

United States District Court  
For the Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**\*E-FILED 7/14/2009\***

NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

PIOTR J. GARDIAS,

No. C08-05498 HRL

Plaintiff,

**ORDER GRANTING DEFENDANT’S  
MOTION TO DISMISS**

v.

THE CALIFORNIA STATE UNIVERSITY,  
SAN JOSE STATE UNIVERSITY,

**[Re: Docket No. 22]**

Defendant.

\_\_\_\_\_ /

Pro se plaintiff Piotr Gardias is a longtime employee of the California State University system at the San Jose State University campus. He filed the instant lawsuit under Title VII, 42 U.S.C. § 2000e-5 for alleged employment discrimination – his seventh in a series of discrimination complaints before the undersigned. In his original complaint in this action, Gardias alleged that he was not promoted, was denied training, was harassed and suffered adverse actions because of his age and national origin and on account of his knee injury and leukemia.

On March 10, 2009, this court dismissed his complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim for relief.<sup>1</sup> Gardias’ age discrimination claim was dismissed without leave to amend because it is barred by Eleventh Amendment immunity. As for the remainder of plaintiff’s allegations, the court concluded that the complaint failed to provide

\_\_\_\_\_

<sup>1</sup> Pursuant to 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73, all parties have expressly consented that all proceedings in this matter may be heard and finally adjudicated by the undersigned.

1 sufficient notice as to the events or conduct that formed the basis for his claims, but nonetheless  
2 gave Gardias leave to amend. Plaintiff’s First Amended Complaint (“FAC”) was filed soon  
3 after.

4 Pursuant to Fed. R. Civ. P. 12(b)(1), defendant Regents of the California State  
5 University<sup>2</sup> now move to dismiss the FAC for lack of subject matter jurisdiction. Alternatively,  
6 it moves to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) on the ground that the FAC still fails to  
7 state a claim for relief. Gardias opposes the motion on the sole ground that defendant “should  
8 [have] complain[ed] before the Court Order dated March 10, 2009 but not after the Court  
9 Order.” (See Opp. at 1). Plaintiff did not appear for oral argument on the matter. Upon  
10 consideration of the moving and responding papers, this court grants the motion without leave  
11 to amend.

12 “If the court determines at any time that it lacks subject-matter jurisdiction, the court  
13 must dismiss the action.” FED. R. CIV. P. 12(h)(3). A lack of jurisdiction is presumed unless  
14 the party asserting jurisdiction establishes that it exists. See Kokkonen v. Guardian Life Ins.  
15 Co. of America, 511 U.S. 375, 377 (1994) (“It is to be presumed that a cause lies outside [a  
16 federal court’s] limited jurisdiction and the burden of establishing the contrary rests upon the  
17 party asserting jurisdiction”) (citations omitted); see also Stock West, Inc. v. Confederated  
18 Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989) (“A federal court is presumed to lack jurisdiction in  
19 a particular case unless the contrary affirmatively appears”).

20 “A jurisdictional challenge under [Fed. R. Civ. P. 12(b)(1)] may be made either on the  
21 face of the pleadings or by presenting extrinsic evidence.” Warren v. Fox Family Worldwide,  
22 Inc., 328 F.3d 1136, 1139 (9th Cir. 2003) (citing White v. Lee, 227 F.3d 1214, 1242 (9th Cir.  
23 2000)). Where a moving party raises a factual challenge by presenting affidavits and other  
24 evidence, the party opposing the motion must present affidavits or other evidence necessary to  
25 satisfy its burden of establishing subject matter jurisdiction. Wolfe v. Strankman, 392 F.3d 358,  
26

27  
28 <sup>2</sup> Defendant says that it was erroneously sued as The California State  
University and San Jose State University.

1 362 (9th Cir. 2004) (quoting Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir.  
2 2004)).

