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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

MICHELE BAKER,

vs.

ROMAN CATHOLIC
ARCHDIOCESE OF SAN DIEGO;
ROMAN CATHOLIC
ARCHDIOCESE OF SAN DIEGO
dba CATHEDRAL CATHOLIC
HIGH SCHOOL; CATHEDRAL
CATHOLIC HIGH SCHOOL,

Defendants.

CASE NO. 14cv800 JM(JMA)

ORDER GRANTING MOTION TO
DISMISS; GRANTING LEAVE TO
AMEND IN PART

Defendant The Roman Catholic Bishop of San Diego (“RCBSD”), erroneously sued as Roman Catholic Archdiocese of San Diego, Roman Catholic Archdiocese of San Diego dba Cathedral Catholic High School and Cathedral Catholic High School, moves to dismiss all claims alleged in Plaintiff Michele Baker’s disability, retaliation, and age discrimination complaint. Plaintiff opposes the motion. Pursuant to Local Rule 7.1(d)(1), the court finds the matters presented appropriate for decision without oral argument. For the reasons set forth below, the court grants the motion to dismiss the FEHA claims with prejudice, grants the motion to dismiss all other claims without prejudice, and grants Plaintiff 15 days leave to amend the complaint from the date of entry of this order.

1 **BACKGROUND**

2 On April 4, 2014, RCBSD removed this action from the Superior Court for the
3 State of California, County of San Diego, based upon federal question jurisdiction
4 under 28 U.S.C. §§1331, 1441, and 1446. The Complaint alleges six claims for relief:
5 (1) disability discrimination in violation of Gov. Code §12940 et seq., Fair
6 Employment and Housing Act (FEHA); (2) disability discrimination in violation of the
7 Americans with Disabilities Act (“ADA”), 42 U.S.C. §12112 et seq.; (3) violation of
8 California Family Rights Act (“CFRA”), Gov. Code §12945.2 et seq., FEHA; (4) age
9 discrimination in violation of Gov. Code §12940 et seq., FEHA; (5) wrongful
10 termination in violation of public policy; and (6) declaratory and injunctive relief. (Ct.
11 Dkt. 1). All of Plaintiff’s claims arise from the following generally described conduct.

12 Plaintiff, a 67 year old teacher, was employed by RCBSD for over 13 years at
13 Cathedral Catholic High School (“CCHS”). (Compl. ¶¶4, 7, 8). On August 23, 2012,
14 Plaintiff “sustained and/or aggravated and/or developed perceived and/or physical
15 disability(s) including, but not limited to, concussions, vision problems, associated
16 conditions and others from work activity.” (Compl. 9). After sustaining the condition,
17 Plaintiff requested, and received, a one week leave of absence under the CFRA.
18 (Compl. ¶12). Plaintiff filed a workers compensation claim. After this incident,
19 RCBSD allegedly began “harassing, discriminating against and retaliating against
20 Plaintiff in terms and conditions of her employment.” (Compl. ¶14).

21 In January 2013, RCBSD conducted a performance review of Plaintiff, the first
22 review since 2009. The principal at CCHS “informed Plaintiff that various categories
23 of work performance and work behavior were ‘areas for growth’ and that her contract
24 was not being renewed.” (Compl. ¶16). On August 8, 2013, Plaintiff alleges that she
25 was “wrongfully terminated [] for no stated reason and/or the false and/or exaggerated
26 and/or pretextual reason(s) that Plaintiff had performance problems.” (Compl. ¶17).
27 The court notes that Plaintiff characterizes the non-renewal of the employment contract
28 as a wrongful termination.

