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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

GRACIELA M. CONTRERAS,  
Plaintiff,  
v.  
MARK T. ESPER, SECRETARY OF THE  
UNITED STATES ARMY, et al.,  
Defendants.

No. 2:14-CV-01282 KJM-KJN

ORDER

Plaintiff, while proceeding *pro se*, has filed a voluminous first amended complaint alleging employment discrimination. Two groups of defendants, the federal defendants and California defendants, as well as Governor Brown as an individual defendant, filed motions to dismiss plaintiff’s complaint. Plaintiff is now represented by counsel. As explained below, the court GRANTS defendants’ motions but also GRANTS plaintiff leave to amend.<sup>1</sup>

I. BACKGROUND

Plaintiff Graciela Contreras’ (“Contreras” or “plaintiff”) filed the operative 197-page first amended *pro se* complaint naming 30 defendants and including 554 paragraphs of

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<sup>1</sup> In an effort to streamline resolution of motions to dismiss in cases where the parties have counsel, when the court is granting leave to amend it is adopting a shortened form of order consistent with the order issued here.

1 allegations. *See* First Am. Compl. (“FAC”), ECF No. 9. She later obtained counsel. *See* ECF  
2 Nos. 66-67. In her oppositions to defendants’ motions to dismiss, Contreras “adopts with few  
3 exceptions” defendants’ framing of her allegations, as culled from her first amended complaint.  
4 *See* ECF No. 83 at 5; *see also* ECF No. 84 at 4. The court has reviewed Contreras’ first amended  
5 complaint in its entirety. For the sake of judicial economy, the court declines to summarize the  
6 complaint’s extensive factual allegations here, as doing so is unnecessary to the court’s ruling.

7 Contreras makes thirteen claims: (1) discrimination based on race, color, national  
8 origin, religion, sex and retaliation under Title VII of the Civil Rights Act of 1964 (“Title VII”)  
9 and the California Fair Employment and Housing Act (“FEHA”); (2) discrimination based on  
10 disability under §§ 501 and 505 of the Rehabilitation Act of 1973 and FEHA; (3) discrimination  
11 based on age and retaliation under the Age Discrimination in Employment Act (“ADEA”) and  
12 FEHA; (4) retaliation under the Whistleblower Protection Act (“WPA”), Whistleblower  
13 Protection Enhancement Act (“WPEA”)<sup>2</sup> and FEHA; (5) harassment, styled “Hostile Work  
14 Environment,” under Title VII, the Rehabilitation Act, ADEA, WPA, WPEA and FEHA;  
15 (6) wrongful termination in violation of public policy; (7) assault; (8) civil conspiracy;  
16 (9) defamation; (10) intentional infliction of emotional distress; (11) negligent infliction of  
17 emotional distress; (12) First Amendment violation; and (13) Fifth Amendment equal protection  
18 and due process violations. *See generally* FAC.

19 On January 26, 2017, the Magistrate Judge originally assigned to the case  
20 determined he would defer screening of the complaint, filed on August 17, 2015, and ordered  
21 plaintiff to file service of summons on each defendant. ECF No. 12. Defendants California  
22 Military Department (“CMD”), Kevin Ellsworth, David Kauffman and Anni Loeb (collectively,  
23 “individual California defendants”) moved to dismiss. Cal. Mot., ECF No. 48. California  
24 Governor Edmund G. Brown also moved to dismiss. Brown Mot., ECF No. 51. Finally,  
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26 <sup>2</sup> Although Contreras treats the WPA and WPEA as distinct causes of action, the WPEA amended  
27 the WPA. *See Daniels v. Merit Sys. Prot. Bd.*, 832 F.3d 1049, 1051-52 (9th Cir. 2016), *cert.*  
28 *denied*, 137 S. Ct. 1242 (2017) (discussing certain WPEA amendments to the WPA).

1 defendants David Baldwin,<sup>3</sup> Carlton Hadden, Deborah Lee James, John M. McHugh and  
2 Marianna Warmee (collectively, “federal defendants”) moved to dismiss. Fed. Mot., ECF No. 54;  
3 *see* Req. for Judicial Notice (“RJN”), ECF No. 55.

4 After all motions were filed, because Contreras had obtained counsel, the  
5 Magistrate Judge currently assigned to the case<sup>4</sup> referred the matter back to this court, as provided  
6 by the Local Rules. ECF No. 67. Plaintiff’s counsel then filed oppositions to the pending  
7 motions, ECF Nos. 83, 84, and defendants filed replies, ECF Nos. 85, 87, 88. The court  
8 submitted the motions on January 22, 2018, ECF No. 92, and resolves the motions here.

