

United States District Court  
For the Northern District of California

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

DEDRICK RILEY,

No. C-13-4752 MMC

Plaintiff,

**ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS, STAY AND/OR  
STRIKE PLEADINGS; AFFORDING  
PLAINTIFF FURTHER LEAVE TO  
AMEND**

v.

THE CITY OF RICHMOND, et al.,

Defendants.

Before the Court is the "Motion to Dismiss Second Amended Complaint, Stay Proceedings, and/or Strike Pleadings," filed April 17, 2014 by defendants City of Richmond ("the City") and Chief of Police Christopher Magnus ("Chief Magnus"). Plaintiff Dedrick Riley has filed opposition, to which defendants have replied. Having read and considered the papers filed in support of and in opposition to the motion, the Court rules as follows.<sup>1</sup>

**A. Dismissal for Failure to State a Claim**

In their motion, defendants argue that each of the six causes of action in the Second Amended Complaint ("SAC") are subject to dismissal for failure to state a claim.

A dismissal for failure to state a claim can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). Rule 8(a)(2), however, "requires only 'a short and plain statement of the claim showing that the pleader

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<sup>1</sup>By order filed May 21, 2014, the Court took the matter under submission.

1 is entitled to relief.” See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting  
2 Fed. R. Civ. P. 8(a)(2)). Consequently, “a complaint attacked by a Rule 12(b)(6) motion to  
3 dismiss does not need detailed factual allegations.” See id. Nonetheless, “a plaintiff’s  
4 obligation to provide the grounds of his entitlement to relief requires more than labels and  
5 conclusions, and a formulaic recitation of the elements of a cause of action will not do.”  
6 See id. (internal quotation, citation, and alteration omitted).

7 In analyzing a motion to dismiss, a district court must accept as true all material  
8 allegations in the complaint, and construe them in the light most favorable to the  
9 nonmoving party. See NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). “To  
10 survive a motion to dismiss, a complaint must contain sufficient factual material, accepted  
11 as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S.  
12 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). “Factual allegations must be enough  
13 to raise a right to relief above the speculative level[.]” Twombly, 550 U.S. at 555. Courts  
14 “are not bound to accept as true a legal conclusion couched as a factual allegation.” See  
15 Iqbal, 556 U.S. at 678 (internal quotation and citation omitted).

#### 16 **1. First Cause of Action: Discrimination Based on Race in Violation of Title VII**

17 In the First Cause of Action, plaintiff, an African-American employed by the City as a  
18 police officer, alleges that the City, in violation of Title VII, 42 U.S.C. § 2000e et seq.,  
19 “discriminated against [him] in the terms and conditions of his employment” on “the basis of  
20 his race.” (See SAC ¶ 66.)

21 A plaintiff states a prima facie Title VII disparate treatment claim by alleging “the  
22 four factors set forth in McDonnell Douglas [Corp. v. Green], 411 U.S. 792 (1973)] are  
23 present: (1) the plaintiff belongs to a class protected by Title VII[;] (2) the plaintiff applied  
24 and was qualified for a job for which the employer was seeking applicants[;] (3) the plaintiff,  
25 despite being qualified, was rejected[;] and (4) after the plaintiff’s rejection, the position  
26 remained open and the employer continued to seek applications from persons of  
27 comparable qualifications.” See Yartzoff v. Thomas, 809 F.2d 1371, 1374-75 (9th Cir.  
28 1987) (holding a plaintiff “fail[s] to state a claim” under Title VII, where the plaintiff does not

1 allege facts to support a prima facie case).

