

1 **BACKGROUND²**

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3 Plaintiff Nancy Parque (“Plaintiff”) worked as a teacher for Defendant Fort Sage
4 Unified School District (“FSUSD”) for approximately twenty-seven years. Defendant
5 Bryan Young (“Young”) was the superintendent of FSUSD and the principal of Herlong
6 High School during the time period relevant to this lawsuit.

7 In September 2012, students in Plaintiff’s classes at Herlong High School “began
8 engaging in a continuing practice of severe sexual harassment of Plaintiff”³ Plaintiff
9 reported the harassment to Young on the day that it began and on several occasions
10 thereafter. Rather than assisting Plaintiff, however, Young instructed other FSUSD staff
11 not to attempt to end the harassment, and he encouraged the students to continue
12 harassing Plaintiff. According to Plaintiff, it was Young’s hope that the harassment
13 would serve as a catalyst for Plaintiff’s resignation. Young’s plan came to fruition: on
14 September 18, 2013, Plaintiff resigned “due to severe stress and emotional difficulties
15 caused by the harassment she endured” on a daily basis for a year.

16 Plaintiff’s FAC alleges the following six causes of action: (1) harassment (hostile
17 work environment based on sex) under Title VII of the Civil Rights Act of 1964 (“Title
18 VII”) against both FSUSD and Young (collectively, “Defendants”); (2) constructive
19 termination in violation of Title VII against FSUSD; (3) age discrimination under the Age
20 Discrimination in Employment Act (“ADEA”) against FSUSD; (4) retaliation under Title VII
21 against FSUSD; (5) violation of 42 U.S.C. § 1983 against Young; and (6) intentional
22 infliction of emotion distress (“IIED”) against Young. In the pending Motion, Defendants
23 seek dismissal of the first, third, fifth, and sixth causes of action.

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27 ² The following statement of facts is based on the allegations in Plaintiff’s FAC (ECF No. 9).

28 ³ The FAC details several specific instances of conduct that Plaintiff alleges amounted to severe sexual harassment.

1 claims across the line from conceivable to plausible, their complaint must be dismissed.”
2 Id. However, “[a] well-pleaded complaint may proceed even if it strikes a savvy judge
3 that actual proof of those facts is improbable, and ‘that a recovery is very remote and
4 unlikely.’” Id. at 556 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

5 A court granting a motion to dismiss a complaint must then decide whether to
6 grant leave to amend. Leave to amend should be “freely given” where there is no
7 “undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice
8 to the opposing party by virtue of allowance of the amendment, [or] futility of the
9 amendment” Foman v. Davis, 371 U.S. 178, 182 (1962); Eminence Capital, LLC v.
10 Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (listing the Foman factors as those to
11 be considered when deciding whether to grant leave to amend). Not all of these factors
12 merit equal weight. Rather, “the consideration of prejudice to the opposing party . . .
13 carries the greatest weight.” Id. (citing DCD Programs, Ltd. v. Leighton, 833 F.2d 183,
14 185 (9th Cir. 1987)). Dismissal without leave to amend is proper only if it is clear that
15 “the complaint could not be saved by any amendment.” Intri-Plex Techs. v. Crest Grp.,
16 Inc., 499 F.3d 1048, 1056 (9th Cir. 2007) (citing In re Daou Sys., Inc., 411 F.3d 1006,
17 1013 (9th Cir. 2005); Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir.
18 1989) (“Leave need not be granted where the amendment of the complaint . . .
19 constitutes an exercise in futility”)).

20 21 ANALYSIS

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23 Defendants seek dismissal of four of Plaintiff’s claims. For the following reasons,
24 Defendants’ Motion to dismiss is GRANTED as to Plaintiff’s harassment and age
25 discrimination claims (first and third causes of action), GRANTED in part and DENIED in
26 part as to Plaintiff’s due process claim (fifth cause of action) and DENIED as to Plaintiff’s
27 IIED claim (sixth cause of action).

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1 **A. First Cause of Action: Harassment Under Title VII**

2 Plaintiff directs her first cause of action at both FSUSD and Young. Defendants
3 argue, and Plaintiff concedes, that this claim should be dismissed as to Young.
4 Accordingly, Defendants’ Motion is GRANTED on this basis, and Plaintiff’s Title VII
5 harassment claim is DISMISSED with prejudice as to Young.