## 9 II. LEGAL STANDARD

10 A party may move to dismiss for “failure to state a claim upon which relief can be  
11 granted.” Fed. R. Civ. P. 12(b)(6). A complaint must contain “a short and plain statement of the  
12 claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Although “detailed  
13 factual allegations” are not required at the pleading stage, *Bell Atl. Corp. v. Twombly*, 550 U.S.  
14 544, 555 (2007), the complaint must contain more than conclusory or formulaic recitations of  
15 elements, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555). The  
16 complaint must contain “sufficient factual matter” to make the alleged claim at least plausible.  
17 *Iqbal*, 556 U.S. at 678; *see also Hartmann v. Cal. Dep’t of Corr. & Rehab.*, 707 F.3d 1114, 1122  
18 (9th Cir. 2013) (explaining plausibility requires that the complaint depict a cognizable legal  
19 theory and sufficient factual allegations to support that theory) (citation omitted). Aside from  
20 external facts properly subject to judicial notice, the court restricts its analysis to the face of the  
21 complaint, construing the complaint in plaintiff’s favor and accepting well-pled factual  
22 allegations as true. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citations omitted).

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23 <sup>3</sup> Baldwin was included as an individual California defendant in that group’s motion to dismiss.  
24 *See* ECF No. 48. After determining defendant Baldwin “was acting within the course and scope  
25 of his federal agency . . . during the relevant times alleged in the First Amended Complaint[,]” the  
26 United States Attorney filed a substitution of counsel to represent Baldwin. *See* ECF Nos. 76-77  
(Proposed substitution dated Nov. 16, 2017). Accordingly, the court treats Baldwin as a federal,  
not a California, defendant.

27 <sup>4</sup> Judge Newman became the assigned magistrate judge after other cases to which he was  
28 assigned were related to this one.

1 Under Rule 15 “[t]he court should freely give leave [to amend] when justice so  
2 requires.” Fed. R. Civ. P. 15(a)(2). “This policy is to be applied with extreme liberality.”  
3 *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (citation and internal  
4 quotation marks omitted). Before granting leave to amend, a court considers any undue delay,  
5 bad faith, dilatory motive, futility or undue prejudice posed by allowing the amendment. *Id.* at  
6 1051-52 (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Potential undue prejudice to the  
7 opposing party “carries the greatest weight,” *id.* at 1052, and “[t]he party opposing amendment  
8 bears the burden of showing prejudice,” *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th  
9 Cir. 1987). Absent prejudice, there is a strong presumption in favor of granting leave to amend.  
10 *Eminence Capital*, 316 F.3d at 1052.

### 11 III. DISCUSSION

#### 12 A. Claims Against Federal Defendants

13 Although the federal defendants move to dismiss for lack of subject matter  
14 jurisdiction under Rule 12(b)(1) and failure to state a claim under Rule 12(b)(6), *see generally*  
15 Fed. Mot., both arguments are resolved by Contreras’ concessions, *see* Pl.’s Fed. Opp’n, ECF No.  
16 84. Specifically, Contreras concedes defendant Mark T. Esper, Secretary of the United States  
17 Army, is the only proper federal defendant in this action. Pl.’s Fed. Opp’n at 10. She further  
18 concedes that her only viable claims are “based on EEO Complaint No. 2012-026 for Title VII  
19 discrimination and retaliation (first cause of action), Rehabilitation Act Discrimination and  
20 Retaliation (second cause of action), hostile work environment under Title VII and the  
21 Rehabilitation Act (fifth cause of action) when Plaintiff’s request for accommodation to work  
22 from home was denied on June 25, 2012 . . . .” *Id.* at 11; *see* Fed. Reply, ECF No. 88, at 2  
23 (agreeing with Contreras’ representations that only these claims are potentially viable).

24 Accordingly, the federal defendants’ motion to dismiss is GRANTED without  
25 leave to amend as to all defendants other than Esper and all claims other than those identified  
26 above.

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1           B.     Claims Against Governor Brown

2           Governor Brown moves to dismiss all claims against him. Brown Mot. Contreras  
3 did not file an opposition or statement of non-opposition to Brown’s motion. The court therefore  
4 considers Contreras’ claims against Brown abandoned. *See Carvalho v. Equifax Info. Servs.,*  
5 *LLC*, 629 F.3d 876, 888 (9th Cir. 2010) (“A plaintiff who makes a claim . . . in his complaint, but  
6 fails to raise the issue in response to a defendant’s motion to dismiss . . . has effectively  
7 abandoned his claim . . .”) (quoting *Walsh v. Nev. Dep’t of Human Res.*, 471 F.3d 1033, 1037  
8 (9th Cir. 2006)); *see also Moore v. Apple, Inc.*, 73 F. Supp. 3d 1191, 1205 (N.D. Cal. 2014)  
9 (collecting cases and holding failure to oppose a claim attacked in a motion to dismiss  
10 “constitutes abandonment of the claim” that warrants dismissal without leave to amend or with  
11 prejudice). Governor Brown’s motion to dismiss is GRANTED without leave to amend.

