

United States District Court
Northern District of California

RUBEN SUMERA,
Plaintiff,
v.
ERIC HOLDER, et al.,
Defendants.

Case No.: 4:13-cv-1950-KAW

ORDER GRANTING MOTION FOR A
MORE DEFINITE STATEMENT;
GRANTING IN PART AND DENYING IN
PART MOTION TO DISMISS

United States District Court
Northern District of California

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Defendant Eric Holder moves to dismiss Plaintiff Ruben Sumera's amended complaint and moves for a more definite statement. The motion has been fully briefed and is suitable for disposition without oral argument pursuant to Civil Local Rule 7-1(b). For the reasons set forth below, the Court GRANTS the motion for a more definite statement. The Court also GRANTS the motion to dismiss with respect to certain issues Plaintiff concedes in his opposition but otherwise DENIES the motion to the extent it seeks dismissal of Plaintiff's amended complaint for failure to state a claim upon which relief can be granted or for failure to exhaust administrative remedies.

I. BACKGROUND

A. Factual background

Ruben Sumera ("Plaintiff") brings this action pursuant to Title VII of the Civil Rights Act, § 42 U.S.C. 2000e-16 ("Title VII") and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621. (Am. Compl., Dkt. No. 25.) According to Plaintiff, he worked as an auditor with the Department of Justice, Office of the Inspector General, San Francisco Division, from April 1998 through his alleged forced resignation in March 2010. (Id. ¶ 7.) He alleges that his supervisors engaged in a series of discriminatory conduct against him because of his race (Filipino), national origin (Philippines), and age (over 40). (Id.) He also avers that this

1 discriminatory and retaliatory conduct resulted from his complaints about unlawful discrimination
2 and his participation in formal proceedings to protect against such unlawful discrimination. (Id.)

3 Plaintiff asserts that he was and is qualified for his position, but that he began
4 experiencing problems at work when his first and second-line supervisors, David Gaschke and
5 Laura Nicolosi, both Caucasian, joined the San Francisco Division.¹ (Id. ¶¶ 7, 8, 10.) According
6 to him, before these individuals became his supervisors, he was "ably performing his job" and
7 "[b]ut for the harassment and actions of the two individuals . . . [he] would have been able to meet
8 standards for successful performance; any perceived performance deficiency was the result of the
9 harassment and adverse employment actions by his employer." (Id. ¶ 16.)

10 Plaintiff contends that on July 31, 2009, Nicolosi placed him on a performance
11 improvement plan after he was late on one audit assignment, and while only a single auditor
12 timely completed assignments during the previous year, no other auditor received a performance
13 improvement plan. (Id.) This plan, Plaintiff claims, was given to him in the middle of his next
14 assignment, disrupting his workload. (Id. ¶ 17.) He responded to the performance improvement
15 plan on August 5, 2009, challenging "certain aspects of and conclusions in [it]." (Id. ¶ 30.) On
16 August 18, 2009, Nicolosi required Plaintiff to submit daily reports instead of weekly reports.
17 (Id. ¶ 31.)

18 He asserts that "[a]s late as 2008, [his] work was satisfying the prerequisite to continued
19 employment." (Id. ¶ 20.) He also avers that on the performance appraisal that preceded the
20 performance improvement plan, he received an overall rating of "successful," from the assistant
21 regional audit manager, with only Nicolosi noting deficiencies in his performance. (Id. ¶ 21.)
22 That performance appraisal covered the period from October 1, 2007 through September 30,
23 2008. (Id.)

24 Plaintiff also alleges that he was assigned to clean the kitchen during his audit, and that for
25 the week he spent on "the humiliating task," he was unable to work on his audit, resulting in
26 another citation for tardiness. (Id.) Plaintiff describes the performance improvement plan and the
27 kitchen cleaning tasks as "discriminatory work assignments," which materially affected the terms

28 ¹ It is unclear when Nicolosi and Gaschke joined the San Francisco Division.

1 and conditions of his employment, depriving him of "the opportunity to do his job on equal
2 footing with similarly situated employees." (Id. ¶ 18.) He claims that auditors who were not
3 members of a protected class received preferential treatment. (Id. ¶ 19.) For example, a
4 Caucasian auditor with the same type of assigned audit report as Plaintiff had two other auditors
5 to assist him, though Plaintiff had no such support. (Id.) Plaintiff consistently complained about
6 this harassment. (Id. ¶ 24.) According to Plaintiff, his supervisors had developed a pattern of
7 singling out minorities and people over the age of 40 for separation beginning in October 29,
8 2009. (Id.)

