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28***E-FILED 08-18-2010***

NOT FOR CITATION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

PIOTR J. GARDIAS,

No. C09-05611 HRL

Plaintiff,

ORDER (1) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS; (2) DENYING PLAINTIFF'S MOTIONS FOR LEAVE TO AMEND; (3) SETTING INITIAL CASE MANAGEMENT CONFERENCE

v.

THE CALIFORNIA STATE UNIVERSITY;
 THE SAN JOSE STATE UNIVERSITY;
 MARY CAIN-SIMON,

[Re: Docket Nos. 12, 16, 18]

Defendant.

Since 1989, pro se plaintiff Piotr Gardias has been employed by the California State University system at the San Jose State University campus. In this, the tenth in a series of Gardias' employment discrimination lawsuits,¹ he claims that defendant discriminated against him on the basis of his Caucasian race, his color, his Polish national origin, and an alleged disability. After filing the instant lawsuit, Gardias amended his complaint, as a matter of course, pursuant to Fed. R. Civ. P. 15(a)(1).

¹ The total number of employment actions Gardias has filed against the University is unknown, but the undersigned has (or had) ten of them. The first five suits (Case Nos. C04-04086, C04-04768, C05-01242, C05-01833 and C06-04695), which this court consolidated, alleged discriminating actions spanning, generally, the time period 2001 to 2006. The court ultimately granted summary judgment in favor of defendant. The court also granted summary judgment for defendant in the sixth lawsuit, C07-06242. The seventh action, C08-05498, covering January 2008 to November 2008, resulted in a judgment of dismissal for defendant. Summary judgment was granted in defendant's favor in the eighth lawsuit, C09-02090. A motion to dismiss has been filed in the ninth (C09-05291) action, which remains pending.

1 Defendants Regents of the California State University (University) and Mary Cain-
2 Simon now move to dismiss the First Amended Complaint. Plaintiff opposes the motion. Upon
3 consideration of the moving and responding papers, as well as the arguments presented at the
4 motion hearing, this court grants the motion in part and denies it in part.

5 DISCUSSION

6 A. Lack of Subject Matter Jurisdiction (Fed. R. Civ. P. 12(b)(1)

7 In their opening brief, defendants stated that they were moving to dismiss on the ground
8 that the allegations of the complaint went beyond those asserted in Gardias' administrative
9 charge. This assertion is not supported by the record, and defendants appear to have dropped
10 this argument in their reply brief. Accordingly, this portion of defendants' motion is denied.

11 B. Failure to State a Claim for Relief (Fed. R. Civ. P. 12(b)(6))

12 1. Legal Standard

13 A motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) tests
14 the legal sufficiency of the claims in the complaint. "Dismissal can be based on the lack of a
15 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal
16 theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). In such a
17 motion, all material allegations in the complaint must be taken as true and construed in the light
18 most favorable to the claimant. *See Balistreri*, 901 F.2d at 699. However, "[t]hreadbare recitals
19 of the elements of a cause of action, supported by mere conclusory statements, do not suffice."
20 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Moreover, "the court is not required to accept
21 legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably
22 be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th
23 Cir. 1994).

24 Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the
25 claim showing that the pleader is entitled to relief." This means that the "[f]actual allegations
26 must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v.*
27 *Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (citations omitted); *see*
28 *also Iqbal*, 129 S. Ct. at 1950 ("[O]nly a complaint that states a plausible claim for relief

1 survives a motion to dismiss.”). However, a complaint attacked by a Rule 12(b)(6) motion to
2 dismiss does not need detailed factual allegations and “heightened fact pleading of specifics” is
3 not required to survive a motion to dismiss. *Bell Atlantic Corp.*, 550 U.S. at 570. Rather, the
4 complaint need only give “enough facts to state a claim to relief that is plausible on its face.”
5 *Id.*

6 2. Defense Counsel

7 Plaintiff has handwritten defense counsel’s name in the caption of the FAC. This is
8 something he acknowledges he did upon the filing of the pleading. However, there are no facts
9 alleged suggesting any liability by defense counsel. Nor is it apparent that plaintiff properly
10 could state a claim against her, since her only affiliation with the University appears to be
11 limited to her role as litigation counsel in this matter. Accordingly, Mary Cain-Simon is
12 dismissed from this suit with prejudice.