12           C.     Claims Against the California Military Department, Kevin Ellsworth, David  
13                 Kauffman and Anni Loeb

14           CMD and the individual California defendants move to dismiss each of Contreras’  
15 claims against them. Cal. Mot. CMD contends Contreras was a federal, not state, employee and  
16 therefore cannot assert employment claims against CMD, a state agency. *Id.* at 11-15. CMD  
17 further argues Contreras’ claims are not viable because she has not exhausted her administrative  
18 remedies; her FEHA, ADEA and common law tort claims are barred by sovereign immunity; and  
19 she has not alleged sufficient facts to state First Amendment, equal protection and due process  
20 claims against CMD. *Id.* at 16-18. The individual California defendants argue they are immune  
21 from liability under California Military and Veterans Code § 392; there is no personal liability for  
22 employees under Title VII, the ADEA, the WPA and the FEHA; the individual defendants are not  
23 covered entities under the Rehabilitation Act; Contreras has not exhausted her administrative  
24 remedies; and Contreras has not alleged sufficient facts to state claims against each defendant. *Id.*  
25 at 19-23.

26           Although Contreras opposes the motion, she does not concretely address the  
27 California defendants’ arguments. *See* Pl.’s Cal. Opp’n, ECF No. 83. Instead, Contreras appears  
28 to argue only that: (1) at least some of her claims are viable under 42 U.S.C. § 1983, *id.* at 11-13;

1 (2) she is not required to exhaust state administrative remedies because exhaustion “is not a  
2 prerequisite to bringing an action under § 1983,” *id.* at 13 (citations omitted); and (3) her  
3 complaint “provides enough details” to satisfy the Federal Rules of Civil Procedure “due the [*sic*]  
4 number of facts alleged,” *id.* at 14.

5 Because Contreras did not substantively address the California defendants’  
6 arguments for dismissal, the court considers Contreras’ claims against the California defendants  
7 in her first amended complaint abandoned and GRANTS the California defendants’ motion to  
8 dismiss without leave to amend. *See Carvalho*, 629 F.3d at 888; *Moore v. Apple, Inc.*, 73 F.  
9 Supp. 3d 1191, 1205 (N.D. Cal. 2014).

10 The California defendants raise several arguments against granting Contreras leave  
11 to assert any claims against the individual California defendants under 42 U.S.C. § 1983. Cal.  
12 Reply at 4-8 (arguing Contreras’ first amended complaint naming the individual California  
13 defendants for the first time does not relate back to her original complaint and any § 1983 claim is  
14 therefore time-barred; arguing violations of the ADA, Title VII and the WPA cannot be asserted  
15 under § 1983). In light of Rule 15(a)’s liberal policy governing amendments, and because  
16 Contreras has not yet asserted claims under § 1983, the court declines to prematurely determine  
17 the merits of any such claims. The California defendants may renew their arguments in a motion  
18 to dismiss Contreras’ second amended complaint, if any.

19 D. Pleading Sufficiency

20 To the extent Contreras’ claims in her first amended complaint survive this order,  
21 those claims are insufficiently pled, despite Contreras’ arguments to the contrary. *See* Pl.’s Fed.  
22 Opp’n at 11 (arguing the complaint is sufficiently pled “due the [*sic*] number of facts alleged”  
23 therein); *see also* Pl.’s Cal. Opp’n at 14 (same). As currently pled, it is difficult if not impossible  
24 for the court and defendants to concretely identify Contreras’ pertinent claims and allegations.  
25 *See J.M. v. Pleasant Ridge Union Sch. Dist.*, No. CV21600897 WBS CKD, 2017 WL 117965, at  
26 \*2 (E.D. Cal. Jan. 10, 2017) (“A defendant is entitled to know what actions a plaintiff alleges it  
27 engaged in that supports the plaintiff’s claims.”). Accordingly, Contreras’ remaining claims are  
28 dismissed as insufficiently pled, but Contreras is GRANTED leave to file a second amended

1 complaint within 30 days, consistent with the above and Federal Rules of Civil Procedure 8 and  
2 11.

3 This resolves ECF Nos. 47-48, 50-51, 54.

4 IT IS SO ORDERED.

5 DATED: March 27, 2018.

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UNITED STATES DISTRICT JUDGE