9 Plaintiff alleges that after constant bullying, harassment, and other acts of discrimination,
10 he filed an informal EEOC complaint on September 11, 2009. (Id. ¶¶ 14, 32.) The complaint
11 included allegations of discrimination based on race, national origin, and age. (Id.) After being
12 contacted by the EEOC, Plaintiff's supervisors responded to the complaint on October 21, 2009.
13 (Id. ¶¶ 33, 34.) Plaintiff then filed a formal complaint on December 14, 2009. (Id. ¶¶ 15, 35.)

14 On February 25, 2010, five months after the filing of his informal complaint and two
15 months after the filing of his formal complaint, he received a notice of proposed removal and an
16 unsatisfactory performance review, both in retaliation for his EEOC complaints. (Id. ¶ 38.)
17 Plaintiff alleges that he responded to the notice of proposed removal on March 5, 2010, after
18 which he was forced to choose early retirement over termination, and "[r]ather than accept a
19 discriminatory and retaliatory termination, [he] submitted his resignation letter on March 24,
20 2010." (Id. ¶¶ 38, 39, 47.) According to Plaintiff, the EEOC "'finally' received [his] original
21 complaint" on January 13, 2010. (Id. ¶ 36.) The EEOC issued an unfavorable decision on
22 December 12, 2012. (Carradero Decl., Ex. A, EEOC Decision.)

23 **B. Procedural background**

24 On April 29, 2013, Plaintiff filed his complaint against Attorney General Eric Holder
25 ("Defendant"),² Gaschke, and Nicolosi, alleging a first cause of action for discrimination in
26 violation of Title VII, a second cause of action for constitutional violations, and a third cause of

27 _____
28 ² Plaintiff has conceded that Attorney General Eric Holder is the only proper defendant in this
case. Pl.'s Opp'n at 2, Dkt. No. 32.

1 action for supervisory liability. (Compl., Dkt. No. 1.) Defendant moved to dismiss the
2 complaint, Dkt. No. 21, and in lieu of filing an opposition to the motion, Plaintiff filed a "Notice
3 of Intent to Amend in Response to Motion to Dismiss," Dkt. No. 24. He filed an amended
4 complaint on March 20, 2014, in which he asserts a first cause of action, captioned "Title VII,"
5 and a third cause of action, captioned "ADEA."³ (Am. Compl, Dkt. No. 25.) On April 3, 2014,
6 Defendant moved to dismiss all causes of action against the Department of Justice, strike all
7 allegations of tortious conduct and/or constitutional violations, strike allegations outside the scope
8 of Plaintiff's EEOC complaint, strike Plaintiff's claims for punitive damages, and strike Plaintiff's
9 claims for damages against individual employees who are not proper parties to this action.⁴
10 (Def.'s Mot. at 1, Dkt. No. 27.) Defendant also seeks dismissal of the first and third causes of
11 action without prejudice, as well as a more definite statement for any remaining claim asserted
12 against him. (Id.)

13 After the Court issued an order to show cause, Plaintiff filed an opposition to the motion
14 on May 9, 2014. (Pl.'s Opp'n, Dkt. No. 32.) In his opposition, Plaintiff concedes that (1) the only
15 proper defendant is the Attorney General, in his official capacity, (2) his prayer for punitive
16 damages should be dismissed, and (3) "the constitutional claims outside the EEOC exhaustion
17 process [Bivens] are not cognizable as to this former federal employee, absent an independent
18 basis for such a claim which on these facts does not appear." (Id. at 2.) He argues, however, that
19 his remaining claims, as exhausted, are viable. (Id.) Defendant filed a reply to Plaintiff's
20 opposition on May 16, 2014. (Def.'s Reply, Dkt. No. 34.)

21 The Court ordered Plaintiff to submit supplemental briefing on whether Plaintiff's
22 allegations go outside the scope of the EEOC charge and whether the amended complaint
23 contains sufficient factual matter to state a claim for relief that is plausible on its face. (May 30,

24 ³ The Court presumes Plaintiff's ADEA claim is erroneously captioned as the third cause of
25 action.