2 Plaintiff alleges that, in 2011, he was “placed in an administrative duty [position],” to  
3 which he also refers as “desk duty.” (See SAC ¶¶ 43, 44.)<sup>2</sup> Plaintiff further alleges that in  
4 the time period at issue, “from July 28, 2012 to the present” (see SAC ¶ 15), he  
5 unsuccessfully requested reassignment to other positions (see SAC ¶ 54 (identifying four  
6 positions to which plaintiff sought reassignment on August 28, 2012), ¶ 58 (identifying two  
7 positions to which plaintiff sought reassignment in June 2013); ¶ 61 (identifying three  
8 positions to which plaintiff sought reassignment on September 23, 2013)). According to  
9 plaintiff, he could earn an additional “approximately \$90,000” per year if he were  
10 reassigned to one of those positions, and can seek promotions only if he is reassigned.  
11 (See SAC ¶¶ 43, 44.) Plaintiff further alleges that, on one occasion in December 2012, he  
12 unsuccessfully requested an opportunity to work overtime (see SAC ¶ 55) and that, as of  
13 September 23, 2013, he no longer was permitted to earn overtime by performing  
14 “background checks” (see SAC ¶ 51).

15 Assuming the City was seeking applicants for the positions identified by plaintiff and  
16 was seeking to provide employees with the opportunity to work overtime on the occasions  
17 identified by plaintiff,<sup>3</sup> and further assuming plaintiff was qualified for each such position  
18 and overtime opportunity,<sup>4</sup> plaintiff nonetheless fails to state a claim. Specifically, plaintiff  
19 fails to allege that, after his requests were denied, the City continued to accept applications  
20 or requests for those positions and opportunities from persons of comparable  
21 qualifications. Cf. McDonnell Douglas, 411 U.S. at 802 (holding African-American plaintiff

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22  
23 <sup>2</sup>Defendants argue that any discrimination claim based on the 2011 assignment is  
24 barred by the applicable statute of limitations. The Court does not address said argument  
25 herein, as plaintiff has limited the scope of his discrimination claims, as well as his  
retaliation claims, to “claims [that] arose from July 28, 2012 to the present.” (See SAC  
¶ 15.)

26 <sup>3</sup>Plaintiff, without elaboration, refers to some of the positions he requested as being  
27 “open” (see SAC ¶ 54) or “vacant” (see SAC ¶ 61), and alleges that he “attempted to sign  
up” to perform a task for which he would have earned overtime (see SAC ¶ 55).

28 <sup>4</sup>Defendants do not argue that plaintiff has failed to sufficiently allege he was  
qualified for the positions and overtime opportunities he sought.

1 established prima face case of discrimination, where he applied for position for which he  
2 was qualified and defendant continued to seek applications from others after it rejected his  
3 application); Fonseca v. Sysco Food Services, 374 F.3d 840, 843, 847 (9th Cir. 2004)  
4 (holding, for purposes of summary judgment, hispanic plaintiff sufficiently created triable  
5 issue of fact regarding discriminatory failure to receive overtime opportunities, where  
6 plaintiff submitted, inter alia, evidence to show “there were between ten and thirteen times  
7 when [plaintiff’s] supervisor called at least one white employee to work overtime that should  
8 have been assigned to [plaintiff] because he had seniority”).

9 Accordingly, the First Cause of Action is subject to dismissal.

10 **2. Second Cause of Action: Harassment in Violation of Title VII**

11 In the Second Cause of Action, plaintiff alleges harassment in violation of Title VII,  
12 specifically, that he was subjected to “slurs, insults, jokes, or other verbal comments or  
13 intimidation of a racial nature” (see SAC ¶ 73) during the time period “from July 28, 2012 to  
14 the present” (see SAC ¶ 15). Defendants argue plaintiff fails to sufficiently identify any  
15 harassing conduct occurring during the specified time period, and, moreover, that the  
16 legally cognizable time period is shorter than the time period alleged.

