

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

3
4 FARID SHAHRIVAR,

No. C 10-01029 CW

5 Plaintiff,

ORDER GRANTING
DEFENDANTS' MOTION
TO DISMISS CERTAIN
CLAIMS AND SETTING
CASE MANAGEMENT
CONFERENCE

6 v.

7 CITY OF SAN JOSE, et al.,

8 Defendants.

9 _____/
10 INTRODUCTION

11 Plaintiff Farid Shahrivar brings claims under federal and
12 state law against Defendants City of San Jose and nineteen
13 individual City employees. Defendants move to dismiss certain
14 claims in Plaintiff's complaint under Federal Rules of Civil
15 Procedure 12(b)(1) and 12(b)(6), arguing, respectively, that the
16 Court lacks subject matter jurisdiction and the claims are
17 untimely.¹ A hearing on the motion was held on March 1, 2012.
18 Having considered oral argument and the papers filed by the
19 parties, the Court GRANTS Defendants' motion to dismiss certain
20 claims, and GRANTS leave to amend some of the dismissed claims.
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23 BACKGROUND

24 Plaintiff describes himself as an "Iranian-American Muslim."
25 He worked for the City as a structural engineer from 2001 to 2009,

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27 ¹ Defendants conclusorily assert that the Court does not have
28 subject matter jurisdiction. This Court has subject matter
jurisdiction because Plaintiff brings various federal claims.

1 when he was terminated. Plaintiff alleges that during the course
2 of his employment with the City he was subjected to discrimination
3 based on his race, national origin, disability and religion. He
4 also claims that City employees retaliated against him for
5 protected activity. Plaintiff alleges that he experienced a
6 series of discriminatory and retaliatory acts, the sum of which he
7 claims created a hostile work environment.
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9 On March 10, 2010, Plaintiff filed the initial complaint in
10 this action. On October 8, 2010, Plaintiff amended his complaint
11 pursuant to a stipulation. On September 28, 2011, Plaintiff's
12 first amended complaint (FAC) was dismissed with leave to amend.
13 On November 28, 2011, Plaintiff filed his second amended complaint
14 (SAC). In his SAC Plaintiff brings thirteen causes of action for:
15 (1) race discrimination in violation of 42 U.S.C. § 1981; (2) race
16 and disability discrimination in violation of 42 U.S.C. § 1983;
17 (3) violation of California Constitution, Article I, §§ 1, 2, and
18 8, and California Civil Code §§ 51, 52 and 52.1; (4) violation of
19 California's Fair Employment and Housing Act (FEHA); (5) violation
20 of California Labor Code § 1102.5; (6) declaratory relief;
21 (7) breach of contract; (8) breach of the implied covenant of good
22 faith and fair dealing; (9) violation of the Fair Labor Standards
23 Act (FLSA); (10) intentional interference with contract;
24 (11) intentional infliction of emotional distress;
25 (12) negligence; and (13) conspiracy.
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LEGAL STANDARD

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2 A complaint must contain a "short and plain statement of the
3 claim showing that the pleader is entitled to relief." Fed. R.
4 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to
5 state a claim, dismissal is appropriate only when the complaint
6 does not give the defendant fair notice of a legally cognizable
7 claim and the grounds on which it rests. Bell Atl. Corp. v.
8 Twombly, 550 U.S. 544, 555 (2007). In considering whether the
9 complaint is sufficient to state a claim, the court will take all
10 material allegations as true and construe them in the light most
11 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d
12 896, 898 (9th Cir. 1986). However, this principle is inapplicable
13 to legal conclusions; "threadbare recitals of the elements of a
14 cause of action, supported by mere conclusory statements," are not
15 taken as true. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009)
16 (citing Twombly, 550 U.S. at 555).

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19 When granting a motion to dismiss, the court is generally
20 required to grant the plaintiff leave to amend, even if no request
21 to amend the pleading was made, unless amendment would be futile.
22 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
23 F.2d 242, 246-47 (9th Cir. 1990). In determining whether
24 amendment would be futile, the court examines whether the
25 complaint could be amended to cure the defect requiring dismissal
26 "without contradicting any of the allegations of [the] original
27 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th
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1 Cir. 1990). But "'where the court has already given a plaintiff
2 one or more opportunities to amend his complaint,'" the court's
3 discretion to deny leave to amend is especially broad.
4 DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 n.3 (9th Cir.
5 1987) (quoting Mir v. Fosburg, 646 F.2d 342, 347 (9th Cir. 1980)).

