

1 Marketing Company ("Tesoro"). Id. ¶ 10. On January 5, 2005,
2 Plaintiff was recalled to active duty, and Tesoro placed him on a
3 military leave of absence. Id. ¶ 12. While serving in Iraq,
4 Plaintiff was injured, and he became permanently disabled. Id.
5 ¶ 13. He was medically retired from the military in November 2008.
6 Id. On December 22, 2008, Tesoro terminated Plaintiff's
7 employment. Id. ¶ 18.

8 Plaintiff was a member of the USW. Id. ¶ 20. On December 22,
9 2008, Plaintiff contacted Steve Rojek ("Rojek"), his union
10 representative, in order to file a grievance regarding his
11 termination. Id. ¶ 21. Defendant filed the grievance on December
12 29, 2008, and Rojek told Plaintiff that "the grievance would
13 probably not go very far due to Defendants Tesoro and USW Local 5's
14 current union contract negotiations." Id. ¶¶ 21, 25. On January
15 6, 2009, Plaintiff spoke with the USW Secretary and Treasurer Jeff
16 Clark ("Clark") about his grievance. Id. ¶ 26. Clark informed
17 Plaintiff "weeks later that his grievance had been denied and that
18 nothing would likely 'be happening' regarding his grievance until
19 after the current collective bargaining negotiations concluded."
20 Id. Plaintiff alleges that the USW failed to pursue the matter any
21 further. Id.

22 On August 28, 2009, Plaintiff commenced this action. See
23 Docket No. 1 ("Compl."). On December 3, 2009, Plaintiff filed a
24 First Amended Complaint. Docket No. 15 ("FAC"). On December 10,
25 2009, USW filed an Answer to the FAC. Docket No. 17. On March 30,
26 2010, Plaintiff filed a Second Amended Complaint. Docket No. 41
27 ("SAC"). On April 19, 2010, USW answered the SAC. Docket No. 44.
28 On June 24, 2010, Tesoro answered the SAC. Docket No. 55. USW now

1 moves for judgment on the pleadings against Plaintiff.

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3 **III. LEGAL STANDARD**

4 "After the pleadings are closed - but early enough not to
5 delay trial - a party may move for judgment on the pleadings."
6 Fed. R. Civ. P. 12(c). The Court must accept all factual
7 allegations in the complaint as true and construe them in the
8 light most favorable to the non-moving party. Fleming v. Pickard,
9 581 F.3d 922, 925 (9th Cir. 2009). Judgment on the pleadings is
10 properly granted when there is no issue of material fact in
11 dispute, and the moving party is entitled to judgment as a matter
12 of law. Heliotrope Gen., Inc. v. Ford Motor Co., 189 F.3d 971,
13 979 (9th Cir. 1999). To survive a Rule 12(c) motion, the
14 complaint must contain sufficient factual matter, accepted as
15 true, to state a claim to relief that is plausible on its face.
16 Johnson v. Rowley, 569 F.3d 40, 44 (2d Cir. 2009).

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18 **IV. DISCUSSION**

19 Plaintiffs' second, fourth, and sixth causes of action are
20 asserted against the USW. See SAC ¶¶ 35-39, 45-49, 54-57.¹ The
21 second cause of action alleges violation of the Americans with
22 Disabilities Act ("ADA"); the fourth cause of action alleges a
23 breach of the statutory duty of fair representation; and the sixth

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25 ¹ The Court notes that the caption of the SAC names Clark and Rojek
26 as individual Defendants, but none of the causes of action are
27 asserted against Clark and Rojek. See SAC. The USW states that
28 Plaintiff has withdrawn its claims against these individuals, see
Mot. at 2, and Plaintiff does not contend otherwise. See Opp'n.
The Court therefore construes the SAC as asserting three claims
against the USW, but not against the individuals Clark and Rojek,
who are no longer parties to this action.

1 cause of action alleges violation of California's Military and
2 Veterans Code. See id.

3 The USW moves for judgment on the pleadings with respect to
4 each of these claims. A party may move for judgment on the
5 pleadings "[a]fter the pleadings are closed." Fed. R. Civ. P.
6 12(c). While the USW should have waited until after Tesoro filed
7 its Answer to the SAC before moving for judgment on the pleadings,
8 now that Tesoro has answered the SAC, the Court will address the
9 USW's motion.

