United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

JOSEPH RYAN,

Plaintiff,

v.

SANTA CLARA VALLEY TRANSPORTATION AUTHORITY, et al.,

Defendants.

Case No. 16-CV-04032-LHK

**ORDER GRANTING IN PART AND DENYING PART DEFENDANTS' MOTION TO DISMISS; GRANTING DEFENDANTS' MOTION TO STRIKE**

Re: Dkt. No. 59

Plaintiff Joseph Ryan ("Plaintiff") sues Defendants Santa Clara Valley Transportation Authority ("SCVTA") and Joseph Fabela ("Fabela") (collectively, "Defendants"). ECF No. 37. Before the Court is Defendants' motion to dismiss and/or motion to strike the Third Amended Complaint ("TAC"). ECF No. 59 ("Mot."). The Court finds this matter suitable for resolution without oral argument and hereby VACATES the motion hearing set for July 26, 2017, at 1:30 p.m. Having considered the submissions of the parties, the relevant law, and the record in this case, the Court hereby DENIES Defendants' motion to dismiss as to Count One, and GRANTS with prejudice Defendants' motion to dismiss as to Counts Two and Three. The Court also GRANTS Defendants' motion to strike.

## I. BACKGROUND

### A. Factual Background

SCVTA "is an independent special district agency that provides" public transportation services in Santa Clara County, California. ECF No. 58 (Third Amended Complaint, or "TAC"), ¶¶ 9, 23. Fabela is the General Counsel for SCVTA. *Id.* ¶ 8. Plaintiff was employed at SCVTA in the position of Senior Assistant Counsel. *Id.* ¶ 22.

SCVTA also employed an individual named David Terrazas ("Terrazas"). *Id.* ¶ 25. Plaintiff "complained to management" during his time at SCVTA "that Terrazas was incompetent." *Id.* According to the SAC, "[t]he fact that Terrazas was a poor performer was widely known by management and recognized by [Fabela] and legal staff" at SCVTA. *Id.*

Terrazas was also a member of the Santa Cruz City Council. *Id.* ¶ 26. In June 2014, Plaintiff "published for one day an internet webpage entitled 'Anyone But Terrazas For City Council.'" *Id.*¶¶ 28, 43. Plaintiff published this on his Facebook page. *Id.* ¶ 39. Plaintiff's posting was "critical of Terrazas' campaign for re-election to City Council in 2014," and Plaintiff "cite[d] some misrepresentations listed on Terrazas' campaign web page, including the misrepresentation that Terrazas was a 'Transportation Manager,' rather than the true fact that he was a 'Labor Relations Supervisor'" at SCVTA. *Id.* ¶ 27. Plaintiff alleges that Plaintiff made the speech "on his own time, at night after working hours, using his own computer equipment." *Id.* ¶¶ 28, 43.

In February 2015, Terrazas alleged that SCVTA and Plaintiff "retaliated against Terrazas for whistleblower activity." *Id.* ¶ 25–27. The TAC does not identify Terrazas's "whistleblower activity," or how Terrazas was retaliated against. *See id.*

Also in February 2015, Plaintiff informed Fabela that Plaintiff had made the webpage posting about Terrazas in June 2014. *Id.* ¶ 28. Fabela "was provided with a printout of the webpage." *Id.* Plaintiff "informed [Fabela] that the webpage was protected off-duty political activity." *Id.* Fabela did not take any action against Plaintiff at that time. *Id.*

On June 3, 2015, Terrazas entered into a settlement agreement with SCVTA regarding the

retaliation that Terrazas allegedly suffered. *Id.* ¶ 29. Nuria Fernandez ("Fernandez"), the General Manager of SCVTA, signed the settlement agreement with Terrazas on June 5, 2015. *Id.*

That same day, June 5, 2015, Fabela "informed [Plaintiff] that he would be terminated by [SCVTA] or that he could retire, but that [Plaintiff] must leave the office that day." *Id.* ¶ 30. "When [Plaintiff] asked [Fabela] why" he was being terminated, Fabela "replied that the action was taken for reasons previously discussed, referring to the previous discussion regarding Mr. Ryan's aforementioned webpage." *Id.*

**B. Procedural History**

Plaintiff filed suit on July 18, 2016, against SCVTA, Fabela, and Fernandez. ECF No. 1. Plaintiff's complaint alleged 22 causes of action against Defendants, including claims under 42 U.S.C. § 1983; Title VII of the Civil Rights Act of 1964 ("Title VII"); the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621; the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101; and violations of California state law. *See id.*

On September 29, 2016, the parties filed a stipulation regarding Plaintiff's filing of a First Amended Complaint. ECF No. 18. Specifically, the parties agreed that Plaintiff would dismiss Fernandez with prejudice, that Plaintiff would "[r]emove any and all allegations that Plaintiff was entitled to a 'Skelly' hearing, and that [SCVTA]'s failure to provide Plaintiff a 'Skelly' hearing constituted a due process violation." *Id.* Plaintiff also stipulated to dismiss the Complaint's twentieth cause of action. *Id.* The Court entered an Order granting the parties' stipulation on September 30, 2016. ECF No. 19.

