

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

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

JOHN NKWUO,  
Plaintiff,  
v.  
SANTA CLARA COUNTY HUMAN  
RESOURCES, et al.,  
Defendants.

Case No. 16-cv-06741-BLF

**ORDER VACATING HEARING ON  
DEFENDANTS’ MOTION TO DISMISS  
FIRST AMENDED COMPLAINT;  
GRANTING MOTION WITHOUT  
LEAVE TO AMEND; AND DISMISSING  
ACTION**

[Re: ECF 44]

Plaintiff John Nkwuo, proceeding *pro se*, claims that the County of Santa Clara refused to consider or interview him for three positions because of his race, national origin, and age. He brings suit under federal anti-discrimination statutes and state common law. Defendants, the County and several individuals allegedly involved in the hiring decisions, successfully moved to dismiss the original complaint under Federal Rule of Civil Procedure 12(b)(6). The Court issued a reasoned order on that motion, identifying numerous deficiencies in the complaint and granting Nkwuo leave to amend. *See* Order Granting Defendants’ Motion to Dismiss Complaint with Leave to Amend (“Dismissal Order”), ECF 42.

Nkwuo timely filed the operative first amended complaint (“FAC”), asserting claims for (1) race discrimination under Title VII<sup>1</sup>, (2) national origin discrimination under Title VII, (3) age discrimination under the ADEA<sup>2</sup>, and (4) intentional infliction of emotional distress (“IIED”). Defendants filed the present motion to dismiss on July 17, 2017, arguing that Nkwuo has not

---

<sup>1</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

<sup>2</sup> Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*

1 cured the pleading deficiencies identified by the Court in its Dismissal Order. Nkwuo has not  
2 filed an opposition to the motion, and the time to do so has elapsed. *See* Civ. L.R. 7-3(a)  
3 (opposition due not more than 14 days after motion was filed).

4 The Court has determined that Defendants’ motion is appropriate for disposition without  
5 oral argument and therefore the hearing set for December 7, 2017 is VACATED. *See* Civ. L.R. 7-  
6 1(b). For the reasons discussed below, the motion is GRANTED WITHOUT LEAVE TO  
7 AMEND and the action is DISMISSED.

8 **I. BACKGROUND<sup>3</sup>**

9 Nkwuo holds a Bachelor’s degree in electrical engineering and a Master’s degree in  
10 information technology, and he has more than twenty-two years of industrial experience. FAC at  
11 13, ECF 43.<sup>4</sup> He also “is a registered Professional Engineer with the State of California (License  
12 No. E 15500) issued by the State California Boards of Professional Engineer and Land Survey.”  
13 *Id.* Between June 23, 2014 and July 15, 2014, Nkwuo applied for three positions with the County:  
14 Electrician, Engineering Assistant, and Enterprise IT Business Specialist. *Id.* at 12. He was  
15 informed that he was not qualified for any of the positions, and he was not interviewed or hired.  
16 *Id.* at 13-14.

17 Nkwuo filed this lawsuit after obtaining an “EEOC Right to Sue Letter.” FAC at 14. He  
18 alleges that the County discriminated against him “because he is a Black US Citizen and  
19 Immigrant with National Origin of African Decent [sic].” *Id.* at 17. He also alleges that “No  
20 Black Job Applicant of any age including Plaintiff who older than 49 years of age was tested,  
21 interviewed or hired.” *Id.* at 19. Finally, Nkwuo claims that “[a]ll Defendants actions have  
22 aggrieved the Plaintiff and subjected the plaintiff to series of emotional distress for which legal  
23 remedy are inadequate.” *Id.* He seeks “monetary relief from Defendants for Intentional Infliction  
24 of Emotional Distress damages of \$1000,000 per Year for the number of years it was inflicted”;

25  
26 \_\_\_\_\_  
27 <sup>3</sup> Plaintiff’s well-pled factual allegations are accepted as true for purposes of the motion to  
dismiss. *See Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 690 (9th Cir. 2011).

28 <sup>4</sup> Because Nkwuo has not numbered the paragraphs of his pleading as required by Federal Rule of  
Civil Procedure 10(b), the Court cites to the FAC by page number.

1 “Lost wages of \$250,000 that Plaintiff would have earned if Plaintiff was hired from 2014. to  
2 2016”; and “compensatory and punitive damages of \$1000,000.00.” *Id.* at 25.

