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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 CRISTIAN CERVANTES,

12 Plaintiff,

13 v.

14 JANET NAPOLITANO, in her official
15 capacity as Secretary of the Department of
16 Homeland Security,

17 Defendant.

Case No.: 12-cv-01045 JLS (JMA)

**ORDER DENYING DEFENDANT'S
MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM**

(ECF No. 37)

18 Presently before the Court is Defendant's Motion to Dismiss Second Amended
19 Complaint or, in the Alternative, for Summary Judgment ("MTD") (ECF No. 37),
20 Plaintiff's Response in Opposition re Motion to Dismiss for Failure to State a Claim or, in
21 the Alternative, for Summary Judgment ("Opp'n") (ECF No. 39), and Defendant's
22 Response in Support re Motion to Dismiss for Failure to State a Claim or, in the Alternative,
23 for Summary Judgment ("Reply") (ECF No. 39). On July 12, 2016 the Court vacated the
24 hearing set for Defendant's MTD and took the matter under submission without oral
25 argument pursuant to Civil Local Rule 7.1(d)(1). (Order Vacating Hr'g 1, ECF No. 42.)
26 Having considered the parties' arguments and the law, the Court **DENIES** Defendant's
27 MTD.

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BACKGROUND

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2 Plaintiff is a Mexican-American male who worked at U.S. Customs and Border
3 Protection (“CBP”). (Second Am. Compl. for Damages and Injunctive Relief (“SAC”) ¶ 7,
4 ECF No. 11.) On January 12, 2011 several employees senior to Plaintiff informed him that
5 he would not be awarded a tenured position. (*Id.* ¶ 9.) One employee told Plaintiff that he
6 was “too young.” (*Id.*) The next day, Plaintiff contacted Union President Jose Bustamante,
7 told him what happened, and was told by Mr. Bustamante the reason for the non-award of
8 tenure was due to Plaintiff having been “written up” (*Id.*) Plaintiff told Mr.
9 Bustamante this “was untrue” because “he had never been counseled or given a letter of
10 reprimand or even told he was the subject of a negative work issue,” and that he instead
11 “believed he was the victim of discrimination and retaliation for complaining about a
12 supervisor’s misconduct.” (*Id.*)

13 Approximately one week later Plaintiff was terminated by CBP. (*Id.* ¶ 10.) Plaintiff
14 alleges that his termination violated Title VII of the Civil Rights Act of 1964 (“Title VII”)
15 because CBP discriminated against him on the basis of his ethnicity. (*Id.* ¶¶ 9–10, 26
16 (noting CBP agent who terminated Plaintiff said “you are young and Hispanic. You could
17 easily get another job anywhere else if you resigned”).)

18 After his termination, Plaintiff met with Mr. Bustamante. (*Id.* ¶ 11.) Plaintiff alleges
19 that he designated Bustamante to serve as his representative for purposes of filing an Equal
20 Employment Opportunity (“EEO”) complaint. (*Id.*) Bustamante allegedly accepted this
21 representation and called the EEO office “within 45 days of the complained of action . . .
22 to obtain an EEO counselor” for Plaintiff and to explain Plaintiff’s allegations of
23 discrimination. (*Id.*) Plaintiff further alleges on information and belief that Mr.
24 Bustamante “specifically requested that EEO begin the informal counseling of Plaintiff’s
25 claim and was informed that the counselor would be contacting him shortly to obtain a
26 factual statement from Plaintiff” (*Id.* ¶ 12.) Accordingly, Mr. Bustamante notified
27 Plaintiff that he did not need to do anything else because the Union was taking care of the
28 matter for him. (*Id.* ¶ 13.)