On October 17, 2016, Plaintiff filed a First Amended Complaint. ECF No. 26. On that same day, Plaintiff filed a notice of voluntary dismissal of Fernandez, ECF No. 27, which this Court granted on October 19, 2016, ECF No. 29.

On November 9, 2016, the parties filed a stipulation regarding Plaintiff's filing of a Second Amended Complaint ("SAC"), ECF No. 32, which the Court granted that same day, ECF No. 34.

On December 14, 2016, Plaintiff filed the SAC. The SAC alleged 13 causes of action

against Defendants, including claims under § 1983 for violation of Plaintiff's First Amendment rights, claims under § 1983 for violation of Plaintiff's Fourteenth Amendment rights, claims under Title VII and FEHA for racial discrimination and retaliation, claims under the ADEA and California's Fair Housing and Employment Act ("FEHA") for age discrimination, claims under the ADA and FEHA for disability discrimination, and a claim for violation of California Government Code § 3202.

On January 13, 2017, Defendants filed a motion to dismiss the SAC or, in the alternative, a motion for more definite statement or a motion to strike. ECF No. 41. On January 27, 2017, Plaintiff filed an opposition and a request for judicial notice. ECF Nos. 47 & 48. On February 3, 2017, Defendants filed a Reply, a request for judicial notice, and oppositions to Plaintiff's request for judicial notice. ECF Nos. 49, 50, 51.

On March 30, 2017, the Court granted in part and denied in part Defendants' motion to dismiss the SAC. ECF No. 54; *Ryan v. Santa Clara Valley Transp. Auth.*, 2017 WL 1175596 (N.D. Cal. Mar. 30, 2007). First, the Court addressed Plaintiff's claims in Counts One and Two, which asserted causes of action under § 1983 for violation of Plaintiff's First Amendment rights. *Ryan*, 2017 WL 1175596, at *3. In analyzing these claims, the Court noted that "[t]he distinction between Plaintiff's claims in Counts One and Two [wa]s unclear." *Id.* n. 1. Specifically, Plaintiff brought Count One against SCVTA and Fabela in his individual capacity and labeled the claim "Illegal Intrusion on First Amendment Right to Free Speech." *Id.* Plaintiff brought Count Two against only SCVTA and labeled it "Retaliation for Exercising Free Speech *Monell* Action." *Id.* However, the allegations in Counts One and Two were substantially the same, and Plaintiff analyzed both Counts One and Two as retaliation causes of action. *Id.* Thus, the Court "construe[d] both Counts One and Two as First Amendment retaliation claims under § 1983, with Count One alleged against Fabela in his individual capacity and Count Two alleged against SCVTA under a *Monell* theory of liability." *Id.*

The Court then analyzed Plaintiff's allegations in Counts One and Two. The Court held

that Plaintiff had stated a plausible claim for relief in Count One against Fabela in his individual capacity for First Amendment retaliation. *Id.* at *8. However, the Court held that Plaintiff had failed to adequately allege in Count Two that SCVTA was liable under *Monell.* *Id.* Specifically, the Court held that Plaintiff "failed to sufficiently alleged that Fabela's allegedly unlawful conduct was the result of a longstanding practice or custom of SCTVA, was the result of SCVTA's failure to train municipal employees, or that Fabela was a final policymaker within the meaning of *Monell.*" *Id.* at *10. The Court granted Plaintiff leave to amend "because Plaintiff may be able to allege facts to support a theory of *Monell* liability." *Id.*

The Court next addressed Plaintiff's claim in Count Three for violation of California Government Code § 3203. The Court noted that Plaintiff and Defendants both analyzed the California Government Code § 3203 claim exactly the same as the parties analyzed Plaintiff's § 1983 claims for First Amendment retaliation. *Id.* Neither party addressed salient differences, if any, between federal law and state law. *Id.* The Court noted, however, that a district court in this Circuit recently expressed doubt that California Government Code § 3203 provided a private cause of action for retaliation. *Id.* n. 4. Nonetheless, because neither party addressed the issue, and because both parties analyzed the state law claim exactly the same as the § 1983 claims in Counts One and Two, the Court did not dismiss Count Three. *Id.*

