

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ERNESTO M. HEREDIA,
Plaintiff,

v.

WEST VALLEY STAFFING GROUP,
Defendant.

Case No.16-cv-06777-HRL

**ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS**

Re: Dkt. No. 9

United States District Court
Northern District of California

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Pro se plaintiff Ernesto Heredia (“Heredia”) sues defendant West Valley Staffing Group (“West Valley”) for retaliatory failure to hire. Dkt. No. 1. Defendant moves to dismiss the complaint for lack of subject-matter jurisdiction (arguing that the suit is moot due to the prohibition on claim-splitting), failure to state a claim upon which relief may be granted, and exceptional circumstances under *D.A. Osuthorpe Family Partnership v. ASC Utah, Inc.*, 705 F.3d 1223 (10th Cir. 2013). Dkt. No. 9. Defendant also requests that the court *sua sponte* revoke Heredia’s *in forma pauperis* status. *Id.* All parties have consented to magistrate judge jurisdiction. Dkt. Nos. 5, 16. Heredia has not opposed West Valley’s motion.

For the reasons stated below, the court grants the motion to dismiss.

BACKGROUND

Heredia alleges that he was denied employment by West Valley. Dkt. No. 1. His brief complaint contains the following allegations: “I believe that I was retaliated against for engaging in protected activities in violation of title VII of the Civil Rights Act of 1964, as amended, and the Age Discrimination in Employment Act [“ADEA”] of 1967 as amended.” *Id.*, ¶ 4. “I have filed multiple employment discrimination and retaliation complaints against the above named respondent with the U.S. Equal Employment Opportunity Commission. I have also filed a lawsuit against the respondent. I believe that the Respondent has continued retaliating against me by not

1 hiring me for positions that I am qualified for.” *Id.*, ¶ 6. Heredia applied for and this court
2 granted leave to proceed *in forma pauperis*. Dkt. Nos. 2, 6.

3 **LEGAL STANDARD**

4 To survive a motion to dismiss under Rule 12(b)(6), a complaint must allege sufficient
5 facts to state a claim for relief that is facially plausible. *Bell Atlantic Corp. v. Twombly*, 550 U.S.
6 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that
7 allows the court to draw the reasonable inference that the defendant is liable for the misconduct
8 alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Complaints that merely recite the elements
9 of a claim are insufficient. *Id.* In considering a 12(b)(6) motion, a court accepts all of the
10 plaintiff’s factual allegations as true and construes the pleadings in the light most favorable to the
11 plaintiff. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). But
12 “the court is not required to accept legal conclusions cast in the form of factual allegations if those
13 conclusions cannot reasonably be drawn from the facts alleged.” *Clegg v. Cult Awareness*
14 *Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

15 When the court is evaluating a pro se complaint, it must construe the allegations liberally,
16 and dismissal of a pro se complaint without leave to amend is only proper if it is “absolutely clear
17 that no amendment can cure the defect.” *Murphy v. United States Postal Serv.*, No. C 14-02156
18 SI, 2014 WL 4437731 (N.D. Cal. Sept. 9, 2014) (quoting *Hughes v. Rowe*, 449 U.S. 5, 9-10
19 (1980)).

20 **DEFENDANT’S REQUESTS FOR JUDICIAL NOTICE**

21 Generally, district courts are limited to the materials contained in and attached to the
22 pleadings in ruling on a 12(b)(6) motion. Courts may, however, without turning the motion to
23 dismiss into a motion for summary judgment, take judicial notice of facts that are not subject to
24 reasonable dispute and that are “capable of accurate and ready determination by resort to sources
25 whose accuracy cannot reasonably be questioned,” as well as matters of public record. *Roca v.*
26 *Wells Fargo Bank, N.A.*, No. 15-cv-02147-KAW, 2016 WL 368153, at *3 (N.D. Cal., Feb. 1,
27 2016) (quoting Fed. R. Evid. 201(b)). “It is well established that the Court may take judicial
28 notice of records from other proceedings not to credit the truth of the allegations or facts set forth

1 therein, but rather ‘for purposes of noticing the existence of the [prior] lawsuit, the claims made in
2 the lawsuit, and the fact that various documents were filed therein.’” *Acasio v. San Mateo Cnty.*,
3 No. 14-cv-04689-JSC, 2015 WL 5568345, at *1, n.1 (N.D. Cal. Sep. 22, 2015) (quoting
4 *McMunigal v. Bloch*, No. C 1002765 SI, 2010 WL 5399219, at *2 (N.D. Cal. Dec. 23, 2010)).