3 **II. LEGAL STANDARD**

4 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a  
5 claim upon which relief can be granted “tests the legal sufficiency of a claim.” *Conservation*  
6 *Force v. Salazar*, 646 F.3d 1240, 1241-42 (9th Cir. 2011) (quoting *Navarro v. Block*, 250 F.3d  
7 729, 732 (9th Cir. 2001)). When determining whether a claim has been stated, the Court accepts  
8 as true all well-pled factual allegations and construes them in the light most favorable to the  
9 plaintiff. *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 690 (9th Cir. 2011). However, the  
10 Court need not “accept as true allegations that contradict matters properly subject to judicial  
11 notice” or “allegations that are merely conclusory, unwarranted deductions of fact, or  
12 unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008)  
13 (internal quotation marks and citations omitted). While a complaint need not contain detailed  
14 factual allegations, it “must contain sufficient factual matter, accepted as true, to ‘state a claim to  
15 relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*  
16 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when it “allows the  
17 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*

18 **III. DISCUSSION**

19 **A. Individual Defendants**

20 Nkwuo lists the following individuals as defendants in the caption of his FAC: John Dam,  
21 Luke Leung, Shraerae Moresco, Irene Vaquerano, Leticia Soto, and Laura Salas. In its Dismissal  
22 Order, the Court noted that “[w]ith respect to the individual defendants, the complaint contains no  
23 allegations whatsoever regarding their conduct.” Dismissal Order at 3, ECF 42. The Court  
24 dismissed all claims against the individual defendants on that basis, with leave to amend. *Id.*  
25 Nkwuo has not even attempted to cure that defect; none of the individual defendants is mentioned  
26 in the FAC except in the caption.

27 Accordingly, the Individual Defendants’ motion to dismiss is GRANTED as to all claims  
28 of the FAC.

1           **B. County**

2                   **1. Discrimination – Claims 1, 2, and 3**

3           Nkwuo asserts that the County’s refusal to consider or interview him was due to  
4           discrimination on the basis of his race (Claim 1), national origin (Claim 2), and age (Claim 3). In  
5           its Dismissal Order, the Court explained to Nkwuo that in order to plead a discrimination claim, he  
6           must allege facts showing that he was qualified for the positions for which he applied. *See*  
7           Dismissal Order at 4-6, ECF 42. The Court referred Nkwuo to cases discussing that requirement,  
8           including *Mack v. California Dep’t of Corr. & Rehab.*, Case No.: 1:15-cv-01600 JLT, 2016 WL  
9           5846995, at \*3 (E.D. Cal. Oct. 5, 2016), and *Korkosz v. Clark Cty.*, 379 F. App’x 593, 595 (9th  
10          Cir. 2010). *See id.* The Court pointed out that Nkwuo “does not allege what qualifications the  
11          County required for the positions of Electrician, Engineering Assistant, and Enterprise IT Business  
12          Specialist, or that he possessed those qualifications.” *Id.* at 4-5.

13          The Court also noted that documents which Nkwuo had attached to the complaint “suggest  
14          that the County required particular qualifications for the positions that Nkwuo did not possess.”  
15          Dismissal Order at 5, ECF 42. For example, the County stated in its response to Nkwuo’s EEOC  
16          charge that applicants must have completed a recognized apprenticeship program or equivalent  
17          training for the Electrician position, and that applicants must have or obtain a Class B Driver’s  
18          license with an air brake endorsement for the Engineering Assistant position. *See* County’s  
19          Response, Exh. 3 to Compl., ECF 1. In explaining why Nkwuo’s failure to address the relevant  
20          qualifications was fatal to his claims, the Court stated that “Nkwuo’s personal belief that he was  
21          discriminated against is insufficient to state a claim – he must allege facts giving rise to a  
22          reasonable inference of discrimination.” Dismissal Order at 5, ECF 42.

23          Instead of adding facts showing that he was qualified for the Electrician, Engineering  
24          Assistant, and Enterprise IT Business Specialist positions, Nkwuo simply omitted the EEOC  
25          documents setting forth the qualifications for those positions. *Compare* Compl., ECF 1, *with*  
26          FAC, ECF 43. However, the Court may take judicial notice of Nkwuo’s EEOC charge and the  
27          County’s response thereto or, alternatively, may consider them under the incorporation by  
28          reference doctrine. *See Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (incorporation by

1 reference doctrine permits a court to consider documents referenced in but not physically attached  
2 to the complaint); *Coleman v. Boeing Co.*, No. C13-1788RSL, 2014 WL 266333, at \*1 n.1 (W.D.  
3 Wash. Jan. 23, 2014) (court may take judicial notice of documents filed with and by the EEOC as  
4 matters of public record). As discussed above, those documents suggest that the County required  
5 very specific qualifications for the Electrician, Engineering Assistant, and Enterprise IT Business  
6 Specialist positions. Nkwuo has not alleged facts showing that he had those qualifications or that  
7 the County would have accepted alternative qualifications for the positions in question.

8 The FAC contains only the most conclusory allegations regarding Nkwuo’s qualifications  
9 for the positions: “Plaintiff has established a prima facie case of desperate treatment and Plaintiff  
10 allege that (i) Plaintiff belongs to a racial minority; (ii) has applied and was qualified for the jobs  
11 for which Santa Clara County Human Resources was seeking applicants for ; (iii) that despite  
12 Plaintiff qualifications he was rejected, and (iv) that after Plaintiff rejection, the position remained  
13 open and that Santa Clara County continued to seek applicants from persons of complainant's  
14 qualification.” FAC at 6; *see also* FAC at 8-9. “Threadbare recitals of the elements of a cause of  
15 action, supported by mere conclusory statements, do not suffice” to state a claim. *Ashcroft v.*  
16 *Iqbal*, 556 U.S. 662, 678 (2009).