The Court then addressed Plaintiff's claims under the Fourteenth Amendment and Plaintiff's claims for race discrimination, age discrimination, disability discrimination, and retaliation for reporting race discrimination. The Court dismissed all of these causes of action with leave to amend because Plaintiff had pled only legal conclusions. *Id.* at *12. Finally, the Court addressed Plaintiff's requests for punitive damages. The Court dismissed with prejudice Plaintiff's claim for punitive damages as to SCVTA because SCVTA was immune from punitive damages. *Id.* at *16. However, the Court denied Defendant's motion to dismiss Plaintiff's claim for punitive damages as to Fabela. *Id.* at *16.

On April 18, 2017, Plaintiff filed a TAC. Plaintiff's TAC did not reallege Plaintiff's

claims for violation of the Fourteenth Amendment, race discrimination, age discrimination, disability discrimination, or retaliation for reporting race discrimination. *See* TAC. Plaintiff's TAC alleged claims only for (1) Illegal Intrusion on First Amendment Right to Free Speech, in violation of 42 U.S.C. § 1983, against Fabela in his individual capacity; (2) Retaliation for Exercising Free Speech *Monell* Action, in violation of 42 U.S.C. § 1983, against SCVTA and Fabela in his official capacity; and (3) violation of California Government Code § 3203, against SCVTA. *Id.*

On May 2, 2017, Defendants filed a motion to dismiss and/or motion to strike the TAC. ECF No. 59 ("Mot."). On May 16, 2017, Plaintiff filed an opposition. ECF No. 60 ("Opp."). On May 23, 2017, Defendants filed a reply. ECF No. 61 ("Reply").

## II. LEGAL STANDARD

### A. Motion to Dismiss Under Rule 12(b)(6)

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss an action for failure to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citation omitted).

For purposes of ruling on a Rule 12(b)(6) motion, the Court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). However, a court need not accept as true allegations contradicted by judicially noticeable facts, *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), and a "court may look beyond the plaintiff's complaint to matters of public record" without converting the Rule 12(b)(6) motion into one for summary judgment, *Shaw v. Hahn*, 56 F.3d 1128, 1129 (9th Cir. 2011). Mere "conclusory

allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss." *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004).

**B. Motion to Strike Under Rule 12(f)**

Federal Rule of Civil Procedure 12(f) provides in relevant part that a court "may strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter." *See* Fed. R. Civ. P. 12(f). "[T]he function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispending with those issues prior to trial." *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). Motions to strike are generally disfavored and "should not be granted unless the matter to be stricken clearly could have no possible bearing on the subject of the litigation . . . . If there is any doubt whether the portion to be stricken might bear on an issue in the litigation, the court should deny the motion." *Platte Anchor Bolt, Inc. v. IHI, Inc.*, 352 F. Supp. 2d 1048, 1057 (N.D. Cal. 2004) (internal citations omitted). "With a motion to strike, just as with a motion to dismiss, the court should view the pleading in the light most favorable to the nonmoving party." *Id.* "Ultimately, whether to grant a motion to strike likes within the sound discretion of the district court." *Cruz v. Bank of N.Y. Mellon*, 2012 WL 2838957, at *2 (N.D. Cal. July 10, 2012) (citing *Shittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010)).

**C. Leave to Amend**

If the Court concludes that a motion to dismiss should be granted, it must then decide whether to grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend "shall be freely given when justice so requires," bearing in mind "the underlying purpose of Rule 15 . . . [is] to facilitate decision on the merits, rather than on the pleadings or technicalities." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (citation omitted). Nonetheless, a district court may deny leave to amend a complaint due to "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the

amendment, [and] futility of amendment." *See Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 532 (9th Cir. 2008).

## III. DISCUSSION

### A. Motion to Dismiss

Defendants move to dismiss all three of Plaintiff's causes of action in the TAC. First, Defendants argue that Count One should be dismissed—even though this Court denied Defendants' motion to dismiss Count One of the SAC—because Plaintiff is alleging an "intrusion" First Amendment claim, rather than a "retaliation" claim. Second, Defendants argue that Count Two should be dismissed because Plaintiff has failed to sufficiently allege *Monell* liability against SCVTA. Third, Defendants argue that Count Three should be dismissed because California Government Code § 3203 does not provide Plaintiff with a private right of action for retaliation. The Court addresses each of these arguments in turn.