DISCUSSION

Legal Standards

Federal Rule of Civil Procedure 12(b)(6) dismissal is proper only in "extraordinary" cases. United States v. Redwood City, 640 F.2d 963, 966 (9th Cir. 1981). Courts should grant 12(b)(6) relief only where a plaintiff's complaint lacks a "cognizable legal theory" or sufficient facts to support a cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). Courts should dismiss a complaint for failure to state a claim when the factual allegations are insufficient "to raise a right to relief above the speculative level." Bell Atlantic Corp v. Twombly, 550 U.S. 544, 555 (2007) (the complaint's allegations must "plausibly suggest[]" that the pleader is entitled to relief); Ashcroft v. Iqbal, 556 U.S. 662 (2009) (under Rule 8(a), well-pleaded facts must do more than permit the court to infer the mere possibility of misconduct). "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." Id. at 678. Thus, "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. The defect must appear on the face of the complaint itself. Thus, courts may not consider extraneous material in testing its legal adequacy. Levine v. Diamantheset, Inc., 950 F.2d 1478, 1482 (9th Cir. 1991). The courts may, however, consider material properly submitted as part of the complaint. Hal Roach Studios, Inc. v. Richard Feiner and Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1989).

Finally, courts must construe the complaint in the light most favorable to the plaintiff. Concha v. London, 62 F.3d 1493, 1500 (9th Cir. 1995), cert. dismissed, 116 S. Ct. 1710 (1996). Accordingly, courts must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them. Holden v. Hagopian, 978 F.2d 1115, 1118 (9th Cir. 1992). However, conclusory allegations of law and unwarranted inferences are insufficient to defeat a Rule 12(b)(6) motion. In Re Syntex Corp. Sec. Litig., 95 F.3d 922, 926 (9th Cir. 1996).

1 **The FEHA Claims** (Claims 1, 3, and 4)

2 In broad brush, Plaintiff alleges that RCBSD violated FEHA by discriminating
3 against her due to her disability, CFRA leave, and age. While FEHA prohibits
4 discrimination by employers, religious associations or corporations are excluded from
5 the definition of employer. Gov't Code §12926(d) (“‘Employer’ does not include a
6 religious association or corporation not organized for private profit.”); see Silo v. CHW
7 Med. Found., 27 Cal.4th 1097, 1100 (2002) (Catholic hospital exempt from FEHA);
8 Henry v. Red Hill Evangelical Church of Tustin, 201 Cal.App.4th 1041, 1049-50
9 (2011) (school operated by Church is religious non-profit corporation and therefore not
10 an employer for purposes of FEHA).

11 Plaintiff argues that the statutory scheme permits her claims to move forward.
12 Cal. Gov't Code §12926.2(f) provides:

13 (1) Notwithstanding any other provision of law, a nonprofit public benefit
14 corporation formed by, or affiliated with, a particular religion and that
15 operates an educational institution as its sole or primary activity, may
restrict employment, including promotion, in any or all employment
categories to individuals of a particular religion.

16 (2) Notwithstanding paragraph (1) or any other provision of law,
17 employers that are nonprofit public benefit corporations specified in
18 paragraph (1) shall be subject to the provisions of this part in all other
19 respects, including, but not limited to, the prohibitions against
discrimination made unlawful employment practices by this part.

20 From these provisions, Plaintiff argues that RCBSD may restrict employment to
21 individuals of a particular religion but all other forms of discrimination are prohibited
22 under FEHA. While this argument has some support in the statute itself, the California
23 Court of Appeals has rejected this argument.

24 In Henry, the plaintiff, a Catholic, taught preschoolers at a Lutheran school. The
25 school permitted teachers of different Christian religions to teach at the school. The
26 school was formed for nonprofit religious purposes and did not exist as a separate legal
27 entity from the Lutheran church. Plaintiff became pregnant by her live-in boyfriend.
28 While she initially informed the school that she intended to marry, that did not happen

1 and she continued to live with her boyfriend and baby. The school terminated plaintiff
2 for living with her boyfriend and raising her son without being married. Plaintiff filed
3 a complaint against the Lutheran church alleging that she was terminated based upon
4 her marital status in violation of FEHA and public policy.

5 The plaintiff argued that Cal. Gov't Code §12926.2(f) permitted her to maintain
6 a claim unrelated to her religious affiliation.

