |
| 23 | | |
| 24 | 4th Claim | Retaliation in violation of 42 U.S.C. § 1983 (alleged against defendants Virag and Barber). |
| 25 | | |
| 26 | 5th Claim | Wrongful termination (alleged against all defendants). |

- 1 6th Claim Violations of California Labor Code § 1102.5 and/or California
2 Government Code § 8547 (alleged against all defendants).
3 7th Claim Defamation (alleged against all defendants).
4 8th Claim Intentional infliction of emotional distress (alleged against all
5 defendants).
6 9th Claim Invasion of privacy (alleged against defendant Barber only).
7 10th Claim Public disclosure of private facts (alleged against defendant barber
8 only).

9 **B. Procedural History**

10 This action was commenced with the filing of the original complaint on
11 September 30, 2010. Defendants moved to dismiss the complaint on December 8, 2010. That
12 motion was granted in part and denied in part on March 31, 2011 (see District Judge order at
13 Doc. 14). In particular, the 1st, 2nd, and 5th claims alleged in the complaint were dismissed
14 without leave to amend, the 4th claim was dismissed without leave to amend except as to
15 plaintiff's claim against defendant Barber relating to allegedly retaliatory conduct occurring
16 between September 30, 2008, and September 30, 2010, the 6th and 7th claims were dismissed
17 with leave to amend, and defendant Virag was dismissed with prejudice. All other claims (i.e.,
18 the 3rd, 8th, 9th, and 10th) were permitted to proceed as originally alleged.

19 On April 13, 2011, defendants filed an answer to the original complaint even
20 though plaintiff had not yet filed her first amended complaint. Plaintiff then filed her first
21 amended complaint on May 16, 2011, along with a motion for leave to amend to add a new claim
22 to the first amended complaint not raised in the original complaint or addressed in the court's
23 March 31, 2011, order. Defendants filed the currently pending motion to dismiss the first
24 amended complaint on May 27, 2011.

25 **II. STANDARD FOR MOTION TO DISMISS**

26 In considering a motion to dismiss, the court must accept all allegations of

1 material fact in the complaint as true. See Erickson v. Pardus, 551 U.S. 89, 93-94 (2007). The
2 court must also construe the alleged facts in the light most favorable to the plaintiff. See Scheuer
3 v. Rhodes, 416 U.S. 232, 236 (1974); see also Hosp. Bldg. Co. v. Rex Hosp. Trustees, 425 U.S.
4 738, 740 (1976); Barnett v. Centoni, 31 F.3d 813, 816 (9th Cir. 1994) (per curiam). All
5 ambiguities or doubts must also be resolved in the plaintiff's favor. See Jenkins v. McKeithen,
6 395 U.S. 411, 421 (1969). However, legally conclusory statements, not supported by actual
7 factual allegations, need not be accepted. See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50
8 (2009). In addition, pro se pleadings are held to a less stringent standard than those drafted by
9 lawyers. See Haines v. Kerner, 404 U.S. 519, 520 (1972).

10 Rule 8(a)(2) requires only “a short and plain statement of the claim showing that
11 the pleader is entitled to relief” in order to “give the defendant fair notice of what the . . . claim is
12 and the grounds upon which it rests.” Bell Atl. Corp v. Twombly, 550 U.S. 544, 555 (2007)
13 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). However, in order to survive dismissal for
14 failure to state a claim under Rule 12(b)(6), a complaint must contain more than “a formulaic
15 recitation of the elements of a cause of action;” it must contain factual allegations sufficient “to
16 raise a right to relief above the speculative level.” Id. at 555-56. The complaint must contain
17 “enough facts to state a claim to relief that is plausible on its face.” Id. at 570. “A claim has
18 facial plausibility when the plaintiff pleads factual content that allows the court to draw the
19 reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal, 129 S. Ct. at
20 1949. “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more
21 than a sheer possibility that a defendant has acted unlawfully.” Id. (quoting Twombly, 550 U.S.
22 at 556). “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability,
23 it ‘stops short of the line between possibility and plausibility for entitlement to relief.’” Id.
24 (quoting Twombly, 550 U.S. at 557).

25 In deciding a Rule 12(b)(6) motion, the court generally may not consider materials
26 outside the complaint and pleadings. See Cooper v. Pickett, 137 F.3d 616, 622 (9th Cir. 1998);

1 Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994). The court may, however, consider: (1)
2 documents whose contents are alleged in or attached to the complaint and whose authenticity no
3 party questions, see Branch, 14 F.3d at 454; (2) documents whose authenticity is not in question,
4 and upon which the complaint necessarily relies, but which are not attached to the complaint, see
5 Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001); and (3) documents and materials
6 of which the court may take judicial notice, see Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir.
7 1994).