#### 1. Count One: Illegal Intrusion on First Amendment Right to Free Speech

Defendants move to dismiss Count One of the TAC, which Plaintiff alleges against Fabela in his individual capacity. Count One of the TAC is labeled "Illegal Intrusion on First Amendment Right to Free Speech in Violation of 42 U.S.C. § 1983." TAC ¶ 34. Plaintiff alleged this same cause of action in Plaintiff's SAC. *See* ECF No. 37, at ¶ 37. In the Court's order granting in part and denying part Defendants' motion to dismiss the SAC, the Court noted that "[t]he distinction between Plaintiff's claims in Counts One and Two [wa]s unclear." *Ryan*, 2017 WL 1175596, at *4 n.1. The Court explained, however, that the allegations in Counts One and Two were substantially the same, and Plaintiff appeared to analyze both Counts One and Two as First Amendment retaliation causes of action. *Id.* Accordingly, the Court "construe[d] both Counts One and Two as First Amendment retaliation claims under § 1983, with Count One alleged against Fabela in his individual capacity and Count Two alleged against SCVTA under a *Monell* theory of liability." *Id.* The Court then proceeded to analyze Plaintiff's claim in Count One under a First Amendment retaliation framework, and held that Plaintiff had adequately

alleged a First Amendment retaliation claim. *Id.*

In the instant motion, Defendants again move to dismiss Count One. *See* Mot. at 11–12. According to Defendants, because Plaintiff still labels Count One as "Illegal Intrusion on First Amendment Speech," Plaintiff is *not* attempting to allege a First Amendment retaliation theory in Count One, but is rather attempting to allege "a § 1983 claim for illegal intrusion of protected speech." *Id.* at 12. Defendants thus argue that Plaintiff must adequately allege that Defendants "deterred or chilled" Plaintiff's speech. *Id.* Defendants contend that Plaintiff cannot do so because, according to the TAC, Plaintiff took down the "Anything but Terrazas for City Council" webpage on his own volition, within 24-hours of posting it, and prior to Fabela learning of the webpage. *Id.* at 13.

Defendants' argument is not well taken. This Court construed Count One of the SAC as a First Amendment retaliation claim because the Court found that Plaintiff alleged the substance of a First Amendment retaliation claim in Count One. *Ryan*, 2017 WL 1175596, at *4. Count One of Plaintiff's TAC, like Count One of Plaintiff's SAC, continues to allege the substance of a First Amendment retaliation claim. Specifically, Plaintiff alleges that Plaintiff engaged in constitutionally protected speech by posting his "Anything But Terrazas for City Council" webpage, and that Plaintiff was deprived "of his rights under the First Amendment to the United States Constitution when [Fabela] terminated [Plaintiff] for having posted the website." *See* TAC ¶¶ 42–46. The Court's prior order held that these allegations in the SAC were sufficient to state a plausible claim for relief under a First Amendment retaliation theory.[1] *Ryan*, 2017 WL 1175596,

[1] Defendants also argue in their motion to dismiss that Fabela was "justif[ied] [in] treating [Plaintiff] differently from other members of the general public." *See* Mot. at 17. Defendants' argument relates to the fourth factor of the *Pickering* balancing test for analyzing First Amendment retaliation claims. The fourth *Pickering* factor asks whether "the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *See Eng v. Cooley*, 552 F.3d 1062, 1072 (9th Cir. 2009) (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)). However, "whether [Defendants] can establish that the restriction [on Plaintiff's speech] is justified based on *Pickering* is not appropriately decided on a motion to dismiss." *Montclair Police Officers' Assoc. v. City of Montclair*, 2017 WL 1288427, at *7 (C.D. Cal. Oct. 24, 2012). As the Court found in its prior Order, Plaintiff has adequately alleged a First Amendment retaliation claim.

at *4. Having already held that Plaintiff adequately stated a First Amendment retaliation claim in Count One, the Court will not now dismiss Count One simply because Plaintiff has not changed the title of Plaintiff's claim. Thus, the Court DENIES Defendants' motion to dismiss Count One.[2]

**2. Count Two: *Monell* Liability against SCVTA under Final Policymaker Theory**

Defendant moves to dismiss Count Two of the TAC, which alleges violation of § 1983 against SCVTA and Fabela in his official capacity, because Plaintiff has failed to adequately allege *Monell* liability. "Under § 1983, a local government may not be sued under a theory of respondeat superior for injuries inflicted by its employees or agents. *Monell*, 436 U.S. at 690–91. However, "[l]ocal governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* at 690–91.

