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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

FACULTY MEMBERS AT MIDDLE
EASTERN SCHOOLS, et al.,

Plaintiffs,

v.

RICHARD DONOVAN, et al.,

Defendants.

Case No. 15-cv-03974-BLF

ORDER OF DISMISSAL

Thirty-four faculty members at the Defense Language Institute Foreign Language Center filed this *pro se* action on August 31, 2015, alleging discriminatory practices and favoritism with respect to promotions. Compl., ECF 1; First Am. Compl. (“FAC”), ECF 13. After the Court granted Defendants’ motions to dismiss with partial leave to amend, Plaintiffs failed to amend their complaint by the deadline set by the Court. ECF 35. In light of Plaintiffs’ failure to comply with that Court order, on September 12, 2016, the Court issued orders to show cause and a notice of imminent dismissal to Plaintiffs warning that failure to comply with Court orders would result in dismissal of this action with prejudice under Fed. R. Civ. P. 41(b). ECF 42, 43. The Court ordered all thirty-four Plaintiffs to file a response to the Order to Show Cause by November 17, 2016. ECF 43. To date, all but one Plaintiff have yet to respond. Accordingly, the Court hereby **DISMISSES** this action with prejudice under Fed. R. Civ. P. 41(b).

I. BACKGROUND

In April 2013, Defendant Richard Donovan, head of the Faculty Personnel System at the Defense Language Institute, held a meeting with faculty members to discuss promotions to the position of Associate Professor for 2013-2014. FAC 4:9-12. According to Mr. Donovan, a faculty member needed to have two areas of specialization to be promoted to the position of

1 Associate Professor. FAC 4:20-21. At the April 2013 meeting, attendees allegedly asked Mr.
2 Donovan whether serving as a Team Leader qualified as one area of specialization to which Mr.
3 Donovan answered it did not. FAC 4:10-14. In a meeting held in 2011 about similar issues, Mr.
4 Donovan also responded to a similar question with the same answer. FAC 4:17-19. In March
5 2014, promotions were announced and to the dissatisfaction of Plaintiffs, serving as Team Leader
6 counted as an area of specialization. FAC 4:22-25. Moreover, Plaintiffs allege that less
7 experienced teachers were promoted over more qualified teachers. FAC 4:25-28.

8 As a result, Plaintiffs filed complaints with the “EEO, OSP, [their] Union, and direct
9 grievances to FPS.” FAC 5:5. In April 2014, six of the Plaintiffs sought the help of Defendant
10 American Federation of Government Employees, AFL-CIO, Local 1263 (“AFGE”). FAC 7:15-
11 16. They met with Mr. Philip White, where they gave him a copy of their EEO petition and
12 requested to speak with AFGE’s attorney regarding the possibility of arbitration if they could not
13 resolve their dispute with Mr. Donovan. FAC 7:17-20. According to Plaintiffs, Mr. White
14 refused to help them and told them to use Google to find an attorney. FAC 7:20-24.

15 Meanwhile, in response to Plaintiffs’ complaints, Mr. Donovan met with dissatisfied
16 faculty members in May 2014 and July 2014. FAC 5:6-16. At the second meeting, AFGE
17 President Reuf Borovac and Provost Dr. Betty Leaver were also present. *Id.* According to
18 Plaintiffs, at these meetings, Mr. Donovan denied telling them that serving as a Team Leader
19 would not count as one area of specialization. *Id.* Dr. Leaver also claimed she researched this
20 issue and did not hear Mr. Donovan tell faculty members that serving as a Team Leader would not
21 qualify as an area of specialization. FAC 5:23-26. After the May 2014 meeting, Plaintiffs wrote a
22 petition, that was signed by eleven of them, to Assistant Commander Colonel Ginger L. Wallace
23 over Mr. Donovan’s alleged misrepresentation of facts at the May 2014 meeting. FAC 5:20-23.

24 In late May 2014, Plaintiffs met and communicated with Mr. Borovac several times. FAC
25 7:25-8:3. Plaintiffs agreed with Mr. Borovac that they would not seek to arbitrate their grievances
26 until the appeal process was finished. FAC 8:4-5. In August 2014, Plaintiffs also met with
27 AFGE’s regional attorney who promised to look into the case but never did. FAC 8:5-10.