10 **A. ADA Claim**

11 Plaintiff's second cause of action alleges that both Tesoro
12 and the USW violated the ADA. The USW contends that Plaintiff's
13 ADA claim against the union should be dismissed because the SAC
14 contains no factual allegations that the USW was involved in the
15 decision to terminate Kirbyson. Mot. at 15. The Court agrees.
16 The SAC alleges that Kirbyson contacted Rojek, his union
17 representative, "after being informed of his termination." SAC
18 ¶ 21. Kirbyson accuses the USW of a "lack of initiative regarding
19 his union grievance." Id. ¶ 26. Having reviewed the allegations
20 in the SAC, his allegations against the union have nothing to do
21 with his employer's decision to terminate him, or with Tesoro's
22 alleged failure to reasonably accommodate his disability. See id.
23 ¶¶ 15-28. Since the SAC is devoid of the necessary factual
24 allegations, the Court grants judgment on the pleadings in favor of
25 the USW on Plaintiff's second cause of action against the USW.

26 While normally the Court would give Plaintiff leave to amend,
27 Kirbyson has already amended his complaint twice, and Kirbyson's
28 Opposition brief contains no argument in defense of his claim that

1 the USW violated the ADA. See Opp'n. Having failed to defend this
2 claim despite an opportunity to do so, the Court will not permit
3 Plaintiff to amend the SAC to assert an ADA claim against the USW.

4 **B. Duty of Fair Representation**

5 Kirbyson accuses the USW of breaching its duty of fair
6 representation by "failing to pursue Plaintiff's grievance in
7 violation of the collective bargaining agreement and processing
8 Plaintiff's grievance in a perfunctory manner." SAC ¶ 47.

9 Kirbyson alleges that the USW's actions were "arbitrary,
10 discriminatory, and/or in bad faith." Id. ¶ 48. The USW moves to
11 dismiss the claim on the basis that the SAC does not set forth
12 sufficient factual allegations, and based on the six-month statute
13 of limitations that applies to claims for breach of the duty of
14 fair representation. Mot. at 10-12.

15 The Court finds that the USW's motion is premature. Plaintiff
16 was told his grievance would not go very far because of union
17 contract negotiations with Tesoro. This factual allegation lends
18 plausibility to his claim that the union breached its duty of fair
19 representation. The USW also contends that this cause of action is
20 time-barred, but it is not clear to the Court when Plaintiff's
21 cause of action accrued. Plaintiff alleges that he was told his
22 grievance had been denied sometime after January 6, 2009. SAC
23 ¶ 26. In its Motion, the USW suggests it was still pursuing
24 Plaintiff's grievance after January 31, 2009. See Mot. at 11 ("The
25 Decision of the Union to defer processing the grievance . . .
26 [until] after January 31, 2009 was an act of judgment."). After
27 the parties engage in discovery, the Court will be in a better
28 position to determine if the USW's conduct constitutes a breach of

1 its duty, and if Plaintiff's claim is time-barred. The Court
2 DENIES the USW's motion for judgment on the pleadings with respect
3 to Plaintiff's fourth cause of action for breach of the duty of
4 fair representation.

5 **C. California Military and Veterans Code**

6 Plaintiff's sixth cause of action alleges that both Tesoro and
7 the USW discriminated against Kirbyson based on his military
8 status. Compl. ¶¶ 54-57. The Complaint contains no factual
9 allegations supporting his claim that the USW discriminated against
10 him. As noted above, Plaintiff was told his grievance would not go
11 very far because of on-going union contract negotiations. Id. ¶¶
12 21, 25. There are no allegations that his grievance was not
13 pursued because Plaintiff was a member of the military.
14 Plaintiff's Opposition brief does not respond to this contention.
15 See Opp'n. Accordingly, the Court GRANTS the USW's motion for
16 judgment on the pleadings with respect to Plaintiff's sixth cause
17 of action. Plaintiff had an opportunity to respond, and failed to
18 do so. Therefore, Plaintiff is not permitted to amend the sixth
19 cause of action to allege a claim for military discrimination
20 against the USW.

21
22 **V. CONCLUSION**

23 For the reasons stated above, the Court GRANTS IN PART and
24 DENIES IN PART the Motion for Judgment on the Pleadings filed by
25 Defendant United Steel Workers, Local 5. The Court GRANTS the
26 motion with respect to Plaintiff's second and sixth causes of
27 action against Defendant United Steel Workers, Local 5. The Court
28 DENIES the motion with respect to Plaintiff's fourth cause of

1 action. All parties shall appear for a Case Management Conference
2 on September 17, 2010, at 10:00 a.m. in Courtroom 1, on the 17th
3 floor, U.S. Courthouse, 450 Golden Gate Avenue, San Francisco, CA
4 94102.

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6 IT IS SO ORDERED.

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8 Dated: July 12, 2010

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UNITED STATES DISTRICT JUDGE

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