7 Henry's argument that the church is subject to the FEHA under section
8 12926.2, subdivision (f) is unavailing. That subdivision permits a
9 "nonprofit public benefit corporation formed by, or affiliated with, a
10 particular religion and that operates an educational institution as its sole
11 or primary activity" to restrict employment to individuals of a particular
12 religion (§ 12926.2, subd. (f)(1)), but otherwise makes such nonprofit
13 public benefit corporations subject to "the prohibitions against
discrimination made unlawful employment practices by this part."
14 (§ 12926.2, subd. (f)(2).) Henry points to no evidence indicating the
15 school operated by the church as part of its ministry is a nonprofit public
16 benefit corporation. (See Corp.Code, § 5110 et seq. [the Nonprofit
17 Public Benefit Corporation Law]). To the contrary, the school has no
18 independent legal status apart from the church.

19 Here, as in Henry, the defendant is a religious corporation, not a nonprofit public
20 benefit corporation whose sole or primary activity is to operate an educational
21 institution. The Request for Judicial Notice provides a copy of the articles of
22 incorporation of the Roman Catholic Bishop of San Diego.¹ Consequently, the court
23 concludes that RCBSD is not an employer for purposes of FEHA.

24 In sum, the court grants the motion to dismiss the FEHA claims without leave
25 to amend.

26 **The ADA Claim (Claim 2)**

27 The elements of an employment claim under the Americans with Disability Act
28 ("ADA") are (1) the claimant has a disability (as defined in 42 U.S.C. §12102(2)), (2)
the claimant is qualified to perform the essential function of the job, (3) the claimant
has suffered adverse employment action because of the disability. Hutton v. Elf
Atochem North America, Inc., 223 F.3d 884, 895 (9th Cir. 2001).

¹ Pursuant to Federal Rule of Evidence 201, the court takes judicial notice of the
articles of incorporation.

1 Here, Plaintiff fails to plead the first and third elements of an ADA claim. The
2 ADA defines disability as “a physical or mental impairment that substantially limits
3 one or more major life activities of [the] individual [who claims the disability],” or “a
4 record of such an impairment,” or “being regarded as having such an impairment.” 42
5 U.S.C. § 12102(1). “Major life activities” include “caring for oneself, performing
6 manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending,
7 speaking, breathing, learning, reading, concentrating, thinking, communicating, and
8 working.” 42 U.S.C. § 12102(2)(A). The Ninth Circuit in Weaving v. City of
9 Hillsboro, — F.3d — (9th Cir. 2014), 2014WL3973411, recently articulated that the
10 term “disability” is to be construed broadly to accomplish the purposes of the ADA.

11 A 2008 amendment to the ADA provides, “The definition of disability in
12 this chapter shall be construed in favor of broad coverage of individuals
13 under this chapter, to the maximum extent permitted by the terms of this
14 chapter.” 42 U.S.C. § 12102(4)(A). “The term ‘substantially limits’ shall
15 be interpreted consistently with the findings and purposes of the ADA
16 Amendments Act of 2008.” *Id.* § 12102(4)(B). Those findings and
17 purposes specifically express Congress’s view that prior Supreme Court
18 and lower court cases, as well as Equal Employment Opportunity
19 Commission (“EEOC”) regulations, had given “substantially limits” an
20 unduly narrow construction. ADA Amendments Act of 2008,
21 § 2(a)(4)-(8), Pub.L. No. 110-325, 122 Stat. 3553, 3553. “An impairment
22 that substantially limits one major life activity need not limit other major
23 life activities in order to be considered a disability.” 42 U.S.C.
24 § 12102(4)(C). According to post 2008 regulations promulgated by the
25 EEOC,

26 An impairment is a disability ... if it substantially limits the
27 ability of an individual to perform a major life activity as
28 compared to most people in the general population. An
impairment need not prevent, or significantly or severely
restrict, the individual from performing a major life activity
in order to be considered substantially limiting.