Specifically, under *Monell*, a plaintiff may establish municipal liability by demonstrating that "(1) the constitutional tort was the result of a longstanding practice or custom which constitutes the standard operating procedure of the local government entity; (2) the tortfeasor was an official whose acts fairly represent official policy such that the challenged action constituted official policy; [] (3) an official with final policy-making authority delegated that authority to, or ratified the decision of, a subordinate," *Price v. Sery*, 513 F.3d 962, 966 (9th Cir. 2008) (internal quotation marks omitted); or (4) "in limited circumstances," the failure to train municipal employees can serve as the policy underlying a *Monell* claim." *Bd. of the Cty. Comm'rs v. Brown*, 520 U.S. 397, 407 (1997).

[2] To the extent that Plaintiff seeks in Count One to allege anything other than a First Amendment retaliation claim, the TAC does not adequately allege such a claim. Plaintiff alleges that he engaged in protected activity by posting the "Anything But Terrazas for City Council" webpage in June 2014, that Plaintiff took down the Terrazas webpage on his own volition less than 24 hours after posting it, TAC ¶ 43, that Plaintiff told his supervisor about the webpage in February 2015, and that Plaintiff was fired nine months later because he had posted the webpage. *Id.* ¶¶ 29–30. As the Court stated in its prior Order, Count One alleges the substance of a First Amendment retaliation claim. *Ryan*, 2017 WL 1175596, at *4.

In Plaintiff's SAC, Plaintiff alleged that SCVTA was liable for Fabela's individual actions because (1) Fabela's actions were pursuant to "a longstanding practice or custom" of SCVTA; (2) SCVTA failed to properly train its employees; and (3) Fabela acted as a "final policymaker." *See Ryan*, 2017 WL 1175596, at *8. This Court held that Plaintiff had failed to adequately allege *Monell* liability because, for each of these theories of *Monell* liability, Plaintiff pled only legal conclusions. *See id.* at *8–9.

In Plaintiff's TAC, Plaintiff alleges that SCVTA is liable for Fabela's individual actions only under a "final policymaker" theory of *Monell* liability. *See* TAC ¶¶ 57–60. Plaintiff does not reallege other *Monell* theories in his TAC. *See id; see also* Opp. at 11–12. Thus, the Court turns to address whether Plaintiff has adequately alleged that SCVTA is liable for Fabela's actions because Fabela is a "final policymaker" within the meaning of *Monell*.

A plaintiff may allege a *Monell* claim by "establish[ing] that the individual who committed the constitutional tort was an official with 'final policy-making authority' and that the challenged action itself thus constituted an act of official government policy." *Palm v. Los Angeles Dep't of Water & Power*, 2015 WL 4065087, at *3 (C.D. Cal. July 2, 2015) (quoting *Hopper v. City of Pasco*, 241 F.3d 1067, 1083 (9th Cir. 2001)). "Whether a particular official has final policymaking authority is a question of state law." *Schiff v. City & Cty. of San Francisco*, 816 F. Supp. 2d 798, 812 (N.D. Cal. 2011). "[T]he fact that a city employee has a level of independent decision-making power does not render him a final policymaker for purposes of municipal liability." *Lopez v. City & Cty. of San Francisco*, 2014 WL 2943417, at *14 (N.D. Cal. June 30, 2014). "The authority to exercise discretion while performing certain functions does not make the official a final policymaker unless the decisions are final, unreviewable, and not constrained by the official policies of supervisors." *Zofragos v. City & Cty. of San Francisco*, 2006 WL 3699552, at *16 (N.D. Cal. Dec. 13, 2006); *see also Lopez*, 2014 WL 2943417, at *14 ("For municipal liability to attach, 'the official who commits the alleged violation of the plaintiff's rights [must have] authority that is final in the special sense that there is no higher authority.'") (quoting *Gernetzke v.*

*Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 469 (7th Cir. 2001)).