17 In that regard, both parties agree that a plaintiff must submit an administrative  
18 charge to the Equal Employment Opportunity Commission (“EEOC”) within 300 days of the  
19 challenged employment practice. (See SAC ¶ 15; Defs.’ Mot. at 6:21-22.) Because “[a]  
20 hostile work environment claim is composed of a series of separate acts that collectively  
21 constitute one unlawful employment practice,” an administrative charge asserting such  
22 claim is timely so long as “an act contributing to the claim occurs within the [300 day] filing  
23 period.” See National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 117 (2002). As  
24 set forth below, the parties disagree as to the date plaintiff exhausted his harassment claim  
25 and thus disagree as to the filing period applicable to plaintiff’s harassment claim.

26 Plaintiff alleges he exhausted his harassment claim in an administrative charge  
27 submitted to the EEOC on May 24, 2013. (See SAC ¶ 15.) If plaintiff is correct, the filing  
28 period began 300 days prior to May 24, 2013, specifically, July 28, 2012, and ended May

1 24, 2013. As defendants point out, however, plaintiff's May 24, 2013 charge neither  
2 expressly refers to harassment nor otherwise alleges any facts suggesting harassment  
3 occurred during the period July 28, 2012 to May 24, 2013. (See Defs.' Req. for Judicial  
4 Notice Ex. H.)<sup>5</sup> Although "incidents of discrimination not included in an EEOC charge" may  
5 be considered in a subsequent civil action where the "new claims are like or reasonably  
6 related to the allegations contained in the EEOC charge," see Sosa v. Hiraoka, 920 F.2d  
7 1451, 1456 (9th Cir. 1990) (internal quotation and citation omitted), the allegations  
8 contained in the May 24, 2013 charge are not like or reasonably related to plaintiff's  
9 harassment claim, as those allegations pertain only to three non-harassing, discrete acts,  
10 specifically: his assignment to an "administrative position" in March 2012, the denial of  
11 "overtime opportunities," and his placement on administrative leave from January 15, 2013  
12 to April 9, 2013 (see Defs.' Req. for Judicial Notice Ex. H).

13 Plaintiff did exhaust his harassment claim in a later administrative charge (see Defs.'  
14 Req. for Judicial Notice Ex. K), which charge plaintiff alleges he submitted to the EEOC on  
15 February 12, 2014 (see SAC ¶ 15). As noted, the claim alleged in the Second Cause of  
16 Action is that plaintiff was subjected to harassment beginning on July 28, 2012 and  
17 continuing to the present. Consequently, the Second Cause of Action is timely only if "an  
18 act contributing to the claim occur[red] within the filing period," see Morgan, 536 U.S. at  
19 117, i.e., the period that began 300 days prior to February 12, 2014, specifically, April 18,  
20 2013.<sup>6</sup> The SAC, however, identifies no such act. Moreover, to the extent the SAC does

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22 <sup>5</sup>Defendants' request, unopposed by plaintiff, that the Court take judicial notice of the  
23 contents of plaintiff's administrative charge is hereby GRANTED. The Court notes,  
24 however, that the charge appears to have been "Received" by the EEOC on June 6, 2013.

25 <sup>6</sup>Plaintiff argues his February 12, 2014 charge, which he denominates an "amended"  
26 charge (see Defs.' Req. for Judicial Notice Ex. K), relates back to May 24, 2013, the date  
27 he submitted his original charge. An amended charge only "relate[s] back," however, when  
28 the newly alleged acts can be deemed "related to or growing out of the subject matter of  
the original charge." See 29 C.F.R. § 1601.12(b). Here, plaintiff's harassment claim does  
not relate back, as the original charge "contain[ed] no hint of" such claim, see Pejic v.  
Hughes Helicopters, Inc., 840 F.2d 667, 670-72, 675 (9th Cir. 1988) (holding amended  
EEOC charge alleging plaintiff was not promoted due to age discrimination did not relate  
back to date of original charge alleging plaintiff was not promoted due to national origin  
discrimination, where original charge "contain[ed] no hint of age discrimination").

1 identify dates on which allegedly harassing conduct occurred, all of those dates are prior to  
2 April 18, 2013 (see SAC ¶¶ 19, 47), and, indeed, all are before July 28, 2012.