6 **B. Third Cause of Action: Age Discrimination Against FSUSD**

7 Plaintiff’s third cause of action is directed at FSUSD only. FSUSD seeks
8 dismissal of that claim on the grounds that it is entitled to immunity under the Eleventh
9 Amendment to the United States Constitution.⁵

10 “[I]n the absence of consent a suit in which the State or one of its agencies or
11 departments is named as the defendant is proscribed by the Eleventh Amendment.”
12 Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984). California school
13 districts are state agencies immune to suit under the Eleventh Amendment. Belanger v.
14 Madera Unified Sch. Dist., 963, F.2d 248, 254 (9th Cir. 1992). Although Congress may,
15 with a valid grant of constitutional authority, abrogate Eleventh Amendment immunity in
16 a specific law, the United States Supreme Court has declared “ADEA’s purported
17 abrogation of the States’ sovereign immunity . . . invalid.” Kimel v. Fla. Bd. of Regents,
18 528 U.S. 62, 91 (2000).

19 The FAC makes clear that FSUSD is a California school district and therefore
20 entitled to immunity under the Eleventh Amendment. Because the ADEA does not
21 abrogate that immunity and because FSUSD has not consented to this suit, Defendants’
22 Motion is GRANTED and the third cause of action is DISMISSED with prejudice.

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28 ⁵ Plaintiff’s Opposition to Defendants’ Motion (ECF No. 11) does not address or even
acknowledge FSUSD’s request to dismiss the third cause of action.

1 **C. Fifth Cause of Action: § 1983 Violation Against Young**

2 Plaintiff's fifth cause of action is a § 1983 claim⁶ against Young based on an
3 alleged deprivation of Plaintiff's Fourteenth Amendment due process rights. According
4 to Plaintiff, her constructive termination from Herlong High School violated both her
5 substantive and procedural due process rights. Young, however, contends this claim
6 should be dismissed on the grounds that he is entitled to qualified immunity because he
7 did not violate a clearly established constitutional right.

8 **1. Substantive Due Process**

9 “The right to pursue a chosen profession is protected by substantive due process
10” Engquist v. Or. Dep’t of Agric., 478 F.3d 985, 998 (9th Cir. 2007). However, the
11 right is “to pursue an entire profession, and not the right to pursue a particular job.” Id.
12 (emphasis added). To rise to the level of a substantive due process violation,
13 governmental conduct must make it “virtually impossible” for Plaintiff to find new
14 employment within the profession. Id. Such a claim is limited to “extreme cases, such
15 as a ‘government blacklist, which when circulated or otherwise publicized to prospective
16 employers effectively excludes the blacklisted individual from his occupation, much as if
17 the government had yanked the license of an individual in an occupation that requires
18 licensure.” Id. at 997-98 (quoting Olivieri v. Rodriguez, 122 F.3d 406, 408 (7th Cir.
19 1997)).

20 Although Plaintiff's FAC does not specify the right on which she bases her
21 substantive due process claim, the right described in Engquist appears to be the most
22 applicable. Plaintiff, however, has not alleged that she was deprived of her right to
23 pursue a profession. Rather, the FAC suggests that Young deprived her only of a job at
24 Herlong High School, and there is no suggestion that the harassment made it “virtually
25 impossible” for Plaintiff to pursue teaching opportunities elsewhere.

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27 ⁶ See Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002) (“42 U.S.C. § 1983 creates a cause of
28 action against a person who, acting under color of state law, deprives another of rights guaranteed under
the Constitution.”).

1 Accordingly, the fifth cause of action is DISMISSED without prejudice to the
2 extent that it alleges a substantive due process claim.⁷

3 **2. Procedural Due Process**

4 A § 1983 claim based upon procedural due process consists of (1) a deprivation
5 of a liberty or property interest protected by the Constitution, and (2) a denial of
6 adequate procedural protections. See Brewster v. Bd. of Educ. of the Lynwood Unified
7 Sch. Dist., 149 F.3d 971, 982 (9th Cir.1998). If a liberty or property interest exists, the
8 essential requirements of due process are notice and an opportunity to respond. See
9 Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985).

10 Under California law, “[a] certified employee is classified as permanent, i.e.,
11 acquires tenure, if, after having been employed for two complete successive school
12 years in a position requiring certification qualifications, he or she is reelected for the
13 following year.” Bakersfield Elementary Teachers Ass’n v. Bakersfield City Sch. Dist.,
14 145 Cal. App. 4th 1260, 1278-79 (2006) (citing Cal. Educ. Code § 44929.21(b)). Tenured
15 teachers “possess a property right in continued employment” Barthuli v. Bd. of Trs.
16 of Jefferson Elementary Sch. Dist., 19 Cal.3d 717, 722 (1977) (citations omitted). “[T]he
17 state must comply with procedural due process requirements before it may deprive [a]
18 permanent employee of [their] property interest [in continued employment] by punitive
19 action.” Bostean v. L.A. Unified Sch. Dist., 63 Cal. App. 4th 95, 110 (1998).