26 ⁴ Because Defendant has not argued that the material it seeks to have stricken is redundant,
27 immaterial, impertinent, or scandalous, see Fed. R. Civ. P. 12(f), the Court treats Defendant's
28 motion to strike as a motion to dismiss, consistent with *Whittlestone, Inc. v. Handi-Craft Co.*, 618
F.3d 970, 974 (9th Cir. 2010) (Rule 12(b)(6), not Rule 12(f), allows a court to dismiss part or all
of a complaint.).

1 2014 Order, Dkt. No. 37.) Plaintiff filed his supplemental brief on June 6, 2014. (Pl.'s
2 Supplemental Br., Dkt. No. 38.)

3 **II. DISCUSSION**

4 **A. Motion for a more definite statement**

5 The Federal Rules of Civil Procedure require that a complaint contain "a short and plain
6 statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule
7 12(e) authorizes a motion for a more definite statement when the pleading at issue is "so vague or
8 ambiguous that the party cannot reasonably prepare a response." Fed. R. Civ. P. 12(e).

9 The Court grants Defendant's motion for a more definite statement on the ground that
10 Plaintiff's amended complaint does not conform to Federal Rule of Civil Procedure 10(b).
11 Plaintiff has failed to plead each cause of action separately, lumping together all Title VII claims,
12 irrespective of whether the claims are based on alleged race, age, or national origin,
13 discrimination, harassment, or retaliation. As such, the amended complaint is so vague and
14 ambiguous that Defendant cannot reasonably prepare a response. Even the Court had a very
15 difficult time deciphering the causes of action in the amended complaint. It is unclear whether
16 each Title VII claim is based on age, race, and national origin, or just race and age.

17 Accordingly, Plaintiff shall file a second amended complaint within 14 days of this order.
18 In his second amended complaint, Plaintiff shall present each distinct Title VII claim separately,
19 consistent with Federal Rule of Civil Procedure 10(b) ("If doing so would promote clarity, each
20 claim founded on a separate transaction or occurrence . . . must be stated in a separate count . . .
21 .").

22 **B. Motion to dismiss**

23 1. Failure to exhaust administrative remedies

24 Defendant argues that Plaintiff cannot assert issues outside the scope of the EEOC charge
25 and may only pursue the allegations and claims that have been administratively exhausted. (Id.)
26 On these grounds, Defendant seeks dismissal, with prejudice, of all allegations and claims not
27 administratively exhausted. (Id. at 13-14.)
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1 In his opposition, Plaintiff concedes that his only viable claims are those he
2 administratively exhausted. (Pl.'s Opp'n at 2.) In his supplemental brief, he asserts that the
3 "allegations in the First Amended Complaint (FAC) do not go outside the scope of the EEOC
4 charge" and adds that: "[t]here were four claims submitted to the EEOC: Discrimination through
5 a hostile work environment based on (1) race (Filipino), (2) national origin (Phillippines) [sic],
6 and (3) age (dob: . . . 1956)[,] and (4) retaliation based on protected activity." (Pl.'s Supp. Br. at
7 2, 9.) This description reflects the issue raised during the administrative proceedings, which, in
8 the EEOC decision, was phrased as follows: "Does the evidence, when considered in the light
9 most favorable to the Complainant, demonstrate that he was discriminated against when subjected
10 to a hostile work environment based upon his race (Filipino), national origin (Phillippines) [sic]
11 and age (dob: . . . 1956) and retaliated against for prior EEO activity when he was issued a Notice
12 of Proposed Removal on February 26, 2010[?]" (Carradero Decl., Ex. A, EEOC Decision at 2.)

13 Filing a charge with the EEOC is a prerequisite to bringing a civil lawsuit on a Title VII or
14 ADEA claim. *Jasch v. Potter*, 302 F.3d 1092, 1094 (9th Cir. 2002); *Santa Maria v. Pacific Bell*,
15 202 F.3d 1170, 1176 (9th Cir. 2000), overruled on other grounds by *Socop-Gonzalez v. INS*, 272
16 F.3d 1176, 1194 (9th Cir. 2001). The jurisdictional scope of a plaintiff's action in district court
17 depends on the scope of the EEOC charge and investigation. *EEOC v. Farmer Bros. Co.*, 31 F.3d
18 891, 899 (9th Cir. 1994). The specific claims made in district court must ordinarily be presented
19 to the EEOC. *Albano v. Schering-Plough Corp.*, 912 F.2d 384, 385 (9th Cir. 1990). The district
20 court, however, has jurisdiction over any charges of discrimination that are like or reasonably
21 related to the allegations made before the EEOC or that could reasonably be expected to grow out
22 of the allegations. *Sosa v. Hiraoka*, 920 F.2d 1451, 1456 (9th Cir. 1990).

