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

CURTIS PHELPS,

Plaintiff,

No. C 07-01055 JSW

v.

UNITED STATES GENERAL SERVICES
AGENCY, et al.,

Defendants.

**ORDER GRANTING
DEFENDANTS’ MOTION TO
DISMISS THE SECOND
AMENDED COMPLAINT**

Now before the Court is the motion to dismiss filed by defendants United States General Services (“GSA”), Lurita Alexis Doan (“Doan”) as administrator of GSA, Dr. Michael Wirtz, Robert Drakes, Patricia Roberts, Mary Ghent and Does 1 through 10 (collectively, “Defendants”). Having carefully reviewed the parties’ papers, considered their arguments and the relevant legal authority, the Court hereby GRANTS Defendants’ motion to dismiss.

BACKGROUND

After an order granting in part and denying in part Defendants’ motion to dismiss the First Amended Complaint, Plaintiff filed a Second Amended Complaint. In it, he alleges that he was employed by GSA since 1988, as an account specialist with the Customer Service Division in the Public Building Service Division, Pacific Rim Region. (Second Amended Complaint ¶ 3.) Plaintiff alleges that during his employment, he has “suffered a pattern and practice of racial discrimination and other wrongful acts.” (*Id.*) Plaintiff alleges that he began work with the GSA in 1988 and was terminated as a result of refusing to accept a management-directed reassignment from Fresno, California to Los Angeles, California. (*Id.* ¶ 7.) After reinstatement,

1 Plaintiff alleges he was subjected to “further discriminatory and retaliatory acts.” (*Id.* ¶ 8.)

2 Plaintiff alleges that the further acts included giving him a considerably smaller
3 workstation. (*Id.* ¶¶ 12-14.) In addition, Plaintiff alleges that in January 2005, during a staff
4 meeting, his colleague, Defendant Mary Ghent stroked Plaintiff on his inner thigh. (*Id.* ¶ 16.)
5 Later, in June 2005, Defendant Ghent became Plaintiff’s supervisor. (*Id.* ¶ 17.) Thereafter,
6 Plaintiff alleges that there were inappropriate letters outlining Plaintiff’s poor performance,
7 which were without merit, he was denied an opportunity to attend a certification training in Los
8 Angeles, his poor performance reviews were unmerited, he was faced with excessive scrutiny in
9 the office, was improperly charged with being absent without leave a number of times, and that
10 he was denied a within-grade increase on March 8, 2006 based on poor performance ratings.
11 (*Id.* ¶ 18(a)-(1).)

12 Based on these allegations, Plaintiff asserts the following claims: (1) race discrimination
13 in violation of 42 U.S.C. § 2000 *et seq.* (“Title VII”) against Defendants Doan and GSA; (2) age
14 discrimination in violation Title VII against Defendants Doan and GSA; (3) failure to maintain
15 environment free from harassment in violation of Title VII against all defendants; (4) retaliation
16 in violation of Title VII against all defendants; (5) failure to promote in violation of Title VII
17 against Defendants Doan and GSA; and (6) intentional infliction of emotional distress against
18 all defendants.

19 Defendants now move to dismiss all of Plaintiff’s claims on the basis that: (1) claim five
20 for failure to promote does not state a claim upon which relief can be granted; (2) claims two,
21 three and four are improperly-added new claims, do not conform to the amendment allowed by
22 the Court, and fail to state a claim upon which relief can be granted; (3) Plaintiff has
23 inappropriately named individual defendants other than Mary Ghent; (4) Plaintiff has still not
24 adequately alleged exhaustion of his administrative remedies; and (5) there was insufficient
25 service of process.

26 The Court shall refer to additional facts as necessary in the remainder of this Order.
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1 ANALYSIS

