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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

WILLIAM L. JOHNSON,  
Plaintiff,

No. C-10-01747 JCS

v.

BODE CONCRETE LLC, ET AL.,  
Defendants.

**ORDER DENYING WITHOUT  
PREJUDICE MOTION FOR  
APPOINTMENT OF COUNSEL,  
GRANTING MOTION TO DISMISS,  
DISMISSING COMPLAINT WITH  
LEAVE TO AMEND AND SETTING  
CASE MANAGEMENT CONFERENCE  
[Docket Nos. 11, 18]**

**I. INTRODUCTION**

Plaintiff William Johnson, proceeding pro se, filed a form complaint on April 23, 2010 alleging one violation of Title VII of the Civil Rights Act of 1964 for the discriminatory termination of his employment based on his race or color against his former employer, Bode Concrete LLC. The parties have consented to the jurisdiction of a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). On April 23, 2010, he filed a motion to proceed in forma pauperis and request for appointment of counsel. The Court granted the request to proceed in forma pauperis but denied the request for appointment of counsel without prejudice on the basis that the record was not sufficiently developed to determine whether this case is an “exceptional case” that warrants appointment of counsel. See Docket No. 8 (May 6, 2010 Order).

On June 3, 2010, Defendant filed a Motion to Dismiss (“the Motion”). Pursuant to Local Rule 7-3(a) and the Court’s June 23, 2010 Clerk’s Notice, Plaintiff’s opposition or statement of non-opposition was due by June 25, 2010. Plaintiff did not file an opposition or a non-opposition. He did, however, file a renewed motion for appointment of counsel on August 9, 2010. That motion is DENIED without prejudice for the same reason the Court denied Plaintiff’s previous request, namely, that a determination as to whether the case is exceptional is premature because the factual

**United States District Court**  
For the Northern District of California

1 record in the case has not yet been developed. A hearing on the Motion to Dismiss was held on  
2 August 13, 2010. Plaintiff appeared at the hearing, as did counsel for Defendant. For the reasons  
3 stated below, the Motion is GRANTED and Plaintiff's complaint is dismissed with leave to amend.

4 **II. BACKGROUND**

5 In his form civil rights complaint, Plaintiff checked boxes indicating that the act complained  
6 of was the termination of his employment based on his race or color. He further alleged that the  
7 discrimination occurred on September 21, 2007. The complaint contained a single factual allegation  
8 in which Plaintiff stated that Defendant "[d]id not follow most of D.O.T. guidelines for drug test  
9 subpart I section 40.193 or subpart B section 40.11." Compl. at 2.

10 In the Motion, Defendant argues that the Court should dismiss the Complaint under Rule  
11 12(b)(6) of the Federal Rules of Civil Procedure because it is wholly conclusory and devoid of any  
12 factual allegations that state a claim that is "plausible on its face." Motion at 3-4 (citing *Bell*  
13 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007); *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949  
14 (2009)). Defendant argues that although the Court must read a pro se complaint liberally, even pro  
15 se plaintiffs must allege sufficient facts to provide fair notice to the defendant as to the nature of the  
16 plaintiff's claims. *Id.* at 5. Defendant concludes that "even in the case of alleged civil rights  
17 violations such as the present matter, vague and conclusory allegations, particularly under the new  
18 pleading standards set forth in *Iqbal* and *Twombly*, require the Court to dismiss the action." *Id.* at 5.

19 **III. ANALYSIS**

20 **A. Legal Standard**

21 **1. Rule 12(b)(6)**

22 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it  
23 fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). To survive a Rule  
24 12(b)(6) motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is  
25 plausible on its face." *Bell Atlantic Corp.*, 550 U.S. at 570. This "facial plausibility" standard  
26 requires the plaintiff to allege facts that add up to "more than a sheer possibility that a defendant has  
27 acted unlawfully." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). The court must assume that the

1 plaintiff's allegations are true and must draw all reasonable inferences in the plaintiff's favor. *Usher*  
2 *v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court is not required to  
3 accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or  
4 unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

5 Pro se complaints are held to "less stringent standards than formal pleadings drafted by  
6 lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Where the petitioner is pro se the court has  
7 an obligation, particularly in civil rights cases, to construe the pleadings liberally and to afford the  
8 petitioner the benefit of any doubt. *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (en  
9 banc). Nonetheless, a pro se plaintiff must allege facts sufficient to allow a reviewing court to  
10 determine that a claim has been stated. *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d 266, 268  
11 (9th Cir. 1982).

## 12 2. Granting Leave to Amend

13 If a court dismisses a complaint under Rule 12(b)(6), it must then decide whether to grant  
14 leave to amend. The Ninth Circuit has "repeatedly held that a district court should grant leave to  
15 amend even if no request to amend the pleading was made, unless it determines that the pleading  
16 could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1130  
17 (9th Cir. 2000) (citations and internal quotation marks omitted). "[D]ismissal of a pro se complaint  
18 without leave to amend is proper only if it is absolutely clear that the deficiencies of the complaint  
19 could not be cured by amendment." *Weilburg v. Shapiro*, 488 F.3d 1202, 1205 (9th Cir. 2007)  
20 (citation omitted).

### 21 B. Application of Legal Standards

22 Title VII makes it unlawful for an employer to "discriminate against any individual with  
23 respect to his compensation, terms, conditions, or privileges of employment, because of such  
24 individual's race . . ." 42 U.S.C. § 2000e-2(a)(1). A person is discriminated against when he or she  
25 is singled out and treated less favorably than others similarly situated on account of race. *Jauregui*  
26 *v. City of Glendale*, 852 F.2d 1128, 1134 (9th Cir. 1988). Here, Plaintiff has alleged only that his  
27 employer did not follow D.O.T. guidelines. This allegation does not support an inference of  
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1 discrimination and does not provide sufficient facts to put Defendant on notice as to the nature of  
2 Plaintiff's claim. Therefore, the Court concludes that Plaintiff's complaint should be dismissed  
3 under Rule 12(b)(6) with leave to amend. *See McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810  
4 (9th Cir. 1988) (“[C]onclusory allegations without more are insufficient to defeat a motion to  
5 dismiss for failure to state a claim.”). Plaintiff, in his amended complaint, should allege specific  
6 facts showing that in terminating Plaintiff, Defendant treated Plaintiff less favorably than other  
7 employees on the basis of his race.

8 **IV. CONCLUSION**

9 Defendant's Motion to Dismiss is GRANTED. Plaintiff will be given an opportunity to  
10 amend his Complaint. Plaintiff's amended complaint shall be filed on or before November 11,  
11 2010.<sup>1</sup> In addition, the Court sets a Case Management Conference for November 12, 2010 at 1:30  
12 p.m.

13 IT IS SO ORDERED.

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15 Dated: August 18, 2010

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19 JOSEPH C. SPERO  
20 United States Magistrate Judge

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25 <sup>1</sup>At the hearing, the Court explained that it would give Plaintiff 90 days to amend his complaint,  
26 in order to allow him time to proceed with his efforts to retain counsel, and stated that the amended  
27 complaint should be filed on November 12, 2010 – the same day as the further case management  
28 conference. On further consideration, the Court Orders that the amended complaint shall be filed by  
November 11, 2010, one day before the case management conference, in order to allow the Defendant  
and the Court to review the amended complaint prior to the case management conference.