

1 light duty requests, marking Plaintiff AWOL, and ultimately terminating him.

2 Plaintiff asserts the following claims: (1) violation of the FMLA; (2) violation of the
3 California Fair Employment and Housing Act (“FEHA”); (3) violation of California public policy;
4 (4) wrongful termination; (5) EEO discrimination; (6) negligent supervision/retention; (7)
5 intentional infliction of emotional distress.

7 **II. DISCUSSION**

8 **A. Motion to Dismiss**

9 Defendant moves to dismiss Plaintiff’s state law claims for violation of FEHA, violation
10 of California public policy, wrongful termination, negligent supervision/retention, and
11 intentional infliction of emotional distress on the ground that Plaintiff’s exclusive remedy for
12 the alleged violation of his workplace rights is under federal law. The Court agrees.

13 Plaintiff’s second cause of action under FEHA alleges that Plaintiff suffers from
14 disabilities and that Defendant failed to accommodate him. However, any claim of disability
15 discrimination against a federal agency must be brought under the Rehabilitation Act of 1973,
16 29 U.S.C. §§ 791, 794. See Boyd v. United States Postal Service, 752 F.2d 410, 413 (9th
17 Cir. 1985) (holding that § 501 of the Rehabilitation Act is “the exclusive remedy for
18 discrimination by the Postal Service on the basis of handicap.”) Therefore, Plaintiff’s FEHA
19 claim is dismissed. Because Plaintiff has not asserted a claim under the Rehabilitation Act,
20 the Court will allow Plaintiff to amend his Complaint to add a claim for violation of the
21 Rehabilitation Act.

22 Plaintiff’s third cause of action generally alleges discrimination based on age, gender,
23 disability, race, and national origin (TAC ¶ 82). As discussed above, any claim of disability
24 discrimination is governed by the Rehabilitation Act. As for Plaintiff’s other claims of
25 discrimination, the TAC’s factual allegations pertain to race and/or gender discrimination
26 only. (TAC ¶¶ 46, 76). Section 717 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16,
27 provides the exclusive remedy for federal employees complaining of job-related
28 discrimination based on race, color, religion, sex, or national origin. Brown v. General

1 Services Administration, 425 U.S. 820, 835 (1976). Accordingly, Plaintiff's state claim for
2 race and/or gender discrimination is dismissed.¹

3 Plaintiff's third cause of action also alleges that Defendant retaliated against Plaintiff
4 for "engaging in protected activities, namely filing [a] report to OSHA." However, any claim
5 that Defendant took prohibited personnel actions against him as a result of his whistleblowing
6 activities must be brought under the Civil Service Reform Act ("CSRA"). By enacting the
7 CSRA, Congress established "an integrated scheme of administrative and judicial review,
8 designed to balance the legitimate interests of the various categories of federal employees
9 with the needs of sound and efficient administration." United States v. Fausto, 484 U.S. 439,
10 445 (1988). If conduct challenged by the plaintiff falls within the scope of the CSRA's
11 "prohibited personnel practices," then the CSRA's administrative procedures are the
12 employee's only remedy. Mangano v. United States, 529 F.3d 1243, 1246 (9th Cir. 2008).
13 The CSRA specifically prohibits personnel actions taken in retaliation for an employee
14 reporting (1) a violation of any law, rule, or regulation; or (2) a substantial and specific danger
15 to public health and safety. 5 U.S.C. § 2302(b)(8)(A). Therefore, Plaintiff's claim of
16 retaliation for whistleblowing must be dismissed. See Rivera v. United States, 924 F.2d 948
17 (9th Cir. 1991) (holding that the Whistleblower Protection Act does not authorize government
18 employees to bring FTCA claims arising out of conduct addressed by the CSRA); Chrisanthis
19 v. United States, 2008 WL 48487674 (N.D. Cal. Nov. 7, 2008) (dismissing plaintiff's FTCA
20 claim that the federal government retaliated against him for filing an OSHA complaint
21 because CSRA was exclusive remedy).²

23 ¹ Plaintiff's Fifth Cause of Action is for "Equal Employment Opportunity Discrimination."
24 The Court construes this claim as a claim under § 717 of the Civil Rights Act of 1964.