Plaintiff alleges in the TAC that Fabela was General Counsel for SCVTA. TAC ¶ 60. Plaintiff's TAC includes several allegations regarding Fabela's "job description," including that Fabela is responsible for "organiz[ing], coordinat[ing], supervis[ing], and direct[ing] the activities of the Office of General Counsel, including hiring, training, evaluating, and counseling professional, administrative and clerical staff." *Id.* Plaintiff alleges that Fabela hired and fired numerous individuals without input or approval from higher authorities, and thus Fabela is a "final policy-maker" with regards to hiring and firing at SCVTA. *Id.*

However, Plaintiffs' allegations regarding Fabela's job description do not show that Fabela had "final policy making" authority within the meaning of *Monell*. To the contrary, the job description provided by Plaintiff in the TAC states: "*[u]nder the policy direction* of the Valley Transportation Authority (VTA) Board of Directors, [General Counsel] serves as the Chief Legal Officer of VTA." *Id.* (emphasis added). Further, the job description provides that the General Counsel "*serves under direction* of the VTA Board of Directors," and "[e]stablishes and maintains goals, objectives and plans for carrying out the functions of the office *consistent with the VTA Board's policy determinations*." *Id.* (emphasis added).

Moreover, California state law is clear that the SCVTA Board of Directors—not the SCVTA General Counsel—makes policy determinations for the SCVTA. Division 10, Part 12 of the California Public Utilities Code, which concerns the SCVTA specifically, provides that "[t]he board of directors is the legislative body of the [SC]VTA and shall determine all questions of [SC]VTA policy." Cal. Pub. Util. Code § 100070. This statutory division further provides that the General Counsel serves as an Officer of the SCVTA that "shall be appointed and may be removed by the affirmative votes of a majority of the [SCVTA Board of Directors]." Cal. Pub. Util. Code § 100090.

Despite this statutory authority, Plaintiff insists that Fabela had final policymaking authority within the meaning of *Monell* because Fabela has the authority to hire and fire

employees without further input. *See* TAC ¶ 60. However, Plaintiff's argument "equates [Fabela's] final *decisionmaking* authority with that of final *policymaking* authority on behalf of [SCVTA]." *Tumbling v. Merced Irrig. Dist.*, 2010 WL 11450406, at *14 (E.D. Cal. Sept. 27, 2010). The Ninth Circuit has recognized that simply "possessing the discretionary authority to hire and fire employees" is not alone "sufficient to establish a basis for municipal liability" under a "final policymaker" theory of *Monell* liability. *Gillette v. Delmore*, 979 F.2d 1342, 1350 (9th Cir. 1992). Rather, municipal liability under *Monell* can be imposed "only if [the individual] was responsible for establishing [the municipality's] employment *policy*." *Id.* (emphasis added); *see Schiff*, 816 F. Supp. 2d at 813 ("Where, as here, an appointing officer has the authority to hire and fire workers, but not the responsibility for establishing employment policy, the personnel decisions of the appointing officer cannot be attributed to the municipality."). Although Fabela may have been granted discretionary authority to hire or fire employees in the General Counsel's Office of SCVTA, Plaintiff has not offered anything to suggest that Fabela, as General Counsel of the SCVTA, "made final employment policy for" the SCVTA. *Gillette*, 979 F.2d at 1350. To the contrary, as discussed above, the California Public Utility Code provides that the SCVTA Board of Directors "shall determine all questions of [SC]VTA policy." Cal. Pub. Util. Code § 100070.

In sum, California state law provides that the SCVTA Board of Directors, not Fabela, has final policymaking authority for the SCVTA. *See* Cal. Pub. Util. Code § 100070. Although Fabela may have discretionary authority to hire and fire employees, this is not equivalent to final policymaking authority for purposes of *Monell* liability. Thus, the Court GRANTS Defendants' motion to dismiss Count Two. In the Court's order dismissing Count Two of Plaintiff's SAC, the Court granted Plaintiff leave to amend to adequately allege *Monell* liability. Plaintiff has failed to do so. Because this is Plaintiff's *fourth* complaint, and because Plaintiff has failed to correct the deficiencies identified by the Court in its order dismissing Count Two of the SAC, the Court finds that granting Plaintiff leave to file a fifth complaint against Defendants would be futile, cause undue delay, and cause undue prejudice to Defendants. *See Leadsinger*, 512 F.3d at 532. Thus,

the Court dismisses Count Two with prejudice.

**3. Count Three: Violation of California Government Code § 3203**

Finally, Defendants move to dismiss Count Three of the TAC, which alleges violation of California Government Code § 3203 based on Defendants' termination of Plaintiff in retaliation for exercise of his First Amendment rights. In this Court's order granting in part and denying part Defendants' motion to dismiss the SAC, the Court denied Defendants' motion to dismiss Count Three because the parties' arguments regarding California Government Code § 3203 were identical to the parties' arguments regarding the § 1983 First Amendment causes of action. Thus, the Court did not address at that time whether California Government Code § 3203 provided Plaintiff with a private cause of action for retaliation. In Defendants' motion to dismiss Count Three of the TAC, Defendants directly present the issue of whether California Government Code § 3203 provides Plaintiff with a private cause of action. Thus, the Court turns to address whether Plaintiff can bring a private cause of action under California Government Code § 3203 for retaliation.