2 **A. Legal Standards Applicable to Motions to Dismiss.**

3 A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) where the
4 pleadings fail to state a claim upon which relief can be granted. The complaint is construed in
5 the light most favorable to the non-moving party and all material allegations in the complaint
6 are taken to be true. *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986). The court,
7 however, is not required to accept legal conclusions cast in the form of factual allegations, if
8 those conclusions cannot reasonably be drawn from the facts alleged. *Clegg v. Cult Awareness*
9 *Network*, 18 F.3d 752, 754-55 (9th Cir. 1994) (citing *Papasan v. Allain*, 478 U.S. 265, 286
10 (1986)). Conclusory allegations without more are insufficient to defeat a motion to dismiss for
11 failure to state a claim upon which relief may be granted. *McGlinchy v. Shell Chemical Co.*,
12 845 F.2d 802, 810 (9th Cir. 1988). Even under the liberal pleading standard of Federal Rule of
13 Civil Procedure 8(a)(2), a plaintiff must do more than recite the elements of the claim and must
14 “provide the grounds of [its] entitlement to relief.” *Bell Atlantic Corporation v. Twombly*, 127
15 S. Ct. 1955, 1959 (2007) (citations omitted). In addition, the pleading must not merely allege
16 conduct that is conceivable, but it must also be plausible. *Id.* at 1974.

17 **B. Defendants’ Motion to Dismiss.**

18 Defendants move to dismiss all of Plaintiff’s claims. The Court will address each
19 argument in turn.

20 **1. Claim Five for Failure to Promote Fails to State a Claim.**

21 Claim five for failure to promote still fails to state a cause of action because Plaintiff has
22 failed to identify what job position he applied for or was otherwise qualified for, to which
23 Defendants failed to promote him. Further, Plaintiff has not alleged any direct or circumstantial
24 evidence of discriminatory intent. *See Vasquez v. County of Los Angeles*, 349 F.3d 634, 640
25 (9th Cir. 2003). Plaintiff also fails to allege facts tending to show that other employees with
26 similar qualifications to his own were treated more favorably with regard to the job position he
27 sought. *See id.* Plaintiff has failed to allege facts sufficient to make out a claim for failure to
28 promote in violation of Title VII. Comparing the first and second amended complaints in this

1 matter, the only changes to this claim are that Plaintiff deleted the sentence about Plaintiff
2 rejecting Ghent’s sexual advances and added the sentence: “Subsequently, he is under a
3 tremendous amount of stress and anxiety because both his immediate supervisors
4 misrepresented their actions in this matter.” (Second Amended Complaint at ¶¶ 16, 18(c).)
5 Neither of these changes provide factual support for the failure to promote claim. Plaintiff’s
6 conclusory statement that GSA “failed to promote him in violation of 42 U.S.C. § 2000 *et seq.*
7 despite Plaintiff’s substantial experience and qualifications” does not provide any factual basis
8 for the claim whatsoever. (*See id.* at ¶ 45.)

9 Taking into consideration that the Court, in its previous order, advised Plaintiff to allege
10 facts to support the necessary elements of this claim and Plaintiff’s concession that he has no
11 further facts to allege in support of a prima facie case, the Court dismisses count five with
12 prejudice for failure to allege sufficient facts to state a claim upon which relief can be granted.

13 **2. Claims Two Through Four Are New and Fail to State a Claim.**

14 Defendants contend that the claims two through four are new and fail to conform to the
15 Court’s previous order permitting only amendment of previously-pled claims. Although the
16 Court agrees that these causes of action, now claims under federal and not state law, are new, if
17 Plaintiff had moved for leave to amend, the Court would have granted the motion under the
18 lenient standard of Federal Rule of Civil Procedure 15(a).¹

19 However, the claims suffer for various other reasons, entitling Plaintiff leave to amend
20 to rephrase the claims in order to state a claim upon which relief may be granted. As an initial
21 matter, the only proper defendant under Title VII is the head of the agency in which the alleged
22 discriminatory acts occurred. *See* 42 U.S.C. § 2000e-16(c); *White v. General Services*
23 *Administration*, 652 F.2d 913, 916 n.4 (9th Cir. 1981) (“Title VII provides that actions based
24 upon federal employment discrimination are to be brought against the director of the agency
25

26 ¹ Plaintiff contends that his participation in mediation interfered with his ability to
27 move for leave to file an amendment. The Court is not convinced that the procedural posture
28 of this case differs in any significant way from any other in that the parties participated in
court-sponsored mediation, but were not successful in resolving the matter. However, for the
sake of resolving the case on its merits, where possible, the Court deems it appropriate to
allow Plaintiff one final chance to amend his complaint to conform to the Court’s orders.

1 concerned.”) The current head of the GSA is Jim Williams, not Lurita Doan. In addition,
2 claims three and four add other, improper defendants who are hereby dismissed without leave.

