

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

SIMON AGUIRRE,

Plaintiff,

v.

SAN LEANDRO POLICE DEPARTMENT, JASON  
KRITIKOS, ROBERT MCMANUS and PETE  
BALLEW,

Defendants.

No. 10-04364 CW

ORDER GRANTING  
DEFENDANTS' MOTION  
TO DISMISS AND FOR  
A MORE DEFINITE  
STATEMENT AND  
GRANTING LEAVE TO  
AMEND

Defendants City of San Leandro,<sup>1</sup> and Officer John Kritikos,  
Sergeant Robert McManus and Lieutenant Pete Ballew move to dismiss  
Plaintiff's First Amended Complaint (1AC) and, in the alternative,  
move for a more definite statement.<sup>2</sup> Plaintiff Simon Aguirre,  
proceeding pro se, opposes the motion. The motion was taken under  
submission and decided on the papers. Having considered all the  
papers filed by the parties, the Court grants Defendants' motion to  
dismiss and for a more definite statement and grants Plaintiff  
leave to file a second amended complaint.

<sup>1</sup>Defendant City of San Leandro indicates that it is  
incorrectly sued as San Leandro Police Department.

<sup>2</sup>Plaintiff filed a complaint and his 1AC in state court.  
Defendants removed the 1AC.

BACKGROUND

The following facts are taken from the allegations in Plaintiff's 1AC. Defendants McManus and Ballew work for the City of San Leandro Police Department (SLPD). On April 28, 2009, Plaintiff was in the lobby of the SLPD to express concern over the death of his brother, Henry J. Aguirre. Defendant McManus "negligently and carelessly made comments such as 'I will not have some one like you come into my office.'" Comp. at 2. This comment took away Plaintiff's "vital rights such as the right not to be victim of racial discrimination." Id.

An untrained officer had told Plaintiff's family, on the night of Henry Aguirre's death, that it was a possible homicide. But, in a telephone conversation, Sgt. McManus and Lt. Ballew told Plaintiff that his brother's death was a "drug house drug overdose."

On July 20, 2009, Plaintiff was again in the lobby of the SLPD to express his concern and file a complaint against untrained officers. Lt. Ballew, "negligently and carelessly, made comments such as 'I will not allow you to make any more comment/complaints, I will not waist [sic] three weeks of resources, you need to get over it.'" Id. Lt. Ballew's comments took away Plaintiff's "vital rights such as the right not to be deprived of the vote or of free speech." Comp. at 1, 2.

As a proximate result of Defendants' acts, Plaintiff was hurt and injured in his health, strength and activity, which have caused and will continue to cause Plaintiff great mental, physical and nervous pain and suffering. Comp. at 3. As a result of this pain

1 and suffering, Plaintiff has been rendered permanently disabled and  
2 his earning capacity has been greatly impaired.

3 Plaintiff does not specify the claims he asserts. He alludes  
4 to racial discrimination; Title VI of the Civil Rights Act of 1963,  
5 42 U.S.C. § 2000d; the Omnibus Crime Control and Safe Streets Act  
6 of 1968, 42 U.S.C. § 2789d(c); and deprivation of his rights to  
7 free speech and to vote.<sup>3</sup> Defendants characterize Plaintiff's  
8 complaint as asserting an Equal Protection claim under the  
9 Fourteenth Amendment and a freedom of speech claim under the First  
10 Amendment. The Court will address these two claims and possible  
11 claims under Title VI and 42 U.S.C. § 2789d(c).