13 3. Res Judicata

14 Gardias claims that the University discriminated against him by restricting his use of an
15 electric cart (i.e., he reportedly was not permitted to drive his cart on San Fernando Street,
16 which borders one part of the University’s campus). The University argues that this claim is
17 barred by the *res judicata* doctrine because claims of alleged discrimination based upon
18 Gardias’ use of an electric cart have already been adjudicated by this court in plaintiff’s prior
19 actions.

20 “The preclusive effect of a judgment is defined by claim preclusion and issue
21 preclusion, which are collectively referred to as ‘res judicata.’” *Taylor v. Sturgell*, 128 S. Ct.
22 2161, 2171, 171 L.Ed.2d 155 (2008). “Under the doctrine of claim preclusion, a final judgment
23 forecloses ‘successive litigation of the very same claim, whether or not relitigation of the claim
24 raises the same issues as the earlier suit.’” *Id.* (quoting *New Hampshire v. Maine*, 532 U.S. 742,
25 748, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001)). “Issue preclusion, in contrast, bars ‘successive
26 litigation of an issue of fact or law actually litigated and resolved in a valid court determination
27 essential to the prior judgment,’ even if the issue recurs in the context of a different claim.” *Id.*
28 (quoting *New Hampshire*, 532 U.S. at 748-49. “By ‘preclud[ing] parties from contesting

1 matters that they have had a full and fair opportunity to litigate,’ these two doctrines protect
2 against ‘the expense and vexation attending multiple lawsuits, conserv[e] judicial resources, and
3 foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions.’” *Id.*
4 at 2171 (quoting *Montana v. United States*, 440 U.S. 147, 15-54, 99 S.Ct. 970, 59 L.Ed.2d 210
5 (1979)).

6 While this court declines to rule that all claims pertaining to Gardias’ use of an electric
7 cart are prospectively foreclosed, it finds that the allegations asserted in the instant complaint
8 are barred because they are, in substance, the same as those that have already been adjudicated
9 in defendant’s favor in Gardias’ past lawsuits. Additionally, having reviewed Gardias’ motions
10 to file amended pleadings, which were filed while the instant motion was being briefed, this
11 court finds that the deficiencies addressed here cannot be resolved by amendment.²

12 Accordingly, defendant’s motion as to Gardias’ discrimination claims pertaining to his use of an
13 electric cart is granted.

14 4. Retaliatory Harassment

15 There is, however, a portion of Gardias’ First Amended Complaint which survives
16 dismissal. In sum, Gardias alleges that he has been subjected to a hostile work environment,
17 primarily at the hands of his supervisors Adam Bayer and Daryn Adams, in retaliation for his
18 participation in protected activities. A claim for harassment as retaliation “is cognizable under
19 the anti-retaliation provisions of Title VII.” *Ray v. Henderson*, 217 F.3d 1234, 1244 (9th Cir.
20 2000). “Harassment is actionable only if it is ‘sufficiently severe or pervasive to alter the
21 conditions of the victim’s employment and create an abusive working environment.’” *Id.* at
22 1245 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L.Ed.2d 295
23 (1993)). “Not every insult or harassing comment will constitute a hostile work environment.”
24 *Id.* Numerous “derogatory or humiliating statements, however, can constitute a hostile work
25 environment.” *Id.*

26
27 ² It is not clear that Gardias’ proposed amendments state claims that are
28 different from those that have already been alleged in his first amended complaint. In any
event, it appears that at least some of the matters Gardias wishes to add by amendment have
not been properly exhausted.

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2. Defendants' motion to dismiss as to defense counsel is GRANTED, and Mary Cain-Simon is DISMISSED from this action WITH PREJUDICE.

3. Defendants' Fed. R. Civ. P. 12(b)(6) motion to dismiss is as to plaintiff's claim for retaliatory harassment is DENIED.

4. Defendants' Fed. R. Civ. P. 12(b)(6) motion is otherwise GRANTED as to all of plaintiff's claims for alleged discrimination based on his race, color, national origin and disability.

5. An initial case management conference is set for **September 28, 2010, 1:30 p.m.** The parties' joint case management statement shall be file no later than **September 21, 2010.**

Dated: August 18, 2010



HOWARD R. LOYD
UNITED STATES MAGISTRATE JUDGE

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5:09-cv-05611-HRL Notice has been electronically mailed to:
Mary Susan Cain-Simon Mary.CainSimon@doj.ca.gov, ECFCoordinator@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.

5:09-cv-05611-HRL Notice mailed to:
Piotr J. Gardias
72 Floyd Street
San Jose, CA 95110