3 Accordingly, the Second Cause of Action is subject to dismissal.

### 4 **3. Third Cause of Action: Retaliation in Violation of Title VII**

5 In the Third Cause of Action, plaintiff alleges that “[a]s a result of [his] complaining  
6 about discrimination and harassment on the basis of race and filing two prior lawsuits  
7 regarding such complaints,” defendants violated Title VII by “retaliat[ing]” against him. (See  
8 SAC ¶ 83.)

9 To establish a prima facie case of retaliation under Title VII, the plaintiff must show  
10 “(1) involvement in a protected activity, (2) an adverse employment action and (3) a causal  
11 link between the two.” See Brooks v. City of San Mateo, 229 F.3d 917, 928 (9th Cir. 2000).

12 As set forth above with respect to the First Cause of Action, plaintiff alleges the City  
13 denied his requests for reassignment and for overtime. As noted above, however, plaintiff  
14 fails to allege the City, after denying plaintiff’s requests, continued to seek applications from  
15 others for any such reassignment or overtime. Nor does plaintiff allege any facts to  
16 otherwise support a finding that plaintiff’s requests were handled in a manner different from  
17 that of other employees. “Absent a showing of disparate treatment, [defendant’s actions]  
18 cannot be deemed retaliatory.” See id. at 928-29 (holding plaintiff could not base  
19 retaliation claim on allegation defendant “used all of its allotted 90 days to process  
20 [plaintiff’s] worker’s compensation claim,” where plaintiff failed to show defendant “treated  
21 her differently from other employees seeking worker’s compensation benefits”); cf. Randlett  
22 v. Shalala, 118 F.3d 857, 860, 862 (1st Cir. 1997) (holding plaintiff, who requested  
23 reassignment to different work location in light of personal hardship, could base retaliation  
24 claim on denial of said request, where plaintiff alleged “hardship transfers were routinely  
25 granted to individuals with hardship requests similar to or less serious than [that of the  
26 plaintiff]”); Iwekaogwu v. City of Los Angeles, 75 Cal. App. 4th 803, 810, 815 (2000)  
27 (affirming judgment for plaintiff on retaliation claim, where plaintiff offered evidence to  
28 establish that after he engaged in protected activity, “everyone in the section was approved

1 to do some overtime work except [plaintiff]).

2 Moreover, with respect to the December 2012 denial of plaintiff's request to work  
3 overtime (see SAC ¶ 55) and the June 2013 denial of plaintiff's request for reassignment  
4 (see SAC ¶ 58), plaintiff fails to allege sufficient facts to support a finding that a causal link  
5 exists between said denials and plaintiff's protected activity, given that the latest alleged  
6 protected activity occurring prior to those denials was in March 2012 (see SAC ¶ 53). See  
7 Manatt v. Bank of America, N.A., 339 F.3d 792, 803 (9th Cir. 2003) (holding nine-month  
8 period between protected activity and adverse employment act insufficient to support  
9 inference of causality).

10 Accordingly, the Third Cause of Action is subject to dismissal.

11 **4. Fourth Cause of Action: Discrimination Based on Race (42 U.S.C.A. § 1981)**

12 In the Fourth Cause of Action, plaintiff alleges defendants, in violation of 42 U.S.C.  
13 § 1981, deprived him of his rights under a contract governing his employment, on the basis  
14 of plaintiff's race. (See SAC ¶¶ 89, 96, 97.)

15 Given said claim is predicated on the same facts as those alleged in support of the  
16 First Cause of Action, which alleges discrimination in violation of Title VII, and given that a  
17 § 1981 discrimination claim is analyzed under the same test as is applicable to Title VII  
18 discrimination claims, see Fonseca, 374 F.3d at 850, the Fourth Cause of Action is subject  
19 to dismissal for the reasons stated above with respect to the First Cause of Action.