8 Finally, leave to amend must be granted “[u]nless it is absolutely clear that no
9 amendment can cure the defects.” Lucas v. Dep’t of Corr., 66 F.3d 245, 248 (9th Cir. 1995) (per
10 curiam); see also Lopez v. Smith, 203 F.3d 1122, 1126 (9th Cir. 2000) (en banc).

11 12 **III. DISCUSSION**

13 **A. Motion for Leave to Amend**

14 Pursuant to the District Judge’s March 13, 2011, order, the 3rd, 8th, 9th, and 10th
15 claims were permitted to proceed as originally alleged. The 4th claims was permitted to proceed
16 as originally alleged, but only on plaintiff’s retaliation claim against defendant Barber for the
17 period between September 30, 2008, and September 30, 2010. Plaintiff was permitted to amend
18 the 6th and 7th claims. The 1st, 2nd, 5th, and those portions of the 4th claim not relating to
19 retaliation by Barber between September 30, 2008, and September 30, 2010, were dismissed with
20 prejudice.

21 In the first amended complaint filed on May 16, 2011, plaintiff alleges the same
22 underlying facts and asserts eight claims as follows:

23	1st Claim	Discrimination and harassment in violation of California’s Fair 24 Employment and Housing Act (alleged against defendant County of Siskiyou only). ²
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² This was originally alleged as plaintiff’s 3rd claim, which was allowed to proceed.

1 2nd Claim Retaliation in violation of 42 U.S.C. § 1983 (alleged against
2 defendant Barber).³

3 3rd Claim Defamation (alleged against all defendants).⁴

4 4th Claim Intentional infliction of emotional distress (alleged against all
5 defendants).⁵

6 5th Claim Invasion of privacy (alleged against defendant Barber only).⁶

7 ///

8 6th Claim Public disclosure of private facts (alleged against defendant barber
9 only).⁷

10 7th Claim Denial of right of association in violation of 42 U.S.C. § 1983
11 (alleged against defendant Barber only).

12 8th Claim Violations of California Labor Code § 1102.5 (alleged against all
13 defendants).⁸

14 Plaintiff seeks leave to amend with respect to the 7th claim listed above, which was not alleged
15 in the original complaint and, therefore, not the subject of defendants' first motion to dismiss or
16 the court's March 13, 2011, order. In opposing plaintiff's request to add the new claim,
17 defendants argue that the court should not permit the new claim to be added because she cannot
18 state a claim for denial of her right to free association. In essence, defendants argue that allowing
19 the 7th claim would be futile.

20 ³ This was originally alleged as the 4th claim, which was permitted to proceed with
21 respect to alleged retaliation by Barber between September 30, 2008, and September 30, 2010.

22 ⁴ This was originally alleged as the 7th claim, as to which plaintiff was permitted
23 leave to amend

24 ⁵ This was originally alleged as the 8th claim, as to which plaintiff was permitted
25 leave to amend.

26 ⁶ This was originally alleged as the 9th claim, which was allowed to proceed.

⁷ This was originally alleged as the 10th claim, which was allowed to proceed.

⁸ This was originally alleged as the 6th claim, as to which plaintiff was permitted
 leave to amend.

1 The constitutionally protected freedom of association has two categories: (1) the
2 freedom of intimate association, which is coextensive with the right to privacy; and (2) the
3 freedom of expressive association, which is implicit in the First Amendment’s guarantees. See
4 Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984). Defendant argues that a freedom of
5 association claim brought by a current or former public employee must allege that the
6 associational conduct relates to a matter of public concern. There is a split among the circuits on
7 this issue. See Tang v. R.I. Dep’t of Elderly Affairs, 163 F.3d 7, 11 n.4 (1st Cir. 1998)
8 (recognizing split). The Second, Fourth, Sixth, and Seventh Circuits follow the rule proposed by
9 defendants here. See Cobb v. Pozzi, 363 F.3d 89, 102-03 (2nd Cir. 2004). Defendants cite no
10 Ninth Circuit authority in support of either position. Reading the complaint liberally and in favor
11 of plaintiff, the new 7th claim asserted in the first amended complaint should be allowed to
12 proceed.

13 Defendants also argue that the new claim cannot relate back to the original
14 complaint because it is based on new facts alleged only in the first amended complaint. This
15 argument is unpersuasive. In the original complaint, as in the first amended complaint, plaintiff
16 claims that Barber infringed upon her associational rights by falsely accusing her of harassing a
17 co-worker at home. It is the association with the co-worker that is at issue in the new 7th claim.
18 Thus, the same operative nucleus of facts support the new claim.