28 In November 2014, Plaintiffs’ appeal process finished and disappointed by the results of

1 the appeal, Plaintiffs wanted to pursue arbitration led by AFGE. FAC 6:14-15; FAC 8:11-15.
2 Mr. Borovac sought advice from Dr. Toth Ben, AFGE’s national representative, who on January
3 20, 2015 suggested Plaintiffs attempt more negotiations with management. FAC 8:15-16.
4 Plaintiffs informed Dr. Ben that management was no longer interested in negotiation and on
5 January 26, 2015, Dr. Ben gave Mr. Borovac instructions on how to file a complaint with the
6 Federal Labor Relations Authority (“FLRA”). FAC 8:17-18. Mr. Borovac delegated filing of the
7 complaint to his Chief Steward, Mr. Mark Chitwood. FAC 8:18-21. According to Plaintiffs, Mr.
8 Chitwood did not have the experience, knowledge, or training to file a FLRA complaint. *Id.*

9 On February 6, 2015, Mr. Borovac received a completed complaint that was ready for
10 filing with the FLRA. FAC 8:22-23. Plaintiffs allege that they had an agreement with Mr.
11 Borovac that he would have Mr. Chitwood file the complaint that same day in order to meet the
12 statute of limitations. FAC 8:24-27. However, Plaintiffs claim that Mr. Chitwood apparently
13 changed his mind and the complaint was never filed. FAC 9:1-7. Plaintiffs did not learn of Mr.
14 Chitwood’s inaction until more than a month later in March 2015. *Id.* On March 22, 2015,
15 Plaintiffs filed a complaint with the FLRA but it was dismissed for being outside the statute of
16 limitations. FAC 6:15-17. Plaintiffs appealed the FLRA decision and on July 31, 2015, Plaintiffs’
17 appeal was denied. FAC 6:17-23. Plaintiffs have now filed the pending action alleging that their
18 union failed to fulfill its duty and seeking a fair review of the facts. FAC 6:24-25; 9:27-28.

19 On April 15, 2016, the Court granted Defendants’ motions to dismiss Plaintiffs’ first
20 amended complaint. ECF 35 (“Dismissal Order”). As detailed in the Dismissal Order, this Court
21 lacks subject matter jurisdiction to hear Plaintiffs’ complaint against AFGE. *Id.*; 5 U.S.C. § 7101,
22 *et seq.* (Federal Service Labor Management Relations Statute (“FSLMRS”)). The exclusive
23 jurisdiction of Plaintiffs’ claims is with the Federal Labor Relations Authority and to the extent
24 Plaintiffs meet the statute’s requirements, with the appropriate United States Court of Appeals. As
25 to the other Defendant, Mr. Donovan, the Court granted his motion with leave to amend as to
26 Plaintiffs’ Title VII claims and without leave to amend as to Plaintiffs’ non-Title VII claims.
27 Plaintiffs’ Title VII claims suffer several deficiencies, including improper defendant, insufficient
28 allegations on whether administrative remedies were exhausted with respect to all Plaintiffs, and

1 omission of facts pertaining to each Plaintiff that are relevant to a Title VII claim. ECF 35. With
2 respect to Plaintiff's non-Title VII claims, the Court lacks jurisdiction because, *inter alia*, claims
3 relating to prohibited personnel practices under the Civil Service Reform Act are governed by the
4 FSLMRS. *See* 5 U.S.C. §§ 7101 *et seq.* (Chapter 71 of the Civil Service Reform Act, also known
5 as the FSLMRS, governs federal labor-management relations). The Court granted Plaintiffs leave
6 to substitute a proper defendant and to amend their allegations with respect to their Title VII
7 claims but not to other claims. ECF 35. The Court further ordered Plaintiffs to file any amended
8 complaint by May 16, 2016.

9 Separately, the Court also noted in the Dismissal Order that only three Plaintiffs, Ahmed
10 Nuri, Abdul Khogali, and Omar Mohamed Ali, signed the opposition brief. *Opp.* at 6, ECF 23.
11 Without signatures of all Plaintiffs, the Court cannot ascribe arguments signed only by Messrs.
12 Nuri, Khogali, and Ali to the remaining Plaintiffs. *See* ECF 11 (order striking complaint) (citing
13 Fed. R. Civ. P. 11); ECF 24. Moreover, as non-attorneys Messrs. Nuri, Khogali, and Ali may not
14 submit arguments on behalf of the other Plaintiffs.

15 On May 9, 2016, Plaintiffs appealed the Court's Dismissal Order. ECF 36. The Ninth
16 Circuit later dismissed the appeal for lack of jurisdiction because the Dismissal Order granted
17 Plaintiffs leave to amend, and thus was not appealable. ECF 38.

18 On August 17, 2016, Plaintiffs Abdul Khogali and Ahmed Nuri moved this court for entry
19 of judgment. ECF 41. However, no other Plaintiffs have signed the motion for entry of judgment
20 or taken any action since their appeal to the Ninth Circuit.

