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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

OLUCHI NNACHI,  
Plaintiff,

v.

CITY AND COUNTY OF SAN  
FRANCISCO,  
Defendant.

Case No. 13-cv-05582-KAW

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTION TO  
DISMISS**

Re: Dkt. No. 69

The City and County of San Francisco (the "City") moves to dismiss Oluchi Nnachi's ("Plaintiff") fifth amended complaint.<sup>1</sup> The motion is fully briefed and is suitable for disposition without hearing pursuant to Civil Local Rule 7-1(b.) The hearing currently set for November 5, 2015 is, therefore, VACATED. Having considered the papers filed by the parties and the relevant legal authority, the motion is GRANTED IN PART and DENIED IN PART, for the reasons set forth below.

The Court has previously set out the factual and procedural background of this case in its earlier orders and will not repeat that here. The fifth amended complaint, now the operative one, repeats allegations nearly identical to those included in the prior versions of Plaintiff's complaint. (5th Am. Compl. ("FAC"), Dkt. No. 68.) It contains two separately captioned causes of action—one for violation of the Fair Labor Standards Act's anti-retaliation provision, 29 U.S.C. § 215(a)(3), and a second for violations of Title VII. (FAC ¶¶ F, G.)

The first cause of action alleging violation of the FLSA's anti-retaliation provision fails for the reasons previously set out in the order issued on April 16, 2015. (See Apr. 16, 2015 Order at

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<sup>1</sup> In the alternative, the City moves for a more definite statement. As discussed below, the only plausible claim for relief is for failure to pay overtime when due. This moots the need for a more definite statement.

1 6, 7 (explaining pleading deficiencies.) As Plaintiff has not remedied the pleading deficiencies  
2 discussed in that order, the first cause of action is DISMISSED WITHOUT LEAVE TO AMEND.

3 The second cause of action alleging violations of Title VII also fails. Throughout this case,  
4 the Court has repeatedly cautioned Plaintiff that the failure to include all of his causes of action in  
5 an amended complaint constitutes a waiver of any omitted claim. (See, e.g., May 15, 2015 Order  
6 at 2; Aug. 19, 2014 Order at 11; Apr. 16, 2015 Order at 11; Jan. 5, 2015 Order at 11.) Despite  
7 these warnings, Plaintiff omitted his Title VII claim, based on both alleged retaliation and race  
8 discrimination, from his fourth amended complaint and sought to reintroduce it in his fifth  
9 amended complaint. (See 4th Am. Compl., Dkt. No. 55.) Plaintiff's failure to include his Title VII  
10 claim in his fourth amended complaint constituted a waiver of that claim, and he may not now  
11 reassert it. See Westley v. Oclaro, No. C-11-2448 EMC, 2013 WL 2384244, at \*11 (N.D. Cal.  
12 May 30, 2013) (dismissing claims with prejudice against defendant who was named in the  
13 plaintiff's original complaint but not named in any subsequent versions). Accordingly, Plaintiff's  
14 Title VII claim is dismissed WITHOUT LEAVE TO AMEND.

15 Plaintiff's fifth amended complaint, however, is not devoid of any plausible claim for  
16 relief. Plaintiff alleges that he worked a total of 13 overtime hours during the second week of  
17 October 2012 and the second week of February 2013, that his overtime rate was \$50 per hour, and  
18 that he was not paid the \$650 in overtime pay until "after 1 year and only upon filing lawsuit [sic]  
19 against the defendant." (FAC ¶ B.) These allegations, when liberally construed and taken as true,  
20 state a plausible claim for failure to pay overtime in violation of the FLSA. See 29 U.S.C. §§ 207,  
21 216; 29 C.F.R. § 778.106 ("The general rule is that overtime compensation earned in a particular  
22 workweek must be paid on the regular pay day for the period in which such workweek ends.").  
23 To this extent, the City's motion to dismiss is DENIED. The City shall file an answer to the fifth  
24 amended complaint within 14 days of this order.

25 **IT IS SO ORDERED.**

26 Dated: 10/16/2015

27   
28 KANDIS A. WESTMORE  
United States Magistrate Judge