17 Accordingly, the County’s motion to dismiss is GRANTED as to Claims 1, 2, and 3 of the  
18 FAC.

19 **2. IIED - Claim 4**

20 Nkwuo asserts IIED by Defendants. In its Dismissal Order, the Court explained that in  
21 order to state a claim for IIED, Nkwuo must allege “outrageous conduct,” that is, conduct “which  
22 is so extreme as to exceed all bounds of that usually tolerated in a civilized society.” Dismissal  
23 Order at 6, ECF 42 (quoting *Johnson v. Ralphs Grocery Co.*, 204 Cal. App. 4th 1097, 1108  
24 (2012)). The Court concluded that “[b]ecause Nkwuo has not alleged facts showing  
25 discrimination or other misconduct on the part of Defendants, he has not alleged that the County’s  
26 hiring decisions were outrageous.” *Id.*

27 Nkwuo has not cured that pleading defect. He asserts that “all Defendants actions were  
28 outrageous and have aggrieved the Plaintiff, consequently subjected the plaintiff to series of

1 emotional distress for which legal remedy are inadequate.” FAC at 10. He also asserts that “[t]his  
2 emotional distress of the Plaintiff is the result Individual Defendants (Santa Clara County)  
3 outrageous acts of Arbitrary, Capricious, Bad Faith and Employment Discrimination based on  
4 Race, Age and National Origin perpetuated on the Plaintiff, in addition to the Elderly and  
5 Financial Abuse that Defendants caused the Plaintiff.” *Id.* at 11. However, as discussed above,  
6 Nkwuo has not alleged facts showing discrimination. Moreover, while he refers to “Elderly and  
7 Financial Abuse,” Nkwuo has neither asserted a claim for elder or financial abuse nor alleged facts  
8 which would make out such a claim. Finally, the County cannot be held liable on a common law  
9 claim such as IIED; all liability against the County must be based on statute. *See Comm. for*  
10 *Immigrant Rights of Sonoma Cty. v. Cty. of Sonoma*, 644 F. Supp. 2d 1177, 1207-08 (N.D. Cal.  
11 2009) (dismissing negligence, false arrest and imprisonment, and IIED claims against a county for  
12 failing to plead a statutory basis for the county’s liability).

13 Accordingly, the County’s motion to dismiss is GRANTED as to Claim 4 of the FAC.

14 **C. Leave to Amend**

15 The Court next must determine whether leave to amend is warranted. In deciding whether  
16 to grant leave to amend, the Court must consider the factors set forth by the Supreme Court in  
17 *Foman v. Davis*, 371 U.S. 178 (1962), and discussed at length by the Ninth Circuit in *Eminence*  
18 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048 (9th Cir. 2003). A district court ordinarily must grant  
19 leave to amend unless one or more of the *Foman* factors is present: (1) undue delay, (2) bad faith  
20 or dilatory motive, (3) repeated failure to cure deficiencies by amendment, (4) undue prejudice to  
21 the opposing party, and (5) futility of amendment. *Eminence Capital*, 316 F.3d at 1052. “[I]t is  
22 the consideration of prejudice to the opposing party that carries the greatest weight.” *Id.* However  
23 a strong showing with respect to one of the other factors may warrant denial of leave to amend.  
24 *Id.*

25 The record does not reflect undue delay or bad faith on the part of Nkwuo, and Defendants  
26 have not established that granting leave to amend would cause them undue prejudice. However,  
27 Nkwuo has failed to cure pleading deficiencies identified by the Court in its Dismissal Order, and  
28 he has not given any indication that he would be able to cure those deficiencies if given a further

1 opportunity to do so. Although the Court specifically pointed out that Nkwuo had not alleged any  
2 facts whatsoever about the individual defendants, Nkwuo did not add any allegations about the  
3 individual defendants to the FAC. Similarly, although the Court explained that Nkwuo must  
4 allege *facts* showing that he was qualified for the positions for which he applied, Nkwuo again  
5 included only conclusory allegations regarding his qualifications in the FAC. Nothing in this  
6 record suggests that Nkwuo would or could do better in another round of pleading. This is  
7 particularly true given that Nkwuo did not even file opposition to Defendants' motion to dismiss  
8 the FAC.

9 Accordingly, after weighing the *Foman* factors, the Court concludes that it is appropriate  
10 to dismiss the FAC WITHOUT LEAVE TO AMEND.

11 **IV. ORDER**

- 12 (1) Defendants' motion to dismiss the FAC is GRANTED WITHOUT LEAVE TO
- 13 AMEND; and
- 14 (2) The action is hereby DISMISSED.

15  
16 Dated: August 21, 2017

17   
18 BETH LABSON FREEMAN  
United States District Judge