6 Although the court is generally confined to consideration of
7 the allegations in the pleadings, when the complaint is
8 accompanied by attached documents, such documents are deemed part
9 of the complaint and may be considered in evaluating the merits of
10 a Rule 12(b)(6) motion. Durning v. First Boston Corp., 815 F.2d
11 1265, 1267 (9th Cir. 1987).

12 DISCUSSION

13 I. First and Second Claims--Federal Civil Rights Statutes

14 Plaintiff's first and second claims allege constitutional
15 violations under 42 U.S.C. § 1981 and § 1983, respectively.

16 Defendants argue that the statute of limitations for § 1981 and
17 § 1983 claims is California's two-year personal injury statute of
18 limitations. Thus, Defendants argue that any claims based on
19 events that occurred more than two years prior to the filing of
20 Plaintiff's March 10, 2010 complaint are barred.

21 Title 42 U.S.C. § 1981 provides in relevant part: "All
22 persons within the jurisdiction of the United States shall have
23 the same right in every State and Territory to make and enforce
24 contracts . . . and to the full and equal benefit of all laws and
25 contracts . . . and to the full and equal benefit of all laws and
26 contracts . . . and to the full and equal benefit of all laws and
27 contracts . . . and to the full and equal benefit of all laws and
28 contracts . . . and to the full and equal benefit of all laws and

1 proceedings for the security of persons and property as is enjoyed
2 by white citizens " 42 U.S.C. § 1981.

3 The statute of limitations for § 1981 claims is governed by
4 either California's limitations period of two years for personal
5 injury torts or the four-year catch-all provision of 28 U.S.C.
6 § 1658(a). Maxwell v. City & Cnty. of San Francisco, 2009 WL
7 688857 (N.D. Cal.) aff'd, 379 F. App'x 641 (9th Cir. 2010). The
8 four-year catch-all provision is limited to claims that do not
9 "allege a violation of the pre-1990 version of Section 1981 but
10 [do] allege violations of the amended statute." Jones v. R.R.
11 Donnelley & Sons Co., 541 U.S. 369 (2004).²

13 Here, Plaintiff's multiple § 1981 claims are all based on
14 violations of the post-1990 version of § 1981 because they relate
15 to Defendants' conduct after Plaintiff began his employment with
16 the City. Thus, the four-year catch-all provision of 28 U.S.C.
17 § 1658(a) applies to all of Plaintiff's § 1981 claims, so that
18 they can be based only on events that occurred on or after March
19 10, 2006.

23 ² In 1989, the United States Supreme Court held that the
24 statutory right under § 1981 "to make and enforce contracts" did
25 not protect against harassing conduct that occurred after the
26 formation of an employment contract. Patterson v. McLean Credit
27 Union, 491 U.S. 164 (1989). In 1991, Congress responded to the
28 Supreme Court's ruling in Patterson by amending the Civil Rights
Act to add a new subsection to § 1981 that defines the term "make
and enforce contracts" to include the "termination of contracts,
and the enjoyment of all benefits, privileges, terms, and
conditions of the contractual relationship." 42 U.S.C. § 1981(b).

1 Plaintiff styles his § 1981 claims as: (1) Disparate
2 Treatment--Tangible Adverse Employment Action; (2) Failure to
3 Correct--Tangible Adverse Employment Action; (3) Hostile Work
4 Environment--Harassment; (4) Hostile Work Environment--
5 Retaliation; and (5) Hostile Work Environment--Failure to Correct.

6 Title 42 U.S.C. § 1983 "provides a cause of action for the
7 'deprivation of any rights, privileges, or immunities secured by
8 the Constitution and laws' of the United States." Wilder v.
9 Virginia Hosp. Ass'n, 496 U.S. 498, 508, (1990) (quoting 42 U.S.C.
10 § 1983).

11 The statute of limitations for § 1983 claims borrows
12 California's for personal injury torts. Alameda Books, Inc. v.
13 City of L.A., 631 F.3d 1031, 1041 (9th Cir. 2011) (citing Wallace
14 v. Kato, 549 U.S. 384, 387 (2007)). In California, the
15 limitations period on personal injury claims is two years. Cal.
16 Civ. Proc. Code § 335.1; Alameda Books, Inc., 2011 WL 258089, at
17 *7 n.8. Thus, Plaintiff's § 1983 claims can be based only on
18 events that occurred on or after March 10, 2008.