19 The motion for leave to amend should be granted.

20 **B. Motion to Dismiss**

21 In their motion to dismiss the first amended, defendants raise the following
22 arguments:

- 23 Point 1 Plaintiff’s state law tort claims (3rd, 4th, 5th, and 8th Claims) are
24 barred by failure to comply with the Tort Claims Act.
- 25 Points 2 & 3 Plaintiff’s 8th Claim fails to state a claim for relief.
- 26 Points 4 & 5 Plaintiff’s 1st Claim is limited to matters raised in a timely
 complaint to the Fair Housing and Employment Department.

1 Point 6 Plaintiff's 2nd Claim is barred by the statute of limitations.

2 Point 7 Plaintiff's 3rd Claim is inadequately alleged.

3 Point 8 Plaintiff's new 7th Claim fails to state a claim for relief.⁹

4 Point 9 Plaintiff's new 7th Claim is barred by the statute of limitations.

5 Defendants also argue that the court should dismissed all state law claims because "the federal
6 claims (Second and Seventh Causes of Action) against the defendant Barber are barred by the
7 statute of limitations. . . ."

8 1. Federal Claims

9 The federal claims alleged in the first amended complaint are plaintiff's 2nd and
10 7th Claims. The 2nd Claim, previously alleged in the original complaint as the 4th claim, was
11 allowed to proceed as against defendant Barber with respect to alleged retaliation between
12 September 30, 2008, and September 30, 2010. In Point 6, defendants argue that this claim is
13 barred by the statute of limitations. The District Judge, however, rejected this argument in the
14 March 13, 2011, order.

15 In Point 9, defendants argue that the new 7th Claim is also barred by the statute of
16 limitations. For claims brought under 42 U.S.C. § 1983, the applicable statute of limitations is
17 California's statute of limitations for personal injury actions. See Wallace v. Kato, 549 U.S. 384,
18 387-88 (2007); Wilson v. Garcia, 471 U.S. 261, 280 (1985); Karim-Panahi v. Los Angeles Police
19 Dep't, 839 F.2d 621, 627 (9th Cir. 1988). State tolling statutes also apply to § 1983 actions. See
20 Elliott v. City of Union City, 25 F.3d 800, 802 (citing Hardin v. Straub, 490 U.S. 536, 543-44
21 (1998)).

22 Before January 1, 2003, the statute of limitations for personal injury actions was
23 one year. See Cal. Code Civ. Proc. § 340(3); see also Fink v. Shedler, 192 F.3d 911, 914 (9th
24 Cir. 1999) (citing Elliott, 25 F.3d at 802, and applying the one-year limitation period specified in

25 ⁹ This argument is, in essence, defendants' opposition to granting leave to amend to
26 add this claim, and is discussed above.

1 § 340(3)). The personal injury statute of limitation was extended by passage of California Code
2 of Civil Procedure § 335.1 to two years, effective January 1, 2003. See Canatella v. Van De
3 Kamp, 486 F.3d 1128, 1132 (9th Cir. 2007) (citing Cal. Code Civ. Proc. § 335.1). The extension
4 of this statute of limitations does not apply retroactively to claims which were already barred
5 under the one-year limitation period specified in § 340(3), plus any statutory tolling, as of the
6 effective date of January 1, 2003. See Maldonado v. Harris, 370 F.3d 945, 955 (9th Cir. 2004)
7 (citing Douglas Aircraft v. Cranston, 58 Cal.2d 462 (1962)). However, the extended statute of
8 limitations period provided for in § 335.1 is applicable to claims which are not yet barred. See
9 Lamke v. Sunstate Equip. Co., LLC, 387 F. Supp. 2d 1044, 1051-52 (N.D. Cal. 2004) (citing
10 Douglas, 58 Cal.2d at 465).

11 Defendants argue that the possible conduct supporting the 7th Claim occurred in
12 December 2008, January 2009, or March 2009 and that, because all these dates are more than
13 two years prior to the filing of the first amended complaint, they are barred. As discussed above,
14 however, the first amended complaint should be found to relate back to the filing date of the
15 original complaint, which was September 2010. Given this filing date, the 7th Claim is timely.

16 2. State Law Claims

17 It is necessary to address plaintiff's state law claims because, as discussed above,
18 plaintiff has stated a prima facie federal § 1983 claim against Barber based on retaliation and
19 denial of freedom of association (2nd and 7th Claims). Therefore, federal subject matter
20 jurisdiction exists and this court may exercise supplemental jurisdiction over plaintiff's state law
21 claims. The state law claims alleged in the first amended complaint are plaintiff's 1st, 3rd, 4th,
22 5th, and 8th Claims. Defendants argue: (1) the 3rd, 4th, 5th, and 8th Claims are barred by failure
23 to comply with the Tort Claims Act;¹⁰ (2) the 1st Claim must be limited to matters raised in a
24 timely complaint to the Fair Housing and Employment Department; (3) the 3rd Claim is

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26 ¹⁰ Defendants concede that this argument is inapplicable to the 1st Claim.