23 The EEOC decision squarely addressed Plaintiff's claims that that he was singled-out for
24 scrutiny and micro-managed, even though other auditors were late with their work. (Carradero
25 Decl., Ex. A, EEOC Decision at 10.) It also discussed Plaintiff's claims of harassment, as to
26 which Plaintiff "primarily point[ed] to the matters surrounding Agency efforts to improve his
27 performance as examples of how he has been harassed on account of his age, race, national origin
28 and in reprisal for prior EEO activity." (Id. at 11.)

1 Defendant fails to explain why or how particular allegations in the amended complaint are
2 beyond the scope of the EEOC complaint. (See Def.'s Mot. at 13-14; Def.'s Reply at 3 ("The
3 motion listed paragraphs 9-13, 16, 18, 19, 23-25, 32 and 40-45 as vague and general allegations
4 that appeared to allege claims beyond the specific adverse employment action denied in the
5 administrative proceedings and sought an order of dismissal with prejudice.") On the face of the
6 amended complaint, it appears that all of the claims Plaintiff asserts in the pleading were raised
7 during the administrative proceedings. See Jasch, 302 F.3d at 1095-96 ("In short, if an agency
8 reaches the merits of a claim . . . administrative remedies should be presumed sufficiently
9 exhausted to permit suit in federal court.") (footnote omitted). For this reason, the Court rejects
10 Defendant's argument that certain allegations must be dismissed because they are beyond the
11 scope of the EEOC charge.

12 Therefore, Defendant's motion to dismiss for failure to exhaust administrative remedies is
13 denied.

14 2. Failure to state a claim

15 Defendant also moves to dismiss Plaintiff's amended complaint for failure to state a claim
16 upon which relief can be granted. (Def.'s Mot at 14, 15, 16, 17, 18.) He asserts that Plaintiff
17 makes vague and general allegations of discrimination, harassment, and retaliation without stating
18 sufficient facts or identifying the specific actions giving rise to his claims. (Id. at 14.)

19 In his opposition, Plaintiff offers the following legal argument:

20 Because the complaint should be construed favorably to Plaintiff, the Court
21 should not dismiss the FAC for failure to state a claim unless it appears beyond a
22 doubt that Plaintiff can prove no set of facts in support of his claims. Conley v.
23 Gibson, 355 U.S. 41, 45 (1957); NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th
24 Cir. 1986).

25 It is no secret what this case is about: Alleged discrimination in the work-
26 place [sic], as described in the FAC and the EEOC ruling attached to defense
27 counsel's declaration.

28 However, if the Court finds that the FAC lacks sufficient specificity,
Plaintiff requests that he be granted leave to amend.

(Pl.'s Opp'n at 3-4.)

Despite Plaintiff's contention to the contrary, the Iqbal-Twombly pleading standard
governs a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be

1 granted. Under the current framework, a Rule 12(b)(6) motion tests the legal sufficiency of the
2 claims asserted in the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

3 In considering such a motion, the court must "accept as true all of the factual allegations
4 contained in the complaint," *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (citations
5 omitted), and may dismiss the case or a claim "only where there is no cognizable legal theory" or
6 there is an absence of "sufficient factual matter to state a facially plausible claim to relief."
7 *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (internal
8 citations and quotations omitted).

9 A claim has facial plausibility when a plaintiff "pleads factual content that allows the court
10 to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft*
11 *v. Iqbal*, 556 U.S. 662, 677-78 (2009) (citation omitted). In other words, the facts alleged must
12 demonstrate "more than labels and conclusions, and a formulaic recitation of the elements of a
13 cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations
14 omitted). "Threadbare recitals of the elements of a cause of action" and "conclusory statements"
15 are not adequate. *Iqbal*, 556 U.S. at 678 (citation omitted); see also *Epstein v. Wash. Energy Co.*,
16 83 F.3d 1136, 1140 (9th Cir. 1996) ("[C]onclusory allegations of law and unwarranted inferences
17 are insufficient to defeat a motion to dismiss for failure to state a claim.") (citation omitted). "The
18 plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer
19 possibility that a defendant has acted unlawfully When a complaint pleads facts that are
20 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and
21 plausibility of entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557).