1 On May 26, 2011 Plaintiff filed a formal EEO complaint with CBP through its
2 Oakland, California office. (*Id.* ¶ 15.) On June 3, 2011, CBP informed Plaintiff that his
3 complaint “may not be timely” because he had waited more than forty-five days to contact
4 an EEO counselor after the alleged discriminatory act. (*Id.* ¶ 17.) The agency required
5 Plaintiff to submit an explanation as to why he was unable to initiate counseling in a timely
6 manner. (*Id.*)

7 Plaintiff responded on June 15, 2011, explaining that he had contacted Mr.
8 Bustamante immediately after the termination took effect and that Mr. Bustamante had
9 assured him that the matter was being addressed and that an EEO complaint was being
10 filed on his behalf. (*Id.* ¶ 19.) He further explained that, after several unsuccessful attempts
11 to follow up with Bustamante, he retained counsel, who immediately initiated counselor
12 contact on March 17, 2011. (*Id.* ¶ 18.) Plaintiff further alleges that Mr. Bustamante had
13 contacted the EEO office, then subsequently contacted CBP management to discuss
14 Plaintiff’s claims, but ultimately agreed not to pursue any further action on behalf of
15 Plaintiff because CBP “management did not wish for the complaint to affect its internal
16 statistic regarding job related discrimination.” (*Id.* ¶ 20.) Plaintiff alleges he did not know
17 this information “at the time,” and therefore did not communicate it to the EEO at that time.
18 (*Id.*)

19 On June 15, 2011, CBP dismissed Plaintiff’s complaint for failure to initiate EEO
20 counselor contact within the forty-five-day deadline. (*Id.* ¶ 24.) On January 23, 2012, the
21 Equal Employment Opportunity Commission’s (“EEOC”) Office of Federal Operations
22 affirmed CBP’s final decision dismissing Plaintiff’s complaint. (*Id.* ¶ 25.)

23 Plaintiff subsequently filed suit in this Court on April 27, 2012, alleging employment
24 discrimination under Title VII, the Age Discrimination in Employment Act (ADEA), and
25 the Fifth Amendment. (Compl., ECF No. 1.) On February 7, 2013 the Court dismissed
26 Plaintiff’s ADEA and Fifth Amendment claims with prejudice and dismissed his Title VII
27 claim without prejudice for failure to exhaust administrative remedies. (Order Granting
28 Mot. to Dismiss Compl., ECF No. 10.) On February 21, 2013 Plaintiff filed his First

1 Amended Complaint, (First Am. Compl., ECF No. 11), Defendant once again moved to
2 dismiss, (Mot. to Dismiss for Failure to State a Claim or, in the Alternative, Mot. for Summ.
3 J., ECF No. 13), and the Court again granted without prejudice the Motion to Dismiss,
4 (Order Granting Mot. to Dismiss, ECF No. 21).

5 On March 16, 2016 Plaintiff filed his SAC. (ECF No. 26.) Defendant filed the
6 instant Motion. (ECF No. 37.) Because Defendant filed her motion as either a 12(b)(6)
7 motion to dismiss or a Rule 56 motion for summary judgment, the Court first addresses
8 which standard to use in reviewing the motion.

9 **WHETHER TO APPLY 12(b)(6) OR RULE 56**

10 As with her last motion, Defendant again moves to dismiss pursuant to Federal Rule
11 of Procedure 12(b)(6) or, in the alternative, for summary judgment pursuant to Rule 56.
12 “Federal Rule of Civil Procedure 12(b)(6) specifically gives courts the discretion to accept
13 and consider extrinsic materials offered in connection with these motions, and to convert
14 the motion to one for summary judgment when a party has notice that the district court may
15 look beyond the pleadings.” *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1160 (9th
16 Cir. 2012). In the present case, there is no indication that Plaintiff was on notice that the
17 Court would look beyond the pleadings. Indeed, Plaintiff’s complaint alleges only facts
18 within the personal knowledge of Plaintiff, relevant sections of the Code of Federal
19 Regulations and agency guidelines, and quotes from of the underlying agency decisions in
20 this case. Accordingly, the Court declines to exercise its discretion to turn this motion into
21 one for summary judgment under Rule 56.

22 **LEGAL STANDARD**

23 Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion the
24 defense that the complaint “fail[s] to state a claim upon which relief can be granted,”
25 generally referred to as a motion to dismiss. The Court evaluates whether a complaint
26 states a cognizable legal theory and sufficient facts in light of Federal Rule of Civil
27 Procedure 8(a), which requires a “short and plain statement of the claim showing that the
28 pleader is entitled to relief.” Although Rule 8 “does not require ‘detailed factual

1 allegations,’ . . . it [does] demand[] more than an unadorned, the-defendant-unlawfully-
2 harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*
3 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, “a plaintiff’s obligation to
4 provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and
5 conclusions, and a formulaic recitation of the elements of a cause of action will not do.”
6 *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). “Nor does
7 a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual
8 enhancement.”” *Iqbal*, 556 U.S. at 677 (citing *Twombly*, 550 U.S. at 557).