5 Accompanying its motion to dismiss, defendant filed a request for judicial notice (“RJN”),
6 asking the court to take notice of 11 items, all (save one) documents from other judicial
7 proceedings. The documents include two state court complaints filed by Heredia alleging
8 discrimination against the defendant in this case; four state and three federal complaints filed by
9 Heredia against different employment agencies; the complaint in this action; and an order granting
10 defendant’s motion to dismiss in a separate case between these two parties, also before the
11 undersigned. Dkt. No. 11. The court takes judicial notice of the requested documents. *See*
12 *Acasio*, 2015 WL 5568345, at *1, n.1 (taking notice of the existence of a state court complaint and
13 an order from another court granting a motion for judgment on the pleadings).

14 **DISCUSSION**

15 **1. Rule 12(b)(6).**

16 Heredia fails to allege sufficient facts to allow the court to draw a reasonable inference that
17 defendant West Valley is liable for retaliatory failure to hire. A prima facie case for retaliatory
18 failure-to-hire requires the plaintiff to show (1) that he engaged in a protected activity, (2) that the
19 position for which he applied was “eliminated or not available” to him, and (3) that the position
20 was not available to him “because of the protected activities.” *See Ruggles v. Cal. Polytechnic*
21 *State Univ.*, 797 F.2d 782 (9th Cir. 1986). Heredia alleges that he engaged in a protected
22 activity—filing complaints before the EEOC and a lawsuit—and that he was not hired by
23 defendant. His central allegation, however—that he was not hired *in retaliation* for engaging in
24 protected activities—is wholly conclusory and not supported by any factual allegations. Heredia
25 states only that he “believe[s]” that he has been retaliated against. This belief, with nothing more,
26 is insufficient to support a reasonable inference of retaliation. On this basis, the court grants the
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1 motion to dismiss for failure to state a claim upon which relief may be granted.¹

2 **2. 28 U.S.C. § 1915.**

3 In addition to moving to dismiss Heredia’s complaint, West Valley requests that the court
4 exercise its discretion to reconsider or revoke its grant of *in forma pauperis* status to pro se
5 plaintiff.

6 The statute governing *in forma pauperis* status permits courts to dismiss claims filed *in*
7 *forma pauperis* “if satisfied that the action is frivolous or malicious.” *Neitzke v. Williams*, 409
8 U.S. 319, 324 (1989); 28 U.S.C. § 1915(e)(2)(B). This provision “is designed largely to
9 discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that
10 paying litigants generally do not initiate because of the costs of bringing suit” *Id.*, at 327.
11 Section 1915 does not define “malicious,” but courts have determined that a complaint is
12 malicious within the meaning of the statute “if it is repetitive or evidences an intent to vex
13 defendants or abuse the judicial process by relitigating claims decided in prior cases.” *Washington*
14 *v. Reno*, 59 F.3d 172 (6th Cir. June 22, 1995). Other courts have given “malicious” its ordinary
15 meaning, stating that cases are malicious if they are “filed with the ‘intention or desire to harm
16 another.’” *Andrews v. King*, 398 F.3d 1113, 1121 (9th Cir. 2005) (quoting *Webster’s Third New*
17 *International Dictionary* 1367 (1993)).

