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

GEORGE L. KIRBYSON,)	Case No. 09-3990 SC
)	
Plaintiff,)	ORDER DENYING DEFENDANT'S
)	<u>MOTION TO DISMISS</u>
v.)	
)	
TESORO REFINING AND MARKETING)	
COMPANY; UNITED STEEL WORKERS,)	
INTERNATIONAL UNION LOCAL 5; JEFF)	
CLARK; STEVE ROJEK, and DOES 1)	
through 200, inclusive,)	
)	
Defendants.)	
)	

I. INTRODUCTION

Now before the Court is a Motion to Dismiss filed by Defendant Tesoro Refining and Marketing Company ("Defendant" or "Tesoro"). Docket Nos. 42 ("Motion"), 42-1 ("Mem. of P. & A."). Plaintiff George Kirbyson ("Plaintiff") filed an Opposition, and Tesoro submitted a Reply. Docket Nos. 47, 48. For the reasons stated below, Defendant's Motion is DENIED.

II. BACKGROUND

Plaintiff joined the U.S. Air Force in 1994, and transitioned into the Air Force Reserve in 1999. Docket No. 41 ("SAC") ¶ 9. Plaintiff began working as a refinery operator at the Golden Eagle Refinery in November 1999. Id. ¶ 10. In 2003, Tesoro purchased

1 the refinery. Id. On January 5, 2005, Plaintiff was recalled to
2 active duty, and Tesoro placed him on a military leave of absence.
3 Id. ¶ 12. While serving in Iraq, Plaintiff was injured, and
4 permanently disabled. Id. ¶ 13. He was medically retired from the
5 military in November 2008. Id. On December 22, 2008, Tesoro
6 terminated Plaintiff's employment. Id. ¶ 18.

7 On August 28, 2009, Plaintiff commenced this action. See
8 Docket No. 1 ("Compl."). On December 3, 2009, Plaintiff filed a
9 First Amended Complaint. See Docket No. 15 ("FAC"). On March 2,
10 2010, the Court granted motions to dismiss filed by a number of
11 individual defendants, and the Court dismissed without prejudice
12 Plaintiff's sixth cause of action against Tesoro for violation of
13 the California Military and Veterans Code. See Docket No. 32
14 ("March 2, 2010 Order"). On March 30, 2010, Plaintiff filed a
15 Second Amended Complaint, which reasserts that Tesoro violated the
16 California Military and Veterans Code. SAC ¶¶ 54-57. Tesoro now
17 moves for dismissal of this cause of action. Mem. of P.& A. at 2.

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19 **III. LEGAL STANDARD**

20 A motion to dismiss under Federal Rule of Civil Procedure
21 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
22 Block, 250 F.3d 729, 732 (9th Cir. 2001). It requires a court to
23 determine whether a complaint comports with Federal Rule of Civil
24 Procedure 8(a)(2), which requires that a pleading contain a "short
25 and plain statement of the claim showing that the pleader is
26 entitled to relief." Dismissal can be based on the lack of a
27 cognizable legal theory or the absence of sufficient facts alleged
28 under a cognizable legal theory. Balistreri v. Pacifica Police

1 Dep't, 901 F.2d 696, 699 (9th Cir. 1990). Allegations of material
2 fact are taken as true and construed in the light most favorable
3 to the nonmoving party. Cahill v. Liberty Mutual Ins. Co., 80
4 F.3d 336, 337-38 (9th Cir. 1996). With regard to well-pleaded
5 factual allegations, the court should assume their truth, but a
6 motion to dismiss should be granted if the plaintiff fails to
7 proffer "enough facts to state a claim for relief that is
8 plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544,
9 547 (2007). The court need not accept as true legal conclusions
10 couched as factual allegations. Ashcroft v. Iqbal, 129 S. Ct.
11 1937, 1949-50 (2009).

12
13 **IV. DISCUSSION**

14 Section 394(a) of the California Military and Veterans Code
15 provides:

16 No person shall discriminate against any officer,
17 warrant officer or enlisted member of the military or
18 naval forces of the state or of the United States
19 because of that membership. No member of the military
20 forces shall be prejudiced or injured by any person,
21 employer, or officer or agent of any corporation,
company, or firm with respect to that member's
employment, position or status or be denied or
disqualified for employment by virtue of membership or
service in the military forces of this state or of the
United States.

22 Cal. Mil. & Vet. Code § 394(a). In a previous Order, the Court
23 dismissed without prejudice Plaintiff's claim for discrimination
24 based on his military status because the First Amended Complaint
25 contained "no fact that suggests that other employees with
26 disabilities were treated differently than Plaintiff." March 2,
27 2010 Order at 16.