9 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
10 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting
11 *Twombly*, 550 U.S. at 570); *see also* Fed. R. Civ. P. 12(b)(6). A claim is facially plausible
12 when the facts pled “allow[] the court to draw the reasonable inference that the defendant
13 is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). That is not
14 to say that the claim must be probable, but there must be “more than a sheer possibility that
15 a defendant has acted unlawfully.” *Id.* Facts “‘merely consistent with’ a defendant’s
16 liability” fall short of a plausible entitlement to relief. *Id.* (quoting *Twombly*, 550 U.S. at
17 557). Further, the Court need not accept as true “legal conclusions” contained in the
18 complaint. *Id.* This review requires context-specific analysis involving the Court’s
19 “judicial experience and common sense.” *Id.* at 678 (citation omitted). “[W]here the well-
20 pleaded facts do not permit the court to infer more than the mere possibility of misconduct,
21 the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’”
22 *Id.*

23 **INCORPORATION BY REFERENCE**

24 Defendant has attached two exhibits to her motion: (1) prior written contact between
25 Plaintiff and the EEO office and (2) a declaration of a CBP officer refuting many of
26 Plaintiff’s allegations. (MTD Exs. 1, 2.) A district court may, but is not required, to
27 incorporate documents by reference on a 12(b)(6) motion to dismiss. *Davis*, 691 F.3d at
28 1160 (9th Cir. 2012). “Specifically, courts may take into account ‘documents whose

1 contents are alleged in a complaint and whose authenticity no party questions, but which
2 are not physically attached to the [plaintiff's] pleading.” *Davis*, 691 F.3d at 1160 (quoting
3 *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (alteration original)).

4 In the present case, Plaintiff, unsurprisingly, vigorously contests the veracity of and
5 validity of the Court's considering the CBP officer's declaration. Given these
6 protestations, and that Plaintiff in his pleadings relied on his own knowledge rather than
7 the contents of the declaration, the Court declines to incorporate the exhibits by reference.
8 Accordingly, because the Court does not accept, or rely upon, any of the extra-pleading
9 material submitted by Defendant, the motion before the Court remains a 12(b)(6) motion
10 to dismiss for failure to state a claim. *See Stein v. United Artists Corp.*, 691 F.2d 885, 889
11 (9th Cir. 1982).

12 ANALYSIS

13 Defendant moves to dismiss the SAC on the ground that Plaintiff has failed to allege
14 facts plausibly establishing that he properly exhausted administrative remedies by
15 contacting an EEO counselor within the forty-five-day deadline established by 29 C.F.R.
16 § 1614.105(a)(1). Both Plaintiff's original complaint and second amended complaint were
17 dismissed on this basis; Defendant again maintains that Plaintiff has failed to cure the
18 deficiencies previously identified by the Court.

19 A Title VII plaintiff suing the federal government must exhaust administrative
20 remedies by consulting an EEO counselor prior to filing a civil complaint. *See* 29 C.F.R.
21 § 1614.105(a). A plaintiff “must initiate contact with a Counselor within 45 days of the
22 date of the matter alleged to be discriminatory or, in the case of personnel action, within
23 45 days of the effective date of the action.” *Id.* at § 1614.105(a)(1). A plaintiff satisfies
24 section 1614.105(a)(1) if he “initiates contact with any agency official logically connected
25 with the EEO process . . . and . . . exhibits an intent to begin the EEO process.” *Kraus v.*
26 *Presidio Tr. Facilities Div./Residential Mgmt. Branch*, 572 F.3d 1039, 1044 (9th Cir. 2009)
27 (citations omitted).

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1 Defendant argues that it is clear from Plaintiff’s SAC that he failed to comply with
2 the requirement to initiate contact with a Counselor within forty-five days. (MTD 6–7.)
3 Even though Plaintiff has added allegations that did not appear in his last complaint—here,
4 specifically that he “is informed and believes” Mr. Bustamante contacted the EEO office
5 on his behalf within forty-five days—Defendant argues these are contradicted by Plaintiffs
6 other allegations such that it is clear that no one contacted the EEOC within the forty-five
7 day time period. With hesitation, the Court disagrees with Defendant and concludes that
8 Plaintiff has plausibly alleged EEOC contact within the forty-five-day period.