20 Here, the FAC alleges that Plaintiff taught in the FSUSD for twenty-seven years
21 before leaving her position in September 2012. She therefore appears to be a tenured
22 teacher with a property right in continued employment.⁸ Furthermore, Plaintiff has

23 ⁷ If Plaintiff bases her substantive due process claim on a different fundamental right, she may file
24 a Second Amended Complaint that specifically identifies that right.

25 ⁸ The United States Supreme Court is currently split on the issue of whether liberty and property
26 interests arising under the Constitution for procedural due process purposes are the same as fundamental
27 rights requiring substantive due process protection. See Kerry v. Din, No. 13-1402, ___ U.S. ___, ___,
28 2015 WL 2473334, at *1 (June 15, 2015). In Kerry v. Din, Justice Breyer’s dissent—which three other
justices joined—distinguished liberty and property interests that warrant procedural due process
protections from fundamental rights that warrant substantive due process protections. Justice Scalia’s
three-judge plurality opinion, however, challenged the notion that “there are two categories of implied
rights protected by the Due Process Clause: really fundamental rights, which cannot be taken away at all

1 sufficiently alleged that she did not receive any, let alone adequate, procedural
2 protections. Specifically, Plaintiff alleges that when she informed Young of the
3 harassment that eventually led to her retirement, Young not only instructed other FSUSD
4 staff not to try to quell the harassment, but he also encouraged the students to continue
5 with their conduct.

6 Thus, Plaintiff has sufficiently alleged that she had a liberty interest in continued
7 employment with FSUSD, and that she was deprived of that liberty interest without
8 adequate protections. Accordingly, Plaintiff has sufficiently pled a prima facie § 1983
9 claim based upon a deprivation of her procedural due process rights under the
10 Fourteenth Amendment.

11 **3. Qualified Immunity**

12 Young argues that he is nonetheless entitled to qualified immunity on Plaintiff's
13 § 1983 procedural due process claim. The doctrine of qualified immunity protects
14 government officials "from liability for civil damages insofar as their conduct does not
15 violate clearly established statutory or constitutional rights of which a reasonable person
16 would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). More succinctly:
17 "Qualified immunity is applicable unless the official's conduct violated a clearly
18 established constitutional right." Pearson v. Callahan, 555 U.S. 223, 232 (2009).
19 "Where the defendant seeks qualified immunity, a ruling on that issue should be made
20 early in the proceedings so that the costs and expenses of trial are avoided where the
21 defense is dispositive." Saucier v. Katz, 533 U.S. 194, 200 (2001), overruled on other
22 grounds, Pearson, 555 U.S. at 227.

23 Here, Young argues that he is entitled to qualified immunity because the
24 procedural protections required for depriving a tenured teacher of her property interest in
25 continued employment through a constructive termination are not clearly established.

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27 absent a compelling state interest; and not-so-fundamental rights, which can be taken away so long as
28 procedural due process is observed." Id. at *8. In any event, this Court has no difficulty concluding that
Plaintiff's property interest in continued employment as a tenured teacher warrants procedural due
process protections but not substantive due process protections.

1 See Defs.' Reply, ECF No. 12, at 2 (“[I]t has not been clearly established what
2 procedural due process an employee claiming constructive termination is due.”).
3 Young’s argument, however, fails to appreciate that the Ninth Circuit has determined
4 that “a retirement or resignation may be involuntary and constitute a deprivation of
5 property for purposes of a due process claim” alleged in a § 1983 action.
6 Knappenberger v. City of Phoenix, 566 F.3d 936, 941 (9th Cir. 2009).⁹ Knappenberger,
7 a case decided in 2009, by itself forecloses Young’s argument that Plaintiff’s due
8 process rights were not clearly established when she was constructively terminated
9 between September 2012 and September 2013. See Mattos v. Agarano, 661 F.3d 422,
10 446 (9th Cir. 2011) (en banc) (“We begin our inquiry into whether this constitutional
11 violation was clearly established by looking at the most analogous case law that existed
12 when [the challenged conduct occurred]”). Although Knappenberger did not address
13 what specific protections are required in the constructive termination context, it implies
14 that some process is due. In the absence of additional guidance, the Court must resort
15 to “the essential requirements of due process,” notice and an opportunity to respond.
16 See Loudermill, 470 U.S. at 546. Plaintiff’s FAC, which describes Young’s response to
17 her complaints of the harassment that eventually led to her retirement, sufficiently
18 alleges that she was not provided notice and an opportunity to respond. Accordingly,
19 Young is not entitled to qualified immunity on Plaintiff’s § 1983 procedural due process
20 claim.