22 Generally, if the court grants a motion to dismiss, it should grant leave to amend even if
23 no request to amend is made "unless it determines that the pleading could not possibly be cured
24 by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (internal
25 quotations and citations omitted).

26 Applying these cases, the Court rejects Plaintiff's argument that the amended complaint
27 should not be dismissed "for failure to state a claim unless it appears beyond a doubt that Plaintiff
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1 can prove no set of facts in support of his claims."⁵ (Pl.'s Opp'n at 3-4 (citations omitted).) The
2 Court, however, concludes that under the Iqbal-Twombly standard, the factual allegations in
3 amended complaint are sufficient to survive Defendant's motion to dismiss.

4 a. Discrimination under Title VII

5 In order to state a claim for discrimination under Title VII, a plaintiff must show that (1)
6 he belongs to a protected class (40 years of age or older, a person with a disability, a person of a
7 minority race), (2) he was qualified for the position, (3) he was subject to an adverse employment
8 action, and (4) similarly situated individuals outside his protected class were treated more
9 favorably. *Leong v. Potter*, 347 F.3d 1117, 1124 (9th Cir. 2003). A similarly situated person is
10 one whose employment situation is similar to Plaintiff's in all material respects. *Morgan v. Selig*,
11 447 F.3d 748, 755 (9th Cir. 2006).

12 Defendant argues that Plaintiff has failed to allege sufficient facts in support of his
13 discrimination claim. (Def.'s Mot. at 15.) More specifically, Defendant asserts that Plaintiff has
14 not alleged sufficient facts with respect to (a) his qualifications for any position during the
15 relevant time period, (b) any adverse employment action taken against him because of his status
16 as a member of a protected class, or (c) particulars of any purportedly similarly situated
17 individuals outside of his protected class being treated more favorably. (Id.)

18 Plaintiff argues that all elements for his discrimination claims are met in this case. (Pl.'s
19 Supplemental Br. at 8.) While the bulk of the allegations in the amended complaint are vague,
20 conclusory, and at times, identical to paragraphs appearing in other parts of the pleading, Plaintiff
21 has stated a claim for discrimination that is plausible on its face.

22 With respect to his qualifications, Plaintiff alleges that "[h]e is and was qualified for the
23 position of federal auditor," that he "was ably performing his job as auditor at GS-13, that he was

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25 ⁵ On this point, the United States Supreme Court in *Twombly* has stated the following: "The 'no
26 set of facts' language has been questioned, criticized, and explained away long enough by courts
27 and commentators, and is best forgotten as an incomplete, negative gloss on an accepted pleading
28 standard: once a claim has been stated adequately, it may be supported by showing any set of
facts consistent with the allegations in the complaint. Conley described the breadth of opportunity
to prove what an adequate complaint claims, not the minimum standard of adequate pleading to
govern a complaint's survival." *Twombly*, 550 U.S. at 562.

1 "recognized as having done the job without problem until David Gaschke and Laura Nicolosi
2 became his supervisors," and that on his performance appraisal for the October 2007-September
3 2008 evaluation period, he received a successful rating. (Am. Compl. ¶¶ 16, 48, 53.) These
4 allegations sufficiently address Plaintiff's qualifications for his position.

5 On the issue of adverse employment action, Plaintiff alleges that "any perceived
6 performance deficiency was the result of the harassment and adverse employment actions by his
7 employer," id. ¶ 16, that he was placed on a performance improvement plan for being late on one
8 audit assignment though no other auditor had been placed in such a plan despite the fact that only
9 one auditor had completed audits on time, id. ¶ 17, and that he was assigned to clean the kitchen,
10 id. He also alleges that "[w]ith the discriminatory work assignments, Sumera's terms and
11 conditions of employment were materially affected. Sumera was not given the opportunity to do
12 his job on equal footing with similarly situated employees because Sumera's terms and conditions
13 of employment were materially affected by supervisors' discriminatory and/or retaliatory
14 conduct." (Id. ¶ 18.) The specific actions referenced in these allegations are the kitchen cleaning
15 assignment and the performance improvement plan, and at the pleading stage, they suffice as
16 potential instances of adverse employment actions based on Plaintiff's protected status, as
17 illustrated by the allegations discussed immediately below.⁶