3 In addition, in his first claim for race discrimination in violation of Title VII, Plaintiff
4 fails to state facts sufficient to demonstrate race discrimination. Plaintiff fails to set out the
5 facts indicating what promotion he did not receive on account of his race, fails to allege any
6 facts demonstrating direct or circumstantial evidence of discriminatory intent, fails to allege that
7 other employees with similar qualifications were treated more favorably with regard to the job
8 position he sought, work assignments, and the terms and conditions of his employment. *See*
9 *Vasquez*, 349 F.3d at 640. The only factual predicate for discrimination currently alleged in the
10 Second Amended Complaint concerns a delay in the processing of Plaintiff’s request to attend a
11 certification training, whereas a white co-worker’s request to attend similar training was
12 granted. (*See* Second Amended Complaint at ¶ 18(c).) The Court therefore dismisses claim one
13 for race discrimination for failure to state a claim with leave to amend. Should Plaintiff fail to
14 allege additional facts tending to support his claim in the Third Amended Complaint, the Court
15 shall be compelled to restrict the claim for race discrimination to Plaintiff’s request for
16 certification training only.

17 Plaintiff’s second claim for age discrimination under Title VII fails to state a claim upon
18 which relief can be granted because Title VII does not prohibit discrimination based upon age.
19 *See* 42 U.S.C. § 2000e-2(a)(1). In addition, the complaint as drafted sets forth no additional
20 facts to support an age discrimination claim. Therefore, the Court dismisses the second claim
21 for age discrimination with leave to amend for failure to state a claim upon which relief can be
22 granted.

23 Plaintiff’s third claim for failure to maintain an environment free from harassment fails
24 to state a claim upon which relief can be granted because the alleged harassment is by a co-
25 worker and there is no allegation that Plaintiff informed the GSA of the fact that his co-worker
26 or that he was being harassed in any other way. A “hostile work environment claim involves a
27 workplace atmosphere so discriminatory and abusive that it unreasonably interferes with the job
28 performance of those harassed.” *Brooks v. City of San Mateo*, 229 F.3d 917, 923 (9th Cir.

1 2000). The third cause of action, as currently drafted, makes confusing references to alleged
2 discriminatory practices against female employees, discrimination in the selection and
3 termination of employees, violations of the California Fair Employment and Housing Act, the
4 unfitness of a decision-maker and discrimination by “the department.” These references are
5 completely unclear and bear no relation to the claims by this Plaintiff. Again, the third cause of
6 action is therefore dismissed, with leave to amend to state a cause of action. If Plaintiff again
7 fails to state a claim for failure to maintain an environment free from harassment, the Court will
8 dismiss the claim with prejudice.

9 Plaintiff’s fourth claim for retaliation in violation of Title VII fails to state a claim upon
10 which relief can be granted because Plaintiff fails to allege that he engaged in a protected
11 activity, such as making a charge, testifying, or participating in any manner in an investigation,
12 proceeding or hearing. *See* 42 U.S.C. § 2000e-3(a). Plaintiff merely alleges that he “reported
13 unlawful conduct to superiors” and “complained on numerous occasions alleged herein that
14 Plaintiff was being harassed on the basis of race, national origin, religion, and age and denies
15 [*sic*] promotional opportunities.” (Second Amended Complaint at ¶ 40.) Again, the fourth
16 cause of action is therefore dismissed, with leave to amend to state a cause of action. If Plaintiff
17 again fails to state a claim for retaliation in violation of Title VII, the Court will dismiss the
18 claim with prejudice.

19 **3. Plaintiff’s Claim for Intentional Infliction of Emotional Distress Fails.**

20 The Court has already ordered that the only defendant who can be sued for intentional
21 infliction of emotional distress for whom Title VII is not the exclusive remedy is the individual
22 defendant Mary Ghent. On this basis, the Court dismisses the sixth claim for relief as against
23 all defendants with the exception of Ghent. In this case, however, because the Attorney General
24 has certified that Ghent was acting within the scope of her employment at the time of the
25 incident giving rise to Plaintiff’s claim of intentional infliction of emotional distress, Plaintiff’s
26 exclusive remedy is under the Federal Torts Claims Act and it is clear that Plaintiff has not
27 exhausted his administrative remedies to pursue such a claim. Therefore, the sixth claim for
28 intentional infliction of emotional distress is dismissed with prejudice.