3 In the instant case, defendant argues that the FAC must be dismissed because plaintiff  
4 failed to exhaust his administrative remedies. “Subject matter jurisdiction extends over all  
5 allegations of discrimination that either fell within the scope of the EEOC’s *actual* investigation  
6 or an EEOC investigation which *can reasonably be expected* to grow out of the charge of  
7 discrimination.” Josephs v. Pacific Bell, 443 F.3d 1050, 1062 (9th Cir. 2006) (quoting B.K.B.  
8 v. Maui Police Dep’t, 276 F.2d 1091, 1100 (9th Cir. 2002) (internal quotation marks omitted).  
9 Here, the FAC again alleges that Gardias was not promoted, was harassed, was denied training,  
10 and suffered adverse actions. Although plaintiff’s age discrimination claim previously was  
11 dismissed without leave to amend, Gardias continues to assert that the alleged conduct was  
12 discriminatory with respect to his age, as well as his national origin, and – suggesting a  
13 disability claim – his knee injury and leukemia. (FAC at 2). The alleged misconduct reportedly  
14 occurred between January 1, 2008 and November 30, 2008. (Id.). The FAC goes on to describe  
15 (a) Gardias’ alleged near-fainting episode in June 2008; (b) an August 2008 incident in which  
16 plaintiff says he was accused of having serious health problems; (c) defendant’s alleged failure  
17 to promote him and alleged denial of training; and (d) instances when Adam Bayer allegedly  
18 created a hostile work environment by calling plaintiff’s supervisors “stupid,” “telling  
19 plaintiff[’s] colleague Leroy ‘you think too much,’” telling Gardias that he could not use a radio  
20 to call a colleague, and “giving plaintiff wrong information in work orders.” (Id. at 4).

21 In support of this motion, defendant has submitted a copy of the EEOC charge identified  
22 in the FAC. However, there is no mention whatsoever of the FAC’s veritable potpourri of  
23 allegations. That charge alleges only that between December 19, 2006 and November 27, 2007  
24 Gardias was wrongly denied use of an electric cart in retaliation for his prior employment  
25 complaints. (See Cain-Simon Declaration and attached exhibit). Plaintiff checked only the box  
26 for “retaliation,” not the boxes for discrimination based on “national origin,” “disability,” or  
27 “age” (and, as noted above, any claim for age discrimination would be barred here). Nor did he  
28 allege in the body of the charge any facts referencing or even suggesting discrimination on such

1 grounds. In sum, comparing the EEOC charge with the FAC, the court sees different kinds of  
2 discrimination, occurring over different time periods and involving completely different specific  
3 events. Under these circumstances, the court concludes that plaintiff has not exhausted his  
4 administrative remedies as to the allegations contained in his FAC. Although the Ninth Circuit  
5 recognizes an equitable exception to the exhaustion requirement when an EEOC representative  
6 misleads a plaintiff about his claim, see Josephs, 443 F.3d at 1061, there is nothing before the  
7 court to suggest anything of the kind here.

8 Accordingly, defendant's motion to dismiss is GRANTED, and the FAC will be  
9 dismissed without prejudice.<sup>3</sup> The clerk shall enter judgment of dismissal and close the file.

10 SO ORDERED.

11 Dated: July 14, 2009

  
\_\_\_\_\_  
HOWARD R. LOTTE  
UNITED STATES MAGISTRATE JUDGE

12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

---

<sup>3</sup> The court does not reach defendant's alternative arguments for dismissal under Fed. R. Civ. P. 12(b)(6).

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**5:08-cv-5498 Notice electronically mailed to:**

Mary Susan Cain-Simon Mary.CainSimon@doj.ca.gov, Leticia.MartinezCarter@doj.ca.gov

**Counsel are responsible for distributing copies of this document to co-counsel who have not registered for e-filing under the court's CM/ECF program.**

**5:08-cv-5498 Notice mailed to:**

Piotr J. Gardias  
72 Floyd St.  
San Jose, CA 95110