18 As to purportedly similarly situated individuals, Plaintiff alleges that "[n]on white-/older
19 employees were subjected to harsher discipline than accorded white and younger individuals for
20 the same or comparable alleged misconduct or performance related issues," that "[o]lder or non-
21 white employees were subjected to pressure and coercion to abandon employment with the OIG,"
22 and that "[a]uditors not members of protected minority classes received preferential treatment."
23 (Id. ¶¶ 12, 13, 19.) Plaintiff then goes on to allege that "[o]ther, late auditors did not undergo a
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25 ⁶ In the amended complaint, Plaintiff also alleges that "Nicolosi required Sumera to submit daily
26 reports instead of weekly reports," however, it appears Plaintiff identifies this conduct as a basis
27 for his harassment claim, not his discrimination claim. See Am. Compl. ¶ 24 ("This harassment,
28 of which there is ample evidence—from daily reports required of Sumera, to the kitchen cleaning,
to being singled out for the PIP—forms the means by which in part a hostile work environment
interfered with the enjoyment of all benefits and conditions of the contractual relationship of
employment and is therefore actionable.").

1 PIP were not over 40, and were not members of a protected class." (Id. ¶ 23.) Plaintiff further
2 alleges specific examples of purported preferential treatment, including being singled out for a
3 performance improvement plan for being late on an audit when only a single auditor had been on
4 time during the previous year and not being offered the type of audit support that "a Caucasian
5 auditor doing the same work" received. (Id. ¶ 23.) These allegations adequately illustrate how
6 similarly situated individuals, performing similar work as Plaintiff, but different only in terms of
7 race or age, were treated more favorably than Plaintiff.

8 For these reasons, the allegations in Plaintiff's amended complaint are sufficient to state a
9 claim for discrimination that is plausible on its face. Defendant's motion to dismiss this claim is,
10 therefore, denied.

11 b. Harassment under Title VII

12 In order to state a claim for hostile work environment under Title VII, a plaintiff must
13 establish that (1) he was subjected to verbal or physical conduct a based on race or national
14 origin, (2) the conduct was unwelcome, and (3) the conduct was sufficiently severe or pervasive
15 to alter the conditions of employment and create an abusive work environment. *Vasquez v. Cnty.*
16 *of Los Angeles*, 349 F.3d 634 (9th Cir. 2003).

17 Defendant correctly asserts that the only specific acts of purported harassment Plaintiff
18 alleges in his amended complaint are the required daily reports, cleaning the kitchen, and being
19 placed on a performance improvement plan. (See Def.'s Mot. at 16.) The Court, however,
20 disagrees with Defendant's argument that these few instances of specific conduct are
21 unaccompanied by allegations that they were based on race, national origin, or age, as discussed
22 *supra* Part II.B.2.a.

23 Moreover, Plaintiff also alleges that "[w]ith the discriminatory work assignments,
24 Sumera's terms and conditions of employment were materially affected," Am. Compl. ¶ 18, and
25 that he "consistently complained about the harassment he received on the job . . . [which] forms
26 the means by which in part a hostile work environment interfered with the enjoyment of all
27 benefits and conditions of the contractual relationship of employment," *id.* ¶ 24. These
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1 allegations, when viewed in conjunction with the other allegations in the amended complaint,
2 state a plausible claim for harassment.

3 Accordingly, Defendant's motion to dismiss Plaintiff's harassment claim is denied.

4 c. Retaliation under Title VII

5 Section 2000e-3(a) makes it unlawful for an employer "to discriminate against any of [its]
6 employees . . . because [the employee] has opposed any practice made an unlawful employment
7 practice" by Title VII, or because he/she has made a charge, testified, assisted or participated in
8 any manner in an investigation, proceeding, or hearing under Title VII. To assert a claim of
9 retaliation claim under § 2000e-3, a plaintiff must demonstrate that: (1) he was engaging in
10 protected activity, (2) he suffered an adverse employment decision, and (3) there was a causal link
11 between his activity and the adverse employment decision. *Ray v. Henderson*, 217 F.3d 1234,
12 1240 (9th Cir. 2000).