1 inadequately alleged; and (4) the 8th Claim fails to state a claim for relief.

2 As defendants correctly note, a plaintiff must plead compliance with California's
3 claims filing requirements and a denial of her claims by the state, and that such compliance is
4 jurisdictional. See Taylor v. Mitzel, 82 Cal.App.3d 665, 671 (1978). Defendants contend that
5 the first amended complaint fails to contain these required allegations with respect to her state
6 law claims. In her opposition, plaintiff argues that she in fact complied with the tort claims filing
7 process. Defendants, however, remain correct that these factual allegations are not contained in
8 the first amended complaint, which should be dismissed with further leave to amend compliance
9 with the Tort Claims Act in a single pleading.

10 Defendants argue that plaintiff's 1st Claim must be limited. Specifically, they
11 assert that a right-to-sue letter issued by the Department of Fair Housing and Employment on
12 August 10, 2008, was the result of a claim of age and gender discrimination and not the
13 harassment alleged in this case. Defendants conclude that any allegations of harassment
14 contained in the 1st Claim are irrelevant and cannot give rise to a unique claim because they were
15 not included in the claim to the Department of Fair Housing and Employment and not addressed
16 in the right-to-sue letter. This argument is persuasive. While allegations of harassment may be
17 relevant to plaintiff's § 1983 retaliation claim, they cannot form the basis of a separate state law
18 claim for relief because such claims are limited by the right-to-sue letter. The 1st Claim should
19 be limited to discrimination

20 Next, defendants contend that the 3rd Claim is "inadequately alleged." Plaintiff's
21 3rd Claim is for defamation, as to which plaintiff was granted leave to amend because she had
22 not alleged specific instances of defamatory utterances. See Gilbert v. Sykes, 147 Cal.App.4th
23 13, 31 (2007); see Jacobson v. Schwarzenegger, 357 F.Supp.2d 1198, 1216 (C.D. Cal. 1004).
24 According to defendants, while plaintiff has included allegations of specific instances of
25 defamatory utterances, the utterances in question are all privileged. Privilege, however, is a
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1 matter of admissibility and not pleading. It may be that plaintiff will not be able to prove her
2 claim due to the operation of certain privileges, but they do not prevent her from asserting the
3 claim.

4 Finally, defendants argue that the 8th Claim fails to state a claim for relief. The
5 current 8th Claim was originally the 6th Claim, as to which plaintiff was granted leave to amend
6 because plaintiff had not alleged exhaustion of administrative remedies via a claim with the state
7 Labor Commissioner. See Ortiz v. Lopez, 688 F.Supp.2d 1072, 1080 (E.D. Cal. 2010).

8 Defendant renews this argument as to the 8th Claim alleged in the first amended complaint.
9 Plaintiff's argument that she is not required to plead exhaustion is unpersuasive in light of the
10 clear case law. Because it appears that plaintiff is either unwilling or unable to allege exhaustion
11 despite having been granted leave to amend to do so, the 8th Claim should now be dismissed
12 with prejudice.

14 IV. CONCLUSION

15 Based on the foregoing, the undersigned recommends that:

- 16 1. Plaintiff's motion for leave to amend (Doc. 19) to add the new 7th Claim
17 be granted;
- 18 2. Defendants' motion to dismiss (Doc. 21) should be granted in part and
19 denied in part;
- 20 3. The 3rd, 4th, 5th, and 8th Claims are dismissed with leave to amend
21 because plaintiff failed to allege compliance with the state's Tort Claims Act;
- 22 4. The 1st Claim is limited to allegations of discrimination addressed in the
23 right-to-sue letter;
- 24 5. The 8th Claim should be dismissed with prejudice; and
- 25 6. Plaintiff should be provided an opportunity to file a second amended
26 complaint to allege compliance with the state's Tort Claims Act in a single pleading.

1 These findings and recommendations are submitted to the United States District
2 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days
3 after being served with these findings and recommendations, any party may file written
4 objections with the court. Responses to objections shall be filed within 14 days after service of
5 objections. Failure to file objections within the specified time may waive the right to appeal.
6 See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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8 DATED: January 23, 2012

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10 **CRAIG M. KELLISON**
11 UNITED STATES MAGISTRATE JUDGE
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