California Government Code § 3203 provides the following: "Except as otherwise provided in this chapter, or as necessary to meet requirements of federal law as it pertains to a particular employee or employees, no restriction shall be placed on the political activities of any officer or employee of a state or local agency." Cal. Gov't Code § 3203. As the Court recognized in its prior order, "California case law interpreting California Government Code § 3203 is limited." *Ryan*, 2017 WL 1175596, at *10 n.4. The Court is aware of no case directly addressing whether California Government Code § 3203 provides employees with a private cause of action for retaliation. Indeed, as the Court noted in its prior order, a district court in this Circuit "recently expressed doubt that California Government Code § 3203 'provide[d] a cause of action for retaliation for the exercise of one's First Amendment rights." *Maner v. Cty. of Stanislaus*, 2016 WL 4011722, at *15 (E.D. Cal. July 27, 2016).

In his opposition to Defendants' motion to dismiss, Plaintiff contends that the Court should

interpret California Government Code § 3203 similar to California Labor Code § 1101, which provides that "[n]o employer shall make, adopt, or enforce any rule, regulation, or policy . . . [c]ontrolling or directing, or tending to control or direct the political activities or affiliations of employees." Cal. Labor Code § 1101(b). According to Plaintiff, this statute has been interpreted as providing a private right of action for retaliation, and thus the Court should hold similarly for California Government Code § 3203. *See* Opp. at 15.

However, the California Supreme Court has found that California Labor Code § 1101 creates a "civil right of action" because California Labor Code *§ 1105* "provides that '[n]othing in this chapter shall prevent the injured employee from recovering damages from his employer for injury suffered through a violation of this chapter.'" *Lockheed Aircraft Corp. v. Sup. Ct. of Los Angeles Cty.*, 171 P.2d 21, 25 (Cal. 1946) (citing Cal. Labor Code § 1105).

By contrast, Plaintiff does not cite—and the Court is not aware of—any similar provision in relation to California Government Code § 3203 or Chapter 9.5 of the California Government Code, which is the chapter encompassing California Government Code § 3203. *See Maner*, 2016 WL 4011722, at *15 (noting that "none of the statutory subsections [in Chapter 9.5 of the California Government Code] clearly provides a cause of action for retaliation for the exercise of one's First Amendment rights"). Importantly, California courts have recognized that "[t]he fact that a remedy or penalty for violation of [a California statute's] mandates was not included in the statute is a strong indication that such a right was not intended." *Rosales v. City of Los Angeles*, 82 Cal. App. 4th 419, 428 (Cal. Ct. App. 2000). In addition, the Ninth Circuit has indicated that federal courts should "hesitate prematurely to extend" state law without "indication from the [state] courts or the [state] legislature that such an extension would be desirable." *Torres v. Goodyear Tire & Rubber Co.*, 867 F.2d 1234, 1238 (9th Cir. 1989).

In sum, given the dearth of case law interpreting and applying California Government Code § 3203, and the lack of indication in the statute that it provides a private right of action for retaliation, the Court declines to extend California law to hold that California Government Code §

3203 provides Plaintiff with a private cause of action against SCVTA for retaliation. Accordingly, because the Court concludes that there is no private right of action for Plaintiff under California Government Code § 3203, the Court GRANTS Defendants' motion to dismiss Count Three. The Court dismisses Count Three with prejudice because leave to amend this claim would be futile. *See Leadsinger*, 512 F.3d at 532.

**B. Motion to Strike**

The Court next addresses Defendants' motion to strike. Defendants move to strike several factual allegations from the TAC that were alleged in the SAC in connection with causes of action that Plaintiff has not realleged in the TAC. *See* Mot. at 20–21. For example, Plaintiff's TAC contains allegations that Defendants "treated [Plaintiff] differently based on his gender, race, and medical conditions," even though Plaintiff does not allege gender discrimination, race discrimination, or disability discrimination claims in the TAC. *See* TAC ¶¶ 2, 9. In addition, Plaintiff's TAC alleges Fernandez violated Plaintiff's rights, even though Plaintiff dismissed Fernandez with prejudice on October 19, 2016. *See* TAC ¶ 49; ECF No. 29.