9 Specifically, the Defendant argues that the following allegations render Plaintiff’s
10 new allegations of Bustamante’s actual contact with the EEO office meaningless:

- 11 • Plaintiff states that he hired an attorney who initiated contact with the EEO
12 counselor “after discovering that Bustamante had not done anything in this
13 regard.” SAC at 4:23–25.
- 14 • “Plaintiff [sic] EEO complaint was a mere twelve (12) days beyond the 45
15 days (sic) period for filing an EEO complaint”. [sic] *Id.* at 4:26–27.
- 16 • “In fact, contact was initiated on March 17, 2011.” *Id.* at 5:6[.]

17 (Opp’n 7 (second sic in original).) However, Defendant removes important surrounding
18 context from these particular quotations in the SAC. The missing portions of the SAC that
19 correspond to Defendant’s quotations are underlined below and presented in the same order
20 as above.

- 21 • [“As a result, Bustamante did not follow up his phone call to the EEO office
22 and obtain a counselor within the 45-day period. 21) After repeated
23 attempts to contact Bustamante, Plaintiff became concerned and hired the
24 services of an attorney who immediately initiated contact with the EEO
25 counselor” (SAC 4:20–23)] “after discovering that Bustamante had not
26 done anything in this regard.” SAC at 4:23–25.
- 27 • “Plaintiff [sic] EEO complaint was a mere twelve (12) days beyond the 45
28 days (sic) period for filing an EEO complaint”. [sic] *Id.* at 4:26–27.
- [“In the decision, Defendants erroneously states [sic] ‘Complainant did not
initiate contact with an EEO counselor until March 29, 2011—22 days
beyond the 45 day deadline.’” (SAC 5:3–6.)] “In fact, contact was initiated
on March 17, 2011.” *Id.* at 5:6[.]

1 (*Compare* Opp’n 7 (second sic original), *with* SAC ¶¶ 20–22, 24.) With context supplied,
2 it becomes clear that although Plaintiff admits he did not through his attorney or by himself
3 initiate contact with the EEO office by the forty-five-day deadline, he nonetheless alleges
4 that “Mr. Bustamante . . . within 45 days of the complained of action called the EEO office
5 to obtain an EEO counselor for the Plaintiff, explained Plaintiff’s problem regarding loss
6 of his job due to discriminatory animus, and expressed to the EEO counselor a desire to
7 have Plaintiff’s claim investigated pursuant to EEO Rules & Procedures.” (SAC ¶ 11.)
8 Furthermore, this was not a deficiency the Court identified in its prior Order; the Court’s
9 concern was instead that Plaintiff had not shown any intent on the part of Mr. Bustamante
10 to begin the EEO process, (Order Granting Mot. to Dismiss 6, ECF No. 21), a concern that
11 Plaintiff has now remedied, (*see* SAC ¶ 11).

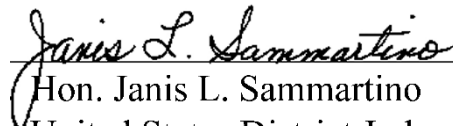
12 Because the Court concludes that Plaintiff has now sufficiently alleged timely
13 contact with the EEO office through Mr. Bustamante, and because the remainder of
14 Defendant’s arguments focus on the propriety of finding that Plaintiff “was entitled to the
15 extension [of the forty-five-day deadline] provided by section 1614.105(a)(2) of the
16 EEOC’s regulations,” (Opp’n 7), the Court need not address Defendant’s remaining
17 arguments.

18 CONCLUSION

19 Plaintiff has adequately and accurately remedied the exact problem identified by the
20 Court in its prior motions to dismiss with the additional allegations regarding what Mr.
21 Bustamante specifically said to the EEO office regarding Plaintiff’s claims. (SAC ¶ 11.)
22 Taking these allegations as true, as the Court must on a motion to dismiss, Defendant’s
23 MTD as presented must therefore fail. Accordingly, the Court **DENIES** Defendant’s
24 MTD.

25 IT IS SO ORDERED.

26 Dated: January 3, 2017

27 
28 Hon. Janis L. Sammartino
United States District Judge