20 **5. Fifth Cause of Action: Retaliation Based on Race (42 U.S.C.A. § 1981)**

21 In the Fifth Cause of Action, plaintiff alleges defendants, in violation of § 1981,  
22 deprived him of his rights under a contract governing his employment, by retaliating against  
23 him after he complained about racial harassment and discrimination. (See SAC ¶¶ 103,  
24 111.)

25 Given said claim is based on the same facts as those alleged in support of the Third  
26 Cause of Action, which alleges retaliation in violation of Title VII, and given that a § 1981  
27 retaliation claim is analyzed under the same test as is applicable to Title VII retaliation  
28 claims, see Surrell v. California Water Service Co., 518 F.3d 1097, 1107-08 (9th Cir. 2008),

1 the Fifth Cause of Action is subject to dismissal for the reasons stated above with respect  
2 to the Third Cause of Action.

3 **6. Sixth Cause of Action: Deprivation of Rights Under Color of Law**

4 In the Sixth Cause of Action, plaintiff alleges retaliatory and malicious prosecution in  
5 violation of 42 U.S.C. § 1983.

6 In support of this claim, plaintiff alleges that although, on March 7, 2009, he and  
7 Officer Anthony Diaz (“Officer Diaz”) used “force” against an arrestee that was not  
8 “excessive” (see SAC ¶ 38), Chief Magnus “directly solicited the District Attorney’s office to  
9 criminally prosecute [p]laintiff for assault and battery and other charges arising out of the  
10 . . . March 7, 2009 incident” (see SAC ¶ 46), and “exerted pressure on the Deputy District  
11 Attorney to pursue the prosecution as a personal political favor” (see SAC ¶ 124).  
12 According to plaintiff, Chief Magnus did so due to “racial animus” and to retaliate for  
13 plaintiff’s having “[spoken] out about the [d]efendants’ unlawful employment practices.”  
14 (See SAC ¶ 125). Plaintiff further alleges that the District Attorney thereafter “brought the  
15 charges” (see SAC ¶ 46), and that a jury acquitted him (see SAC ¶ 47).

16 Defendants argue plaintiff fails to state a claim because he does not allege sufficient  
17 facts to support a finding that the District Attorney lacked probable cause to bring the  
18 charges. See Hartman v. Moore, 547 U.S. 250, 252 (2006) (holding “want of probable  
19 cause must be alleged” to state claim for retaliatory prosecution); Freeman v. City of Santa  
20 Ana, 68 F.3d 1180, 1189 (9th Cir. 1995) (holding claim of malicious prosecution requires  
21 showing plaintiff was “prosecuted without probable cause”).

22 The SAC includes conclusory allegations that probable cause was lacking,  
23 specifically, that (1) the “Deputy District Attorney assigned to investigate the charges  
24 advised Chief Magnus, prior to the prosecution, that the evidence supporting the charges  
25 against [p]laintiff was either demonstrably false or grossly unreliable” and, “[a]s a result,”  
26 that “the case was lacking in probable cause” (see SAC ¶ 124), and (2) an “Internal Affairs  
27 investigator who[ ] recommended the criminal charges to the District Attorney . . . admitted  
28 to [plaintiff] that he did not see grounds for prosecution” (see SAC ¶ 120).

1           “While legal conclusions,” either by a plaintiff or by others, “can provide the  
2 framework of a complaint, they must be supported by factual allegations,” see Iqbal, 556  
3 U.S. at 679, sufficient to “plausibly suggest an entitlement to relief,” see id. at 681. Here,  
4 as discussed below, the SAC does not include factual allegations sufficient to “nudge[ ] his  
5 claims . . . across the line from conceivable to plausible.” See id. at 680 (internal quotation,  
6 alteration, and citation omitted).