Plaintiff does not oppose Defendants' motion to strike, except to the extent that Defendants move to strike ¶ 49 of the TAC. *See* Opp. at 17–18. Paragraph 49 of the TAC contains Plaintiff's allegation that Fernandez violated Plaintiff's rights. *See* Opp. at 17–18. According to Plaintiff, although Fernandez has been dismissed from this case, "her conduct still remains at issue in this case." *Id.*

Plaintiff's argument is not well taken. Paragraph 49 of the TAC alleges that "[t]he conduct of . . . Nuria Fernandez, VTA General Manager, in her official capacity . . . constitutions violations under color of law" of Plaintiff's rights. TAC ¶ 49. This is a legal conclusion regarding Fernandez's liability, despite the fact that Plaintiff dismissed Fernandez with prejudice on October 19, 2016, which is prior to Plaintiff's filing of the *SAC* in this action on December 14, 2016. ECF No. 29. Indeed, in this Court's order granting in part and denying in part Defendants' motion to dismiss the SAC, the Court explicitly stated that "Plaintiff dismissed with prejudice Fernandez as

a defendant on October 19, 2016. ECF No. 29. Thus, Plaintiff must strike all references to Fernandez as a defendant and all allegations that Fernandez violated the law." *Ryan*, 2017 WL 175596, at *10 n.3. Plaintiff's allegation regarding Fernandez in ¶ 49 of the TAC is in direct contravention of this Court's order.

Accordingly, the Court GRANTS Defendants' motion to strike. Plaintiff shall strike the following allegations from the complaint:

- *Paragraph 2, Page 2, Lines 1-2:* "and treated him differently based on his gender, race, and medical conditions."
- *Paragraph 3, Page 2, Lines 5-6*: "California Fair Employment and Housing Act, California Labor Code, Title VII of the 1964 Civil Rights Act, as amended."
- *Paragraph 9, Page 3, Lines 1-2*: "or on the basis of gender, race, age, disability or medical conditions."
- *Paragraphs 15-16, Page 4, Lines 11-16*: "Plaintiff has exhausted his administrative remedies by filing charges of discrimination with appropriate federal and state agencies….Plaintiff received his Right to Sue letter from the EEOC on February 6, 2017."
- *Paragraph 20, Page 5, Lines 3-10*: "For years, and specifically during the period since 2014 until present, Defendant VTA had initiated, endorsed, ratified, and approved a policy and custom….causing deprivations of the United States Constitutional Right of Free Speech and Right to Petition the government and other state and federal rights."
- *Paragraph 21, Page 5, Lines 11-14*: "This illegal custom, practice, pattern, and policy is exemplified in Defendant VTA's managing agent, Defendant Fabela….threatening Plaintiff with termination because Plaintiff exercised his Right to Free Speech and political activity away from the workplace."
- *Paragraph 31, Page 7, Lines 5-10*: "Throughout his employment, Defendants, and each of them, knew or should have known, that Mr. Ryan suffered from a medical condition amounting to a disability within the meaning of the Americans with Disabilities Act ("ADA") and the California Fair Employment and Housing Act ("FEHA"). Mr. Ryan frequently expressed, both physically and verbally, physical pain resulting from his disability while in the presence of his supervisor, Defendant Fabela, during activities such as walking, sitting, and speaking."
- *Paragraph 32, Page 7, Lines 11-13*: "Plaintiff's medical condition substantially limited his ability to sleep, walk, stand, lift, bend, concentrate, tolerate substandard performance by coworkers and perform manual tasks at work and at home. VTA had actual and

constructive knowledge of Plaintiff's disability."

- *Paragraph 32, Page 7, Lines 14-16*: "Despite this knowledge, Defendant never offered to engage in, and did not engage in, an interactive process as required by Federal and California law regarding disability accommodation."

- *Paragraph 48, Page 10, Lines 21-26*: "…including but not limited to, inadequate training and hiring practices….constitute a policy, pattern, practice and custom…"

- *Paragraph 49, Pages 10:27-11:3:* "The conduct of . . . NURIA FERNANDEZ, VTA General Manager, in her official capacity, at all times relevant and as set forth above, constitutes violations under color of law, of Mr. Ryan's rights, privileges and immunities guaranteed him by the First Amendment of the United States Constitution."

## IV. CONCLUSION

For the foregoing reasons, the Court DENIES Defendants' motion to dismiss as to Count One, and GRANTS with prejudice Defendants' motion to dismiss as to Counts Two and Three. In addition, the Court GRANTS Defendants' motion to strike.

**IT IS SO ORDERED.**

Dated: July 25, 2017

Lucy H. Koh

LUCY H. KOH
United States District Judge