21 Because Plaintiffs had not filed an amended complaint by the ordered deadline, on
22 September 12, 2016, the Court issued orders to each and every Plaintiff to show cause by
23 November 17, 2016, why this case should not be dismissed for failure to prosecute. ECF 42, 43.
24 To date, Plaintiffs have not filed and served an amended complaint and only one of the plaintiffs,
25 Plaintiff Bozo Dzakula, responded to the Order to Show Cause, requesting the Court to dismiss
26 him from this case. ECF 44.

27 **II. LEGAL STANDARD**

28 Federal Rule of Civil Procedure 41(b) allows for involuntary dismissal of an action “[i]f

1 the plaintiff fails to prosecute or to comply with these rules or a court order.” The Rule permits a
2 court to dismiss an action sua sponte. *See Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962).
3 “The failure of the plaintiff eventually to respond to the court’s ultimatum – either by amending
4 the complaint or by indicating to the court that it will not do so – is properly met with the sanction
5 of a Rule 41(b) dismissal.” *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1065 (9th Cir. 2004).

6 Before imposing dismissal as a sanction, “the district court must consider five factors: ‘(1)
7 the public’s interest in expeditious resolution of litigation; (2) the court’s need to manage its
8 docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of
9 cases on their merits; and (5) the availability of less drastic alternatives.’” *Yourish v. Cal.*
10 *Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999) (quoting *Henderson v. Duncan*, 779 F.2d 1421, 1423
11 (9th Cir.1986)).

12 **III. DISCUSSION**

13 Plaintiffs have failed to comply with the Court’s orders, including the Dismissal Order,
14 which gave leave to amend, and the Order to Show Cause, which provided notice of imminent
15 dismissal. These failures can serve as grounds for dismissal if the *Henderson* factors favor
16 dismissal. *See Yourish*, 191 F.3d at 986.

17 Here, four of the five *Henderson* factors strongly favor dismissal. Dismissal serves the
18 public’s interest in expeditious resolution of litigation because Plaintiffs’ failure to amend their
19 complaint has stalled this case since this Court issued its Dismissal Order on April 15, 2016.
20 Plaintiffs failed to file and serve an amended complaint within the allotted time, to seek an
21 extension of time to amend, or to respond in any way to the Dismissal Order or the Order to Show
22 Cause.

23 With respect to the second factor, Plaintiffs’ conduct has interfered with the Court’s need
24 to manage its docket because Plaintiffs have repeatedly ignored the Court’s orders by not filing an
25 amended complaint within the time allotted, by not responding to the Order to Show Cause, and
26 by not having all submissions signed by each and every Plaintiffs as required by Fed. R. Civ. P.
27 11. As to the third factor, failure to dismiss this action would prejudice Defendants, who are
28 entitled to notice and resolution of Plaintiffs’ claims. The fourth factor – the public policy

1 favoring disposition of cases on their merits – does not favor dismissal.


2 Finally, as to the fifth factor, the Court sees little point in imposing less severe sanctions
3 because Plaintiffs have shown no interest in complying with this Court’s orders. The Court’s
4 Order to Show Cause expressly warned Plaintiffs of the potential for imminent dismissal under
5 Rule 41(b) and Plaintiffs did not respond. ECF 42, 43. *Edwards*, 356 F.3d at 1065 (holding that
6 the “failure of the plaintiff eventually to respond to the court’s ultimatum – either by amending the
7 complaint or by indicating to the court that it will not do so – is properly met with the sanction of a
8 Rule 41(b) dismissal”).

9 Alternative to amending their complaint, Plaintiffs could make an affirmative choice to
10 allow the prior Rule 12(b)(6) dismissal to ripen into a final, appealable judgment. *Id.* However, to
11 exercise that right, Plaintiffs must give the Court notice of their intent not to file an amended
12 complaint. *Id.* Plaintiffs in this case did not notify this Court of their intention not to file an
13 amended complaint. Although Plaintiffs Abdul Khogali and Ahmed Nuri moved this court for
14 entry of judgment, the motion was not signed by the other thirty-two Plaintiffs. ECF 41. As
15 stated repeatedly throughout this case, the Court cannot accept representations from non-attorneys
16 Messrs. Khogali and Nuri on behalf of other Plaintiffs. Accordingly, since Plaintiffs did not
17 amend their complaint by the ordered deadline, did not respond to the Court’s Order to Show
18 Cause,¹ and failed to notify the Court of the intention not to amend the complaint from each and
19 every Plaintiff, the Court hereby dismisses this case with prejudice pursuant to Fed. R. Civ. P.
20 41(b).

21 **IV. ORDER**

22 The Court hereby DISMISSES all claims against Defendants WITH PREJUDICE.

23
24 Dated: November 22, 2016

25 
26 BETH LABSON FREEMAN
United States District Judge

27 _____
28 ¹ Only one plaintiff, Bozo Dzakula, requested this Court to dismiss him from this case, indicating that he does not intend to prosecute this case.