12 LEGAL STANDARD

13 A complaint must contain a "short and plain statement of the  
14 claim showing that the pleader is entitled to relief." Fed. R.  
15 Civ. P. 8(a). When considering a motion to dismiss under Rule  
16 12(b)(6) for failure to state a claim, dismissal is appropriate  
17 only when the complaint does not give the defendant fair notice of  
18 a legally cognizable claim and the grounds on which it rests.  
19 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In  
20 considering whether the complaint is sufficient to state a claim,  
21 the court will take all material allegations as true and construe  
22 them in the light most favorable to the plaintiff. NL Indus., Inc.  
23 v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, this  
24 principle is inapplicable to legal conclusions; "threadbare  
25 recitals of the elements of a cause of action, supported by mere

26 \_\_\_\_\_  
27 <sup>3</sup>The right to vote is not implicated by the allegations in  
28 this complaint and will not be addressed.

1 conclusory statements," are not taken as true. Ashcroft v. Iqbal,  
2 \_\_\_ U.S. \_\_\_, 129 S. Ct. 1937, 1949-50 (2009) (citing Twombly, 550  
3 U.S. at 555).

4 When granting a motion to dismiss, the court is generally  
5 required to grant the plaintiff leave to amend, even if no request  
6 to amend the pleading was made, unless amendment would be futile.  
7 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911  
8 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment  
9 would be futile, the court examines whether the complaint could be  
10 amended to cure the defect requiring dismissal "without  
11 contradicting any of the allegations of [the] original complaint."  
12 Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).

13 DISCUSSION

14 I. Equal Protection Claim

15 Defendants move to dismiss this claim because Plaintiff's  
16 allegation that Sgt. McManus negligently and carelessly made  
17 comments such as, "I will not have some one like you come into my  
18 office," is insufficient to state a claim under the Fourteenth  
19 Amendment's Equal Protection Clause.

20 Section 1983 "provides a cause of action for the 'deprivation  
21 of any rights, privileges, or immunities secured by the  
22 Constitution and laws' of the United States." Wilder v. Virginia  
23 Hosp. Ass'n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983).  
24 To state a claim under § 1983, a plaintiff must allege two  
25 essential elements: (1) that a right secured by the Constitution  
26 or laws of the United States was violated and (2) that the alleged  
27 violation was committed by a person acting under the color of state

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1 law. West v. Atkins, 487 U.S. 42, 48 (1988).

2 "The Equal Protection Clause of the Fourteenth Amendment  
3 commands that no State shall 'deny to any person within its  
4 jurisdiction the equal protection of the laws,' which is  
5 essentially a direction that all persons similarly situated should  
6 be treated alike." City of Cleburne v. Cleburne Living Center, 473  
7 U.S. 432, 439 (1985). A plaintiff alleging denial of equal  
8 protection in a claim under 42 U.S.C. § 1983 must plead intentional  
9 unlawful discrimination or allege facts that are at least  
10 susceptible of an inference of discriminatory intent. Monteiro v.  
11 Tempe Union High School Dist., 158 F.3d 1022, 1026 (9th Cir. 1998).  
12 Also, the plaintiff must allege that the defendant state actor  
13 acted at least in part because of the plaintiff's membership in a  
14 protected class. Serrano v. Francis, 345 F.3d 1071, 1081-82 (9th  
15 Cir. 2003).

16 In his opposition, Plaintiff argues that he is prepared to  
17 show that McManus and Ballew used racial discrimination,  
18 intimidation and harassment to cover up their mistakes in the  
19 investigation of Henry Aguirre's death, in the hope that Plaintiff  
20 would go away while Henry Aguirre's murderer remained free.  
21 Plaintiff argues that McManus' statement to him, "I will not have  
22 someone like you come into my office," was motivated by the fact  
23 that Plaintiff is Mexican.

24 Although this clarifies that Plaintiff is a member of a  
25 protected class, he has alleged no facts that raise an inference of  
26 discriminatory motive on the part of McManus or Ballew, or an  
27 inference that similarly situated people were treated differently

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1 by them. Accordingly, Plaintiff's equal protection claim is  
2 dismissed. Plaintiff is given leave to amend to cure these  
3 deficiencies, if he can truthfully do so without contradicting the  
4 allegations in his 1AC.

