

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

MAHMOUD ASCARIE,  
Plaintiff,  
v.  
DEAN FRAN LOZANO, et al.,  
Defendants.

Case No. [16-cv-02493-BLF](#)

**ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS WITHOUT  
LEAVE TO AMEND**

[Re: ECF 43]

United States District Court  
Northern District of California

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Plaintiff Mahmoud Ascarie, proceeding pro se, alleges that he was wrongfully terminated and tricked into working on a volunteer basis as a part time chemistry lecturer by his former employer, Gavilan College. Second Am. Compl. (“SAC”) ¶¶ 7, 17, 19–20, ECF 34. In relation to this alleged wrongful termination, Ascarie brings this action for “retaliation against plaintiff’s freedom of speech, and against his belief of scientific integrity,” *id.* ¶ 5, against the Dean of Gavilan College, Fran Lozano, and a chemistry professor at the College, Dr. Dale Clark (collectively, “Defendants”). Presently before the Court is Defendants’ motion to dismiss Ascarie’s SAC. Mot., ECF 43.

This is Ascarie’s third attempt to state a claim against Defendants. *See* Order Granting in Part Defs.’ Mot. Dismiss With Leave to Amend (“Second Dismissal Order”), ECF 41; Order Granting Defs.’ Mot. Dismiss With Leave to Amend in Part (“First Dismissal Order”), ECF 31. In its Second Dismissal Order, the Court granted Defendants’ motion to dismiss for failure to state a claim. First, the Court found that Plaintiff had failed to adequately allege that his claims were timely. Second Dismissal Order 5–6. Second, as to Ascarie’s claim for retaliation, the Court found that Ascarie did not allege facts sufficient to satisfy the first two prongs of the *Eng* tests—the FAC did not allege that Ascarie spoke on a matter of public concern or that he spoke as a private citizen rather than a public employee. *Id.* at 6–7. Finally, as to his claim for conspiracy in violation of 42 U.S.C. § 1983, the Court found that the allegations in the FAC were vague and

1 conclusory, and failed to satisfy the pleading standard. *Id.* at 8. The Court advised Plaintiff that  
2 his claims would be dismissed with prejudice if he failed to cure the deficiencies identified in the  
3 order. *Id.* at 9.

4 In their motion to dismiss, Defendants argue that Ascarie has failed to cure the pleading  
5 deficiencies identified by this Court in its Second Dismissal Order. Mot. 1. Specifically,  
6 Defendants contend that the SAC still fails to state a claim for retaliation because Ascarie has not  
7 alleged that he engaged in any protected activity, that he spoke as a private citizen rather than a  
8 public employee, or that Defendants took adverse action against him. *Id.* at 7. Defendants also  
9 assert that Ascarie has failed to remedy his conspiracy claim because he has failed to allege that he  
10 engaged in any protected activities and because he has not alleged facts to establish that  
11 Defendants conspired against him for exercising his right of free speech. *Id.* at 8.

12 Ascarie’s opposition to Defendants motion is difficult to understand as it primarily  
13 contains verbatim copies of the opinions of other courts. *See, e.g.*, Opp’n 4–9, ECF 44. Ascarie  
14 also appears to be negotiating with Defendants. *See, e.g., id.* at 2 (“If defendants substantiate  
15 documents to verify that their budget cut prevented/effected by employment/salary from Spring  
16 2010 through Spring 2017, then I request this court to save time without reading the rest of this  
17 document to dismiss all my claim, and I am willing/eager to treat all parties for lunch and express  
18 my apology for my wrong direction/action.”). Nevertheless, in his conclusion, Ascarie states  
19 clearly that he disagrees with Defendants’ portrayal of the SAC, as he states that he has “expressly  
20 pleaded facts sufficient to constitute a cause of action or pleaded facts from which facts sufficient  
21 to state a cause of action can be inferred.” *Id.* at 12.

22 Upon reviewing the SAC, the Court agrees with Defendants. Although Ascarie has  
23 remedied the potential statute of limitations problem by alleging that he first realized that Dean  
24 Lozano “was taking advantage of him,” on May 20, 2014, SAC ¶ 19, he has failed to remedy the  
25 other deficiencies identified in this Court’s Second Dismissal Order. As with the FAC, the SAC  
26 does not allege that Ascarie engaged in any constitutionally protected activity. In addition to  
27 alleging that he notified Dr. Clark of an error in a calculation/key for a lab experiment and used  
28 the proper key for “scientific integrity,” Ascarie now alleges that Plaintiff did so “to bring to light

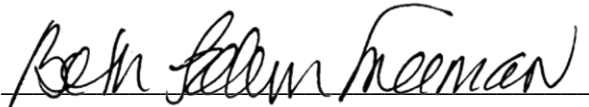
1 the correct calculation/key . . . , thus furthering the goal of maintaining the pursuit of scientific  
2 integrity[.]” SAC ¶ 10. Despite this additional fact, Ascarie has not explained how this is a matter  
3 of public concern pursuant to *Eng v. Cooley*, 552 F.2d 1062 (9th Cir. 2009). As the Court stated  
4 in its Second Dismissal Order, “[t]he First Amendment does not protect speech by public  
5 employees made pursuant to their employment responsibilities.” Second Dismissal Order 7 (citing  
6 *Coomes v. Edmonds Sch. Dist. No. 15*, 816 F.3d 1255, 1260 (9th Cir. 2016) (citation omitted)).  
7 Because Ascarie has not remedied the previously identified deficiencies with respect to his claim  
8 for retaliation, the Court GRANTS Defendants’ motion to dismiss Ascarie’s retaliation claim  
9 WITHOUT LEAVE TO AMEND.

10 Likewise, Ascarie has not remedied the identified deficiencies with respect to his  
11 conspiracy claim. The facts alleged in the SAC remain vague and conclusory. *See Burns v. Cty.*  
12 *of King*, 883 F.2d 819, 821 (9th Cir. 1989) (“To state a claim for conspiracy to violate one’s  
13 constitutional rights under section 1983, the plaintiff must state specific facts to support the  
14 existence of the claimed conspiracy.”). In its Second Dismissal Order, the Court specifically  
15 noted that “Ascarie fails to state who was responsible for making chemistry teacher assignments  
16 during the time period in question, whether Gavilan College announced an open recruitment for  
17 part-time chemistry instructors during the relevant time period, and whether Defendants were even  
18 responsible for reviewing applications for part-time chemistry instructors.” Second Dismissal  
19 Order 8 (citations omitted). The SAC fares no better, as Ascarie does not appear to have added  
20 additional allegations regarding the claimed conspiracy. As such, the Court GRANTS  
21 Defendants’ motion to dismiss Ascarie’s conspiracy claim WITHOUT LEAVE TO AMEND.

22 Accordingly, the Court now DISMISSES the above-titled action WITHOUT LEAVE TO  
23 AMEND. The Clerk is instructed to close the file.

24 **IT IS SO ORDERED.**

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26 Dated: July 20, 2017

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28 BETH LABSON FREEMAN  
United States District Judge