7           First, plaintiff alleges that a “Sgt. Mitch Peixoto [“Sgt. Peixoto”] advised [plaintiff] that  
8 he was asked to lie to the Deputy District Attorney handling the matter and to say that  
9 Officer Diaz had been 30-40 feet away when the altercation with the suspect occurred.”  
10 (See SAC ¶ 121.) Plaintiff fails, however, to allege that Sgt. Peixoto actually made any  
11 such untrue statement to the Deputy District Attorney. Moreover, assuming Sgt. Peixoto  
12 did make such a statement, plaintiff fails to allege facts suggesting how the statement  
13 would be material to a determination as to whether or not plaintiff himself committed an  
14 assault or battery. See Smith v. Almada, 640 F.3d 931, 937-38 (9th Cir. 2011) (holding  
15 plaintiff failed to establish malicious prosecution claim, where assertedly false information  
16 provided by defendant to prosecutor was “not material to the finding of probable cause”); cf.  
17 Galbraith v. County of Santa Clara, 307 F.3d 1119, 1126-27 (9th Cir. 2002) (holding plaintiff  
18 charged with murder stated claim for malicious prosecution, where plaintiff identified false  
19 statements made by defendant coroner in autopsy report, specifically, that decedent had  
20 been strangled rather than committed suicide; noting such statements “play[ed] a material  
21 role” in prosecutor’s decision to file criminal charges against plaintiff).

22           Second, plaintiff, apparently referring to Chief Magnus, alleges that “[d]efendants  
23 . . . promised not to prosecute or severely discipline Officer Diaz in exchange for his proffer  
24 of false testimony to help justify the . . . prosecution of [p]laintiff,” and that Officer Diaz  
25 “complied and proffered the solicited false testimony.” (See SAC ¶ 122.) Plaintiff fails,  
26 however, to set forth the “false testimony” he alleges was given, and, consequently, does  
27 not allege facts to support a finding that such testimony was material to a determination as  
28 to whether plaintiff committed an assault or battery.

1 Third, plaintiff alleges that the “suspect,” i.e., the asserted victim of the assault/  
2 battery, was interviewed by “the District Attorney’s own investigator,” who concluded “the  
3 suspect was lying about [p]laintiff’s use of force.” (See SAC ¶ 123.) Other than by stating  
4 the “suspect” lied “about” the use of force, plaintiff provides no allegation as to the content  
5 of any such false statement, and, consequently, fails to allege facts to support a finding that  
6 whatever the individual said “about” the use of force was material to a determination as to  
7 whether plaintiff committed an assault or battery.

8 Accordingly, the Sixth Cause of Action is subject to dismissal.

### 9 **7. Leave to Amend**

10 In his opposition, plaintiff requests leave to amend in the event the SAC is  
11 dismissed.

12 By order filed March 18, 2014, the Court dismissed the First Amended Complaint for  
13 failure to state a claim, and afforded plaintiff leave to amend to cure the deficiencies  
14 identified by that order. As plaintiff has partially cured those deficiencies, e.g., by  
15 identifying the acts within the relevant time frame on which he bases his racial  
16 discrimination and retaliation claims, and affording plaintiff an opportunity to amend to cure  
17 the deficiencies identified herein does not necessarily appear to be futile, the Court will  
18 afford plaintiff a further opportunity to amend.

### 19 **B. Stay and/or Strike Pleadings**

20 Because each of plaintiff’s six causes of action is subject to dismissal, the Court  
21 does not address herein defendants’ alternative arguments that the instant action should be  
22 stayed in favor of a pending action filed by plaintiff in state court, and that certain portions  
23 of the SAC should be stricken.

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**CONCLUSION**

For the reasons stated above, defendants' motion is hereby GRANTED, and the Second Amended Complaint is hereby DISMISSED, with leave to amend.

Any Third Amended Complaint shall be filed no later than July 3, 2014. In any such Third Amended Complaint, plaintiff may amend to cure the deficiencies noted above but may not add new causes of action or new defendants without first obtaining leave of court.

See Fed. R. Civ. P. 15(a)(2).

**IT IS SO ORDERED.**

Dated: June 16, 2014

  
MAKIME M. CHESNEY  
United States District Judge