5 II. Title VI of the Civil Rights Act

6 Title VI and the Equal Protection Clause of the Fourteenth  
7 Amendment are coextensive in their protection of individual  
8 liberties. Regents of University of California v. Bakke, 438 U.S.  
9 265, 287 (1977). Title VI provides that:

10 No person in the United States shall, on the ground of  
11 race, color, or national origin, be excluded from  
12 participation in, be denied the benefits of, or be  
subjected to discrimination under any program or activity  
receiving Federal financial assistance.

13 42 U.S.C. § 2000d. To state a claim under Title VI, "a plaintiff  
14 must allege that (1) the entity involved is engaging in racial  
15 discrimination; and (2) the entity involved is receiving federal  
16 financial assistance." Fobbs v. Holy Cross Health Sys. Corp., 29  
17 F.3d 1439, 1447 (9th Cir. 1994). Unlike claims under the Equal  
18 Protection Clause which must plead intentional discrimination,  
19 Title VI claims need only allege that the defendant is engaging in  
20 discrimination, although a showing of intent is necessary at trial.  
21 Monteiro, 158 F.3d at 1026. Because Title VI is directed at  
22 programs that receive federal assistance, there is no right of  
23 action against individual employees or agents of those entities.  
24 Clemes v. Del Norte County Unified Sch. Dist., 1994 WL 317546, \*4-5  
25 (N.D. Cal.); Johnson v. Telew, 2007 WL 414346, \*3 (D. Or.).

26 Therefore, the Title VI claim against individual Defendants is  
27 dismissed with prejudice. Furthermore, the Title VI claim against  
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1 the City of San Leandro is dismissed because Plaintiff has failed  
2 to allege discrimination or that it receives federal financial  
3 assistance. Plaintiff is granted leave to amend the Title VI claim  
4 against the City to correct this deficiency, if he can truthfully  
5 do so.

6 III. Claim Under 42 U.S.C. § 3789d(c)

7 Title 42 section 3789d(c) of the United States Code provides:

8 No person in any State shall on the ground of race,  
9 color, religion, national origin, or sex be excluded from  
10 participation in, be denied the benefits of, or be  
11 subjected to discrimination under or denied employment in  
12 connection with any programs or activity funded in whole  
13 or in part with funds made available under this chapter.

14 Section 3789d concerns discriminatory behavior of law enforcement  
15 agencies that receive funding under the United States Department of  
16 Justice, Office of Justice Programs (OJP). Jones v. Jones, 2004 WL  
17 3214457, \*4 (E.D. Va.). An aggrieved person may bring a civil  
18 action after exhaustion of administrative remedies, which involves  
19 filing an administrative complaint with the OJP or any other  
20 administrative enforcement agency. Sims v. Montgomery County  
21 Comm'n, 873 F. Supp. 585, 608 (M.D. Ala. 1994) (citing 42 U.S.C.  
22 § 3789d(c)(4)(A)).

23 Plaintiff fails to allege that the SLPD receives federal  
24 funding from the OJP or that he has exhausted his administrative  
25 remedies before filing this civil complaint. Therefore, this claim  
26 is dismissed. Plaintiff is granted leave to amend to cure these  
27 deficiencies, if he truthfully can do so.

28 IV. First Amendment Claim

Governmental action intended to chill or retaliate against

1 political expression implicates the First Amendment protection  
2 against abridgement of free speech. Mendocino Environmental Center  
3 v. Mendocino County, 14 F.3d 457, 464 (9th Cir. 1994). In order to  
4 survive a motion to dismiss a First Amendment free speech claim, a  
5 plaintiff must plead that a government official sought to chill  
6 protected speech. Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310,  
7 1314 (9th Cir. 1989). Although individuals "may not recover merely  
8 on the basis of a speculative 'chill' due to generalized and  
9 legitimate law enforcement initiatives," discrete acts by state  
10 agents directed solely at silencing an individual's political  
11 expression may constitute a cognizable claim for violations of  
12 First Amendment rights. Mendocino Environmental Center, 14 F.3d at  
13 464.