25 ² The CSRA is not to be construed to extinguish or lessen any right or remedy
26 available to any employee or applicant for employment in the civil service under § 717 of the
27 Civil Rights Act of 1964 or § 501 of the Rehabilitation Act of 1973. 5 U.S.C. § 2302(e). In
28 contrast, claims under Title II of the FMLA (applicable to federal civil service employees with
more than twelve months of service) are preempted by the CSRA. Russell v. United States
Dept. of the Army, 191 F.3d 1016 (9th Cir. 1999). If Plaintiff is a Title II employee, his FMLA
claims are preempted. However, Defendant has not moved to dismiss Plaintiff's FMLA claim
at this time.

1 Plaintiff's fourth claim for wrongful termination, sixth claim for negligent supervision
2 and/or retention, and seventh claim for intentional infliction of emotional distress, are
3 premised on the acts of alleged discrimination governed by the federal statutes discussed
4 above. Therefore, these state claims are dismissed as well.

5
6 **B. Motion to Strike**

7 Defendant moves to strike Plaintiff's Doe allegations (TAC ¶ 6) on the ground that the
8 Postmaster General is the only proper defendant in this case. Defendant's motion is granted.
9 John E. Potter in his official capacity as Postmaster General, as the "head of the department,
10 agency, or unit," is the only proper defendant. See 42 U.S.C. § 2006e-16(c); 29 U.S.C. §
11 794a(a)(1). Therefore, there is no need for Doe defendants.

12 Defendant also moves to strike Plaintiff's request for punitive and exemplary
13 damages. (TAC ¶¶ 68, 79, 87, 92, 100, 103, 107; Prayer for Relief, ¶ 4.) Under 42 U.S.C.
14 § 1981a(b)(1), a Title VII plaintiff may recover punitive damages "against a respondent (other
15 than a government, government agency, or political subdivision)" The Postal Service
16 is a "government agency" for purposes of section 1981. Baker v. Runyon, 114 F.3d 668 (7th
17 Cir. 1997); Robinson v. Runyon, 149 F.3d 507 (6th Cir. 1998). Therefore, Plaintiff cannot
18 recover punitive damages against Defendant, and his allegations regarding such relief are
19 stricken.

20
21 **C. Leave to Amend**

22 Plaintiff has requested leave to amend his complaint once more. The Court **DENIES**
23 Plaintiff's request as it pertains to the state claims dismissed by the Court. These state
24 claims cannot be salvaged by amending the pleadings. However, the Court **GRANTS**
25 Plaintiff leave to amend his complaint to allege a claim under § 501 of the Rehabilitation Act.
26 In keeping with this Order, the Fourth Amended Complaint (1) should reassert Plaintiff's
27 federal claims under the FMLA and Title VII; (2) should include a claim for disability
28 discrimination under the Rehabilitation Act; (3) should **not** include the state claims dismissed

1 in this order; and (4) should **not** include allegations pertaining to punitive or exemplary
2 damages. The Fourth Amended Complaint should be complete in and of itself and should
3 not refer to previously filed complaints. Civ.L.R. 15.1.

4 **Plaintiff's Fourth Amended Complaint must be filed within 25 days of the filing**
5 **of this order. If Plaintiff does not file a Fourth Amended Complaint, Defendant shall**
6 **answer the TAC within 45 days of the filing of this order.**

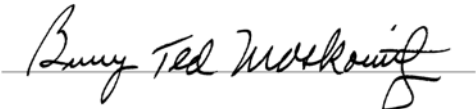
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III. CONCLUSION

For the reasons discussed above, Defendant's motion to dismiss is **GRANTED**.
Plaintiff's second, third, fourth, sixth, and seventh claims are **DISMISSED** for failure to state
a claim. Defendant's motion to strike is **GRANTED**. The Court strikes Plaintiff's Doe
allegations (TAC ¶ 6) and the allegations pertaining to punitive and exemplary damages
(TAC ¶¶ 68, 79, 87, 92, 100, 103, 107; Prayer for Relief, ¶ 4.) Plaintiff's motion to amend his
complaint is **GRANTED IN PART** and **DENIED IN PART**. Plaintiff is granted limited leave
to amend his complaint to add a claim under § 501 of the Rehabilitation Act.

IT IS SO ORDERED.

DATED: July 12, 2010


Honorable Barry Ted Moskowitz
United States District Judge