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

SARAH STEWART,

Plaintiff,

No. C 11-04438 JSW

v.

SEIU UNITED HEALTHCARE WORKERS-
WEST, et al.,

Defendants.

**ORDER REGARDING
DEFENDANTS' MOTION TO
DISMISS**

Now before the Court is the motion by defendants SEI United Heathcare Worker-West ("UHW") and Rosa Vanegas (collectively, "Defendants") to dismiss Plaintiff Sarah Stewart's first, second, and fifth claims in her first amended complaint ("FAC"). The Court has considered the parties' papers, relevant legal authority, and it finds these matters suitable for disposition without oral argument. *See* N.D. Civ. L.R. 7-1(b). Accordingly, the hearing set for July 27, 2012 is VACATED. The Court denies Defendants' motion to dismiss.

BACKGROUND

Plaintiff was employed by UHW. Vanegas was one of Plaintiff's supervisors at UHW. Plaintiff alleges that she is disabled because she has diabetes and that UHW failed to provide her with reasonable accommodations. She further alleges that UHW retaliated against her and that UHW discriminated against her based on her age. Plaintiff bring claims against UHW under the Americans with Disabilities Act ("ADA"), California's Fair Housing and Employment Act ("FEHA"), and the Age Discrimination in Employment Act ("ADEA").

1 Plaintiff also brings a claim for negligent infliction of emotional distress against Vanegas. The
2 Court shall address specific additional facts in the remainder of this Order.

3 **ANALYSIS**

4 **A. Applicable Legal Standards.**

5 A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) where the
6 pleadings fail to state a claim upon which relief can be granted. The complaint is construed in
7 the light most favorable to the non-moving party and all material allegations in the complaint
8 are taken to be true. *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986). The Court may
9 consider the facts alleged in the complaint, documents attached to the complaint, documents
10 relied upon but not attached to the complaint, when the authenticity of those documents is not
11 questioned, and other matters of which the Court can take judicial notice. *Zucco Partners LLC*
12 *v. Digimarc Corp.*, 552 F.3d 981, 990 (9th Cir. 2009).

13 Federal Rule of Civil Procedure 8(a) requires only “a short and plain statement of the
14 claim showing that the pleader is entitled to relief.” Even under Rule 8(a)’s liberal pleading
15 standard, “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief”
16 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause
17 of action will not do.” *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 555 (2007) (citing
18 *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Pursuant to *Twombly*, a plaintiff must not merely
19 allege conduct that is conceivable but must instead allege “enough facts to state a claim to relief
20 that is plausible on its face.” *Id.* at 570. “A claim has facial plausibility when the plaintiff
21 pleads factual content that allows the court to draw the reasonable inference that the defendant
22 is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing
23 *Twombly*, 550 U.S. at 556). “The plausibility standard is not akin to a probability requirement,
24 but it asks for more than a sheer possibility that a defendant has acted unlawfully. ... When a
25 complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of
26 the line between possibility and plausibility of entitlement to relief.” *Id.* (quoting *Twombly*, 550
27 U.S. at 556-57) (internal quotation marks omitted).

1 **B. Defendants' Motion to Dismiss.**

2 UHW moves to dismiss Plaintiff's claims for failure to accommodate and for retaliation
3 under the ADA and FEHA for failure to state a claim. In the Order dismissing Plaintiff's initial
4 complaint, the Court held that, based on the filing of the Intake Questionnaire on June 19, 2008,
5 all conduct prior to August 24, 2007 was not actionable under the ADA as time-barred and all
6 conduct before June 19, 2007 was time-barred under FEHA. The Court informed Plaintiff that
7 she needed to make clear what conduct, other than her termination, happened during this brief
8 period before she was terminated on August 27, 2007. Specifically, Plaintiff had not alleged
9 that she made any requests for accommodations during this period. Merely alleging continued
10 effects from prior refusals to accommodate was insufficient to state a claim that was not time-
11 barred. Additionally, Plaintiff had not alleged facts that were sufficient to show that she was
12 disabled under the ADA. With respect to her claim for retaliation, the Court found that Plaintiff
13 had not clearly alleged from what protected activity she alleged her termination, or any other
14 timely adverse employment actions, were in retaliation.

15 In her FAC, although Plaintiff still appears to rely heavily on conduct that occurred
16 before the actionable time period, she does allege, albeit barely, sufficient facts to state a claim.
17 Plaintiff alleges that she suffers from "brittle" diabetes and that the stress of working so many
18 hours had a negative impact on the control of her diabetes. (FAC, ¶¶ 8, 14, 18.) Plaintiff
19 alleges that on August 23 and 24, 2007, she requested accommodations in her emails. (*Id.*, ¶
20 35.) Moreover, Plaintiff now alleges that she was terminated in retaliation for a complaint she
21 filed with the EEOC in March 2007. (FAC, ¶ 27.) Accordingly, the Court denies Defendants'
22 motion to dismiss Plaintiff's first and second claims against the UHW.

23 Vanegas moves to dismiss the claim for negligent infliction of emotional distress. In
24 response to Defendant's motion to dismiss her initial complaint, Plaintiff conceded that the only
25 incident in support of her claim for negligent infliction of emotional distress claim against
26 Vanegas which is not time-barred was her allegation that Vanegas falsely testified to an EEOC
27 investigator that Plaintiff's work performance was deficient. The Court dismissed Plaintiff's
28 claim based on her failure to allege that she suffered severe emotional distress. Plaintiff cured

1 this defect in her FAC. Without knowing the specific content of Vanegas's alleged false
2 testimony to the EEOC investigator and what was told to Plaintiff, the Court cannot determine
3 whether Venegas breached any duty owed to Plaintiff and whether Plaintiff may succeed on her
4 claim for negligent infliction of emotional distress. However, the Court cannot find, at this
5 procedural stage, that Plaintiff fails to state a claim for negligent infliction of emotional distress.
6 Accordingly, the Court denies Defendants' motion to dismiss Plaintiff's claim against Vanegas.

7 **CONCLUSION**

8 For the foregoing reasons, the Court DENIES Defendants' motion to dismiss.

9 **IT IS SO ORDERED.**

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11 Dated: July 19, 2012

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14 JEFFREY S. WHITE
15 UNITED STATES DISTRICT JUDGE
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