13 As to the first element, an employee's formal or informal complaint regarding unlawful
14 employment practices is a "protected activity" under Title VII, and a plaintiff need only show that
15 his belief that an unlawful employment practice occurred was "reasonable." *Passantino v.*
16 *Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 506 (9th Cir. 2000). With respect to
17 the second element, a challenged action must be "materially adverse," which means that it would
18 dissuade a reasonable worker from exercising protected rights. *Burlington N. & Santa Fe Ry. Co.*
19 *v. White*, 548 U.S. 53, 68 (2006). As to the third element, a plaintiff may establish a causal link
20 between the protected activity and the adverse action by circumstantial evidence, including the
21 employer's knowledge of the protected activity and a proximity in time between the protected
22 action and the adverse employment act. *Jordan v. Clark*, 847 F.2d 1368, 1376 (9th Cir. 1988).

23 Defendant argues that "Plaintiff fails to specify the adverse employment action(s) that he
24 claims were taken in retaliation for protected activity, or the causal link between a specified
25 adverse employment action and a specified protective activity." (Def.'s Mot. at 18-19.) To the
26 extent Plaintiff claims he received a notice of proposed removal in retaliation for his informal and
27 formal EEOC complaints, the Court rejects Defendant's argument that Plaintiff has failed to
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1 identify adverse employment actions.⁷ Defendant's additional argument that Plaintiff has failed to
2 identify the causal link between the notice of proposed removal and either EEOC complaint also
3 lacks merit. On this point, Plaintiff alleges that "the EEO e-mailed Sumera's allegations to
4 management. Management, Gaschke and Nicolosi, e-mailed their response to the EEO on
5 October 21, 2009." (Am. Compl. ¶ 34.) He also alleges that he received the notice of proposed
6 removal only five months after his initial EEOC complaint and two months after his formal
7 complaint. (Id. ¶ 15.) These allegations are sufficient to state a claim for retaliation.

8 Therefore, Defendant's motion to dismiss is denied as to Plaintiff's retaliation claim.

9 d. Age discrimination

10 The ADEA provides that all personnel decisions affecting federal employees who are at
11 least 40 years of age shall be made free from discrimination based on age. *Gross v. FBL Fin.*
12 *Servs., Inc.*, 557 U.S. 167, 176 (2009). To state a claim for age discrimination under the ADEA, a
13 plaintiff must establish that (1) he was at least forty years old, (2) performing his job
14 satisfactorily, (3) discharged, and (4) either replaced by substantially younger employees with
15 equal or inferior qualifications or discharged under circumstances giving rise to an inference of
16 age discrimination." *Diaz v. Eagle Produce, Ltd. P'ship*, 521 F.3d 1201, 1207 (9th Cir. 2008).

17 As discussed supra Part II.B.2.a, Plaintiff alleges that he was ably performing his job but
18 placed on a performance improvement plan, assigned to clean and the kitchen, and was not given
19 the type of audit support provided to other employees who were not members of a protected class.
20 (See Compl. ¶¶ 16, 17, 19, 51.) He specifically alleges that "[o]ther, late auditors did not undergo
21 a PIP were not over 40, and were not members of a protected class." (Id. ¶ 23.) Plaintiff also
22 alleges that "[n]on-white and/or older employees were singled out for disparate treatment,
23 harassment, termination or forced retirement" and that he was "forced to choose early retirement
24 over termination." (Id. ¶¶ 10, 39.)

25 _____
26 ⁷ If, however, Plaintiff believes he has any other basis for his retaliation claim, such as the
27 unsatisfactory performance review referenced in paragraph 38 of the amended complaint, he shall
28 clearly identify that separate basis in the appropriate section in his second amended complaint.
With such level of specificity, the second amended complaint need not contain allegations such as
"[e]very time Sumera engaged in protected activity, his employer retaliated" see Am. Compl. ¶
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Plaintiff shall file a second amended complaint within 14 days of this order. If Plaintiff fails to file a second amended complaint within 14 days of this order, the Court may dismiss this action with prejudice. The Court reminds Plaintiff that continued failures to comply with filing deadlines will not be tolerated.

IT IS SO ORDERED.

Dated: July 3, 2014


KANDIS A. WESTMORE
United States Magistrate Judge