14 Defendants argue that the allegation that Lt. Ballew  
15 negligently and carelessly mentioned that Plaintiff could not make  
16 statements about the police investigation of his brother's death is  
17 insufficient to implicate the First Amendment because the focus is  
18 on the police investigation, not on Plaintiff's speech, and, thus,  
19 he is not challenging a restraint of his speech. Plaintiff argues  
20 that Lt. Ballew's statement took away his right to complain about  
21 police procedure. However, he also states that, after Lt. Ballew  
22 made this comment, Plaintiff went home and filled out a written  
23 complaint against him.

24 Plaintiff fails to allege that Lt. Ballew's statements were  
25 directed at silencing Plaintiff's ability to speak about the police  
26 investigation of his brother's death. Therefore, this claim is  
27 dismissed. Plaintiff is granted leave to amend to cure this

1 deficiency, if he truthfully can do so.

2 V. Officer Kritikos

3 Plaintiff fails to include any allegations about Officer  
4 Kritikos in his complaint. Also, in his opposition, Plaintiff does  
5 not mention Officer Kritikos. Therefore, any claims against  
6 Officer Kritikos are dismissed with leave to amend.

7 VI. Motion for More Definite Statement

8 "[T]he proper test in evaluating a motion for a more definite  
9 statement under Rule 12(e) is whether the complaint provides the  
10 defendant with a sufficient basis to frame his responsive  
11 pleadings." Federal Sav. and Loan Ins. Corp. v. Musacchio, 695 F.  
12 Supp. 1053, 1060 (N.D. Cal. 1988). "Motions for a more definite  
13 statement are viewed with disfavor and are rarely granted because  
14 of the minimal pleading requirements of the Federal Rules." Sagan  
15 v. Apple Computer, Inc., 874 F. Supp. 1072, 1077 (C.D. Cal. 1994).  
16 A Rule 12(e) motion may be granted, however, "where the complaint  
17 is so general that ambiguity arises in determining the nature of  
18 the claim or the parties against whom it is being made." Id.

19 Plaintiff's allegations are so general that they create  
20 ambiguity in determining the nature of the claims asserted.  
21 Therefore, the motion for a more definite statement is granted. If  
22 Plaintiff chooses to file an amended complaint, he must follow the  
23 instructions below.

24 CONCLUSION

25 Based on the foregoing, Defendants' motions to dismiss and for  
26 a more definite statement are granted. Docket no. 8. Plaintiff is  
27 granted leave to file an amended complaint to cure the deficiencies

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1 noted above. If Plaintiff chooses to file an amended complaint, he  
2 must list each claim in a separate section and, under each claim,  
3 he must specify which Defendant is being sued and the specific  
4 conduct of each Defendant that violated his rights. Furthermore,  
5 if Plaintiff chooses to file an amended compliant, he must do so  
6 within twenty-one days from the date of this order. If he fails to  
7 file an amended compliant within this time, his case will be  
8 dismissed for failure to prosecute.

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10 IT IS SO ORDERED.

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12 Dated: 2/22/2011

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14 CLAUDIA WILKEN  
15 United States District Judge  
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1 UNITED STATES DISTRICT COURT  
2 FOR THE  
3 NORTHERN DISTRICT OF CALIFORNIA

4 AGUIRRE et al,

5 Plaintiff,

6 v.

7 CITY OF SAN LEANDRO et al,

8 Defendant.

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Case Number: CV10-04364 CW

**CERTIFICATE OF SERVICE**

9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court,  
10 Northern District of California.

11 That on February 22, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said  
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said  
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located  
14 in the Clerk's office.

15 Simon Aguirre  
16 2306 West Avenue 135th  
17 San Leandro, CA 94577

Dated: February 22, 2011

Richard W. Wieking, Clerk  
By: Nikki Riley, Deputy Clerk