18 The court is persuaded that Heredia’s complaint in this action is malicious. Heredia has
19 filed 11 separate actions against staffing agencies in the Bay Area. Dkt. No. 11, RJN. The four
20 actions against this defendant all have similar conclusory allegations of discrimination, virtually
21 all of which are unsupported by any facts. *Id.* Heredia’s conduct once his cases were filed further
22 reveals his bad faith. Earlier this month, the undersigned issued an order to dismiss *Heredia v.*
23 *Boyd*, Case No. 16-cv-04031, for failure to prosecute. The order issued after Heredia failed to (1)
24 oppose defendant’s motion to dismiss, (2) timely amend his complaint, (3) file a Case
25 Management Conference statement, and (4) appear at a show cause hearing. Case No. 16-cv-

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28 ¹As the court grants the motion to dismiss pursuant to Rule 12(b)(6), and in light of the discussion
of 28 U.S.C. § 1915 that follows, the court declines to consider defendant’s arguments with
respect to *Osuthorpe* and claim-splitting.

1 4031, Dkt. No. 25. Heredia similarly failed to amend his complaint when given leave to do so in
2 Case No. 16-cv-4593, *Heredia v. Coast Personnel Services*. And Heredia has failed to oppose
3 defendant's motion to dismiss in this action.

4 More revealing of defendant's malicious motives, however, are the e-mails he has sent
5 defendant's counsel. Defendant's counsel has submitted a declaration detailing twenty-six
6 instances of insulting or profane communications Heredia sent to her or her colleagues, including
7 nine e-mails in one day. Dkt. No. 12, Bonnel-Rogers Decl., ¶ 3, Ex. A. The e-mails include
8 gender-, race-, national origin-, and sexual orientation-based insults, sometimes in combination
9 and occasionally in more than one language. *Id.* Significantly, the e-mails also include
10 communications dated August 30, 2016, stating: "You need to settle for 3,500.00 before this goes
11 to court or I will have to go to the state a[nd] federal court and file more lawsuits for retaliation on
12 all recruiters that work for west valley staffing." *Id.* Heredia appears to have carried out his threat
13 by initiating the present action, in which the complaint was filed November 23, 2016. Dkt. No. 1.

14 Heredia threatened to (and did) file likely-frivolous lawsuits (query whether Heredia could
15 have legitimate claims against "all recruiters that work for" defendant, particularly when
16 individual defendants cannot be held liable for damages under Title VII or the ADEA, *Miller v.*
17 *Maxwell's Int'l, Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993)) against West Valley to gain leverage
18 in making settlement demands, and he has insulted and threatened defendant's counsel. When
19 viewed in combination with Heredia's prior and continuing failures to prosecute his claims once in
20 court, Heredia's malicious purpose in filing this action becomes clear. Heredia has abused the
21 judicial process, and the court dismisses his complaint pursuant to 28 U.S.C. § 1915(e) as a result.

22 CONCLUSION

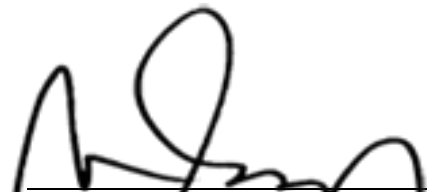
23 The court grants defendant's motion to dismiss the complaint for failure to state a claim
24 upon which relief may be granted and because the court determines the complaint was maliciously
25 filed. As the court has determined that Heredia has proceeded in bad faith, the court denies leave
26 to amend. *See In re Rogstad*, 126 F.3d 1224, 1228 (9th Cir. 1997) ("Whether leave to amend
27 should be granted is generally determined by considering the following factors: (1) undue delay;
28 (2) bad faith; (3) futility of amendment; and (4) prejudice to the opposing party.").

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Finally, the court is concerned that Heredia may be engaging in a pattern of malicious conduct. The court CAUTIONS HEREDIA that a plaintiff who engages in a pattern of CONTINUED ABUSE of the judicial process may be declared a VEXATIOUS LITIGANT and may face SANCTIONS, MONETARY OR OTHERWISE.

IT IS SO ORDERED.

Dated: 2/28/2017



HOWARD R. LLOYD
United States Magistrate Judge