28 In response, Plaintiff filed a Second Amended Complaint

1 containing factual allegations related to Plaintiff's claim for
2 discrimination based on his military status. Plaintiff alleges
3 that:

4 Defendant Tesoro has provided a number of
5 accommodations for disabled employees who are not
6 military veterans returning from military
7 service. At the Golden Eagle Refinery location
8 alone, these include, but are not limited to: an
9 operator (the same position held by Plaintiff)
10 who was permitted to bring in a cot and lie down
11 at work approximately every 30 minutes after a
12 softball injury; a disabled employee working as
13 an operator who was permanently assigned to the
14 control room which permitted the employee to
15 perform virtually all work sitting down; a
16 pregnant operator who was permitted to work in
17 the control room until her maternity leave began;
18 a disabled operator who was provided with an
19 assistant to 'shadow' him while performing his
20 duties as an operator; an operator in Plaintiff's
21 unit who was allowed to work solely in the
22 control room following elective stomach staple
surgery; an operator who contracted cancer and
was given a job as a training coordinator when no
longer able to work in the refinery's process
area; an operator who worked solely in the
control room after knee replacement surgery until
the time of his retirement; and a maintenance
supervisor who suffered a heart attack rendering
him unable to perform duties in the refinery's
process area and was placed in a turnaround
planning position which no longer required the
employee to enter the refinery's process area.
Despite Defendant Tesoro's accommodations of
numerous non-military/reservist employees at
Golden Eagle Refinery, Defendant refused to
accommodate or even attempt to accommodate
returning military veteran and reservist George
Kirbyson.

23 SAC ¶ 19. Plaintiff therefore alleges that Tesoro accommodated
24 eight disabled employees who were not members of the military, but
25 refused to accommodate Plaintiff. These factual allegations are
26 not conclusory, so the Court must assume their truth. See Iqbal,
27 129 S.Ct. at 1950. Assuming their veracity, these factual
28 allegations give rise to a plausible claim for discrimination based

1 on Plaintiff's membership in the military.

2 Tesoro attempts to persuade the Court that these allegations
3 do not give rise to a plausible claim. Tesoro contends that
4 "Plaintiff fails to plead, and completely ignores, the many fact
5 specific reasons why Tesoro may have been able to accommodate those
6 employees," and that it would be improper for the Court to infer
7 that Plaintiff was similarly situated to these other employees.
8 Mot. at 8-9. However, if Tesoro accommodated eight disabled
9 employees who were not members of the military, and refused to
10 accommodate a disabled military veteran, then one plausible
11 explanation is that the veteran was a victim of discrimination
12 based on his membership in the military. While discovery may
13 reveal the "many fact specific reasons" why Plaintiff was treated
14 differently, Plaintiff's factual allegations make it inappropriate
15 for the Court to dismiss the military discrimination claim at the
16 pleading stage.

17 In Tesoro's Reply brief, Tesoro incorrectly argues that
18 Plaintiff must "plead" facts demonstrating that he was similarly
19 situated to employees outside of his class who received more
20 favorable treatment. Reply at 4-5. The cases cited by Tesoro in
21 support of this contention do not concern pleading standards. See
22 Holland v. Washington Homes, Inc., 487 F.3d 208, 214 (4th Cir.
23 2007) (discussing evidence necessary to withstand summary judgment
24 in discrimination case); Mitchell v. Toledo Hosp., 964 F.2d 577,
25 583 (6th Cir. 1992) (same); Marquez v. Bridgestone/Firestone, Inc.,
26 353 F.3d 1037, 1038 (8th Cir. 2004) (same); Vasquez v. County of
27 Los Angeles, 349 F.3d 634, 640-41 (9th Cir. 2003) (same); Aragon v.
28 Republic Silver State Disposal Inc., 292 F.3d 654, 633 (9th Cir.

1 2002) (same); Coleman v. Quaker Oats Co., 232 F.3d 1271, 1282-83
2 (9th Cir. 2000) (same); Beck v. United Food and Commercial Workers
3 Union, Local 99, 506 F.3d 874, 885 (9th Cir. 2007) (discussing
4 evidence necessary to support inference of discriminatory intent
5 after bench trial). Given that this case is still at the pleading
6 stage, Tesoro's attempt to get the Court to dismiss Plaintiff's
7 military discrimination claim based on his failure to show he was
8 similarly situated to non-military employees who were accommodated
9 is simply premature.

10 Whether Plaintiff will be able to prove his claim for military
11 discrimination is another matter entirely. Reviewing the
12 allegations in Plaintiff's Second Amended Complaint as a whole, it
13 still seems more likely that Plaintiff was terminated because of
14 his disability, not because of his status as a member of the
15 military. However, the question presently before the Court is
16 whether Plaintiff's Second Amended Complaint contains enough
17 factual content to make his claim for discrimination based on his
18 military status plausible. Plaintiff's account of how Tesoro
19 accommodated eight non-military employees with disabilities lends
20 plausibility to his military discrimination claim.¹ Therefore, the
21 Court DENIES Tesoro's motion to dismiss the sixth cause of action
22 in Plaintiff's Second Amended Complaint.

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27 ¹ Because the Court finds that Plaintiff's allegations regarding
28 these other employees lend plausibility to his claim for military
discrimination, the Court does not need to address Plaintiff's
allegations that he faced resentment and hostility at Tesoro
because of his status as a military reservist.

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V. CONCLUSION

For the reasons stated above, the Court DENIES the Motion to Dismiss filed by Defendant Tesoro Refining and Marketing Company.

IT IS SO ORDERED.

Dated: June 10, 2010


UNITED STATES DISTRICT JUDGE