19 Plaintiff styles his § 1983 claims as: (1) Disparate
20 Treatment--Tangible Adverse Employment Action; (2) Failure to
21 Correct--Tangible Adverse Employment Action; (3) Hostile Work
22 Environment--Harassment; (4) Hostile Work Environment--
23 Retaliation; (5) Hostile Work Environment--Failure to Correct;
24 (6) Denial of Procedural Due Process (Fourteenth Amendment);
25 (7) Denial of Equal Protection (Fourteenth Amendment);
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1 (8) Violation of Right to Free Exercise of Speech and Petition
2 (First Amendment); and (9) Violation of Privacy (Fourteenth
3 Amendment).

4 The Court DISMISSES without leave to amend Plaintiff's
5 §§ 1981 and 1983 claims for "Failure to Correct--Tangible Adverse
6 Employment Action" and "Hostile Work Environment--Failure to
7 Correct" because a failure to correct is not a recognized cause of
8 action under § 1981 or § 1983.
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10 The Court DISMISSES Plaintiff's §§ 1981 and 1983 claims for
11 "Hostile Work Environment--Harassment" because the alleged
12 harassment is unrelated to Plaintiff's protected categories,³ the
13 alleged harassment occurring outside of the limitations period is
14 time-barred and Plaintiff's continuing violation doctrine argument
15 fails. The continuing violation doctrine permits a plaintiff to
16 bring a hostile workplace claim even if some of the conduct that
17 contributed to the hostile environment occurred outside the
18 limitations period, so long as some of the contributing conduct
19 occurred inside the period. Nat'l R.R. Passenger Corp. v. Morgan,
20 536 U.S. 101, 117 (2002). However, the doctrine does not permit a
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23 ³ To establish a prima facie hostile work environment claim,
24 a plaintiff must raise a triable issue of fact as to whether he
25 was subjected to unwelcome verbal or physical conduct because of
26 his protected category. Manatt v. Bank of Am., NA, 339 F.3d 792,
27 798 (9th Cir. 2003) (citing Kang v. U. Lim Am., Inc., 296 F.3d
28 810, 817 (9th Cir. 2002)). Here, Plaintiff alleges a series of
acts taken against him by Defendants, but fails to relate these
acts to his race, national origin, disability, religion or to
retaliation.

1 plaintiff to sue for discrete acts of discrimination or
2 retaliation that occurred outside the limitations period solely
3 because they are related to other discrete acts that occurred
4 inside the limitations period. Id. at 113-14. Here, Plaintiff
5 alleges discrete acts of discrimination and retaliation occurring
6 outside of the limitations period, which are insufficient to
7 implicate the continuing violation doctrine. Plaintiff is granted
8 leave to amend, to cure the noted deficiencies, if he truthfully
9 can do so. For his § 1981 claim, Plaintiff must allege unwelcome
10 verbal or physical conduct based upon his race or in retaliation
11 for protected activity based upon race. For his § 1983 claim,
12 Plaintiff must allege unwelcome verbal or physical conduct based
13 upon his race, national origin, religion or in retaliation for
14 protected activity. Plaintiff may only include conduct that is
15 not time-barred.
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18 The Court DISMISSES Plaintiff's §§ 1981 and 1983 claims for
19 "Hostile Work Environment--Retaliation;" any such claim should be
20 included with his Hostile Work Environment--Harassment claim
21 addressed above.

22 The Court DISMISSES Plaintiff's § 1983 claim for "Violation
23 of Right to Free Exercise of Speech and Petition (1st Amendment)"
24 but grants leave to amend to allege a prima facie case of
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1 retaliation in his amended complaint.⁴ Plaintiff alleges that he
2 engaged in protected activity and that Defendants took adverse
3 action against him, but does not allege the causal connection
4 between these two acts. Furthermore, if Plaintiff chooses to
5 amend these claims, he may only include events that are not time-
6 barred.