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22 ⁹ See also Lauck v. Campbell Cnty., 627 F.3d 805, 813 (10th Cir. 2010) (“This is not to say that
23 there is no such thing as a due-process constructive-discharge claim. . . . An employer cannot circumvent
24 the due-process requirements that would attend a true firing by trying to compel a resignation in a manner
25 that violates the employee’s property (that is, contract) rights.”); Buchanan v. Little Rock Sch. Dist. of
26 Pulaski Cnty., Ark., 84 F.3d 1035, 1038 n.3 (8th Cir. 1996) (“had she been terminated or had her transfer
27 amounted to a constructive termination, the due process clause could have been implicated”); Stone v.
28 Univ. of Md. Med. Sys. Corp., 855 F.2d 167, 173 (4th Cir. 1988) (“If, on the other hand, [plaintiff’s]
‘resignation’ was so involuntary that it amounted to a constructive discharge, it must be considered a
deprivation by state action triggering the protections of the due process clause. A public employer
obviously cannot avoid its constitutional obligation to provide due process by the simple expedient of
forcing involuntary ‘resignations.’”); Fowler v. Carrollton Public Library, 799 F.2d 976, 981 (5th Cir. 1986)
 (“Constructive discharge in a procedural due process case constitutes a § 1983 claim only if it amounts to
forced discharge to avoid affording pretermination hearing procedures.”).

1 Young's Motion to Dismiss is therefore GRANTED to the extent that it seeks
2 dismissal of Plaintiff's § 1983 substantive due process claim and DENIED to the extent
3 that it seeks dismissal of Plaintiff's § 1983 procedural due process claim.

4 **D. Sixth Cause of Action: IIED Against Young**

5 Plaintiff's IIED claim is directed at Young only. In the pending Motion, Young
6 argues that if the Court dismisses the Title VII harassment and the § 1983 claim against
7 him,¹⁰ the IIED claim will be the only remaining claim against him. Young argues that
8 because the IIED claim is a state law claim, the Court should decline supplemental
9 jurisdiction over that claim and dismiss him from the case.

10 In this case, the Court has original jurisdiction over the Title VII claims against
11 FSUSD and the § 1983 procedural due process claim against Young because those
12 claims arise under federal laws. The FAC makes clear that the IIED claim is based on
13 the exact same facts as the Title VII claims and the § 1983 procedural due process
14 claim. It follows that the IIED claim should ordinarily be tried with those federal causes
15 of action. See 28 U.S.C. § 1367(a); United Mine Workers v. Gibbs, 383 U.S. 715, 725
16 (1966). Accordingly, Defendants' Motion is DENIED to the extent it requests that the
17 Court decline to exercise supplemental jurisdiction over the IIED claim against Young.

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28 ¹⁰ This Order fulfils only one of those conditions.

1 **CONCLUSION**

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3 Defendants' Motion to Dismiss (ECF No. 10) is GRANTED in part and DENIED in
4 part as follows:

5 1. The Motion is GRANTED as to the first and third causes of action. Thus, the
6 Title VII harassment claim against Defendant Young and the ADEA claim against
7 Defendant FSUSD are DISMISSED with prejudice.

8 2. As to the fifth cause of action, the Motion is GRANTED to the extent that it
9 seeks dismissal of Plaintiff's substantive due process claim and DENIED to the extent
10 that it seeks dismissal of Plaintiff's procedural due process claim. Plaintiff's substantive
11 due process claim is DISMISSED without prejudice.

12 3. The Motion is DENIED to the extent that it requests that the Court decline
13 supplemental jurisdiction over the IIED claim against Defendant Young.

14 4. Not later than twenty (20) days following the date this Order is electronically
15 filed, Plaintiff may, but is not required to, file an amended complaint. If no amended
16 complaint is filed, the causes of action dismissed by virtue of this Order will be deemed
17 dismissed WITH PREJUDICE upon no further notice to the parties.

18 IT IS SO ORDERED.

19 Dated: July 8, 2015

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23 MORRISON C. ENGLAND, JR., CHIEF JUDGE
24 UNITED STATES DISTRICT COURT
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