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8 The Court DISMISSES Plaintiff's remaining §§ 1981 and 1983
9 claims with leave to amend because the Court is unable to
10 determine which of these claims are time-barred. Plaintiff's
11 complaint often fails to state which specific actions or events
12 are being used to support which claims. In his amended complaint,
13 Plaintiff shall ensure that each of his descriptive paragraphs
14 includes the name or names of each Defendant who participated in
15 the action, the alleged action committed by each Defendant, and
16 the date the alleged action occurred. For each of his causes of
17 action and sub-causes of action, he shall state which Defendant or
18 Defendants are named and which actions described in his
19 descriptive paragraphs constitute that cause of action and sub-
20 cause of action. Plaintiff shall also address whether a
21 disability discrimination claim can be brought under § 1983.
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25 _____
26 ⁴ To establish a prima facie retaliation claim, a plaintiff
27 must show (1) that he engaged in protected activity, (2) that he
28 suffered an adverse employment decision, and (3) that there was a
causal link between the protected activity and the adverse
employment decision. EEOC v. Hacienda Hotel, 881 F.2d 1504, 1513-
14 (9th Cir. 1989).

1 II. Fourth Claim--FEHA

2 Plaintiff's fourth claim alleges violations of California's
3 FEHA. The parties agree that any charges not timely addressed in
4 the June 2009 or February 2010 right-to-sue letters issued to
5 Plaintiff by the Department of Fair Employment and Housing have
6 not been administratively exhausted as FEHA requires. An
7 aggrieved party must file an administrative complaint with the
8 DFEH within "one year from the date upon which the alleged
9 unlawful practice . . . occurred." Cal. Gov't Code § 12960(d).

10 Plaintiff's June 2009 right-to-sue letter was based on his
11 complaint of discrimination due to national origin/ancestry and
12 retaliation submitted on July 1, 2008. Plaintiff's February 2010
13 right-to-sue letter was based on his complaint of discrimination
14 due to race, national origin/ancestry, religion, disability, age
15 and retaliation submitted on February 18, 2010. Thus, Plaintiff
16 may include in the FEHA claim in his amended complaint only
17 actions mentioned in these administrative claims which occurred
18 within a year prior to the dates each was filed.

19 Because Plaintiff failed to provide the Court with a copy of
20 his July 1, 2008 administrative complaint, the Court is unable to
21 determine which alleged actions are barred. Plaintiff must attach
22 to his amended complaint copies of his July 1, 2008 and February
23 18, 2010 administrative complaints, as well as the corresponding
24 right-to-sue letters.

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28 III. Eleventh and Twelfth Claims--State Law

1 A two-year statute of limitations applies to Plaintiff's
2 negligence and intentional infliction of emotional distress (IIED)
3 claims contained in the eleventh and twelfth causes of action,
4 respectively. Cal. Civ. Proc. Code § 335.1. Thus, any negligence
5 or IIED claims based on events that occurred more than two years
6 prior to the filing of Plaintiff's March 10, 2010 complaint are
7 barred and should not be included in support of those causes of
8 action in the amended complaint.
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10 IV. Individual Defendants

11 Defendants seek to dismiss Plaintiff's claims against certain
12 individual Defendants on the grounds that the alleged actions and
13 events on which Plaintiff bases the claims against them all
14 occurred outside the limitations periods. The Court is unable to
15 determine which of Plaintiff's claims are time-barred and
16 consequently whether all individual Defendants are accused of non-
17 time-barred conduct because Plaintiff's complaint often fails to
18 state which actions are being used to support which claims and/or
19 fails to specify which Defendants committed which alleged actions
20 and/or their dates. Plaintiff's amended complaint should make
21 this clear.
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23 CONCLUSION

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25 For the foregoing reasons, the Court GRANTS Defendants'
26 motion to dismiss certain claims, and grants leave to amend some
27 of the causes of action. Plaintiff shall submit an amended
28 complaint with descriptive paragraphs including the name or names

1 of each Defendant who participated in the action, the alleged
2 action committed by each Defendant, and the date the alleged
3 action occurred. For each of his causes of action and sub-causes
4 of action, he shall state which Defendant or Defendants are named
5 and which actions described in his descriptive paragraphs
6 constitute that cause of action and sub-cause of action.
7 Additionally, Plaintiff shall attach to his amended complaint
8 copies of his July 1, 2008 and February 18, 2010 administrative
9 complaints filed with the DFEH, as well as copies of the
10 corresponding right-to-sue letters. If Plaintiff chooses to file
11 an amended complaint, he must do so within seven days from the
12 date of this Order. If he fails to file an amended complaint
13 within this time period, the claims that are dismissed with leave
14 to amend will be dismissed for failure to prosecute and the claims
15 that are not dismissed will proceed. A case management conference
16 is set for Wednesday August 8, 2012 at 2 pm.

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18 IT IS SO ORDERED.

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20 Dated: 6/4/2012

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22 CLAUDIA WILKEN
23 United States District Judge
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