29 C.F.R. § 1630.2(j)(1)(ii). Determining whether an impairment is
substantially limiting “requires an individualized assessment.” *Id.* §
1630.2(j)(1)(iv).

30 Id.

31 Plaintiff alleges that her disability consists of “concussions, vision problems,
32 associated conditions and others.” (Compl. ¶8). It is well-established that temporary
33 conditions generally are not considered disabilities. 29 C.F.R. Part 1630 App.,

1 §1630.2(j) (“temporary, non-chronic impairments of short duration, with little or no
2 long term or permanent impact, are usually not disabilities. Such impairments may
3 include, broken limbs, sprained joints, concussions, appendicitis, and influenza.”);
4 Sanders v. Arneson Products, Inc., 91 F.3d 1351 (9th Cir. 1996) (temporary condition
5 which lasted less than four months was not a disability under the ADA). While
6 Plaintiff alleges that she suffered a concussion and vision problems, apparently arising
7 from her fall in August 2012, this allegation fails to establish that the concussion and
8 vision problems substantially limited a major life activity within the meaning of the
9 ADA. A temporary condition is not one that limits a major life activity.²

10 In sum, the court grants the motion to dismiss this claim with leave to amend.

11 **The CFRA Claim (Claim 3)**

12 In order to make a prima facie case of retaliation under CFRA, Plaintiff must
13 allege (1) defendant was a covered employer; (2) plaintiff was eligible for CFRA leave;
14 (3) plaintiff exercised her right to take CFRA leave; and (4) plaintiff suffered an
15 adverse employment action because of taking CFRA leave. Rogers v. County of Los
16 Angeles, 199 Cal.App. 4th 480, 491 (2011).

17 The complaint simply alleges that Defendant “harassed, discriminated against,
18 retaliated against and terminated Plaintiff because of Plaintiff’s entitlement and/or
19 request and or taking of the right to medical leave in violation of” CFRA. Such
20 conclusory pleading is insufficient to state a claim for relief. See Twombly, 550 U.S.
21 at 555. The parties do not dispute that in August 2012, Plaintiff requested and received
22 one week of CFRA leave. One year later, in August 2013, RCBSD did not renew
23 Plaintiff’s contract. Plaintiff cannot rely on the temporal proximity of these two events
24 to establish that she suffered an adverse employment action because of taking CFRA
25 leave.

27 ² As Plaintiff fails to allege a cognizable disability, Plaintiff also fails to
28 adequately allege that she suffered an adverse employment action because of her
alleged disability. As a general proposition, the court notes that many of the
complaint’s boilerplate allegations fail to comply with Fed.R.Civ.P. 8(a).

1 In sum, the court grants the motion with leave to amend.

2 **The Wrongful Termination and Declaratory Relief Claim** (Claims 5-6)

3 To establish a claim for wrongful termination in violation of public policy, one
4 must allege and prove that “he or she is discharged for performing an act that public
5 policy would encourage, or for refusing to do something that public policy would
6 condemn.” Gantt v. Sentry Ins., 1 Cal.4th 1083, 1090 (1992). As explained by the
7 California Supreme Court, “violations of public policy are found generally fall into
8 four categories: (1) refusing to violate a statute, (2) performing a statutory obligation,
9 (3) exercising a statutory right or privilege, and (4) reporting an alleged violation of a
10 statute of public importance .” Id at 1090-91 (internal citations omitted).

11 Here, the wrongful termination claim in violation of public policy fails for two
12 reasons. First, Plaintiff does not allege that she (1) refused to violate a statute, (2)
13 performed a statutory obligation, (3) exercised a statutory right, or (4) reported an
14 alleged violation of public importance. Second, while discharging a disabled
15 individual on account of her disability would violate FEHA and ADA (and constitute
16 a wrongful termination), Plaintiff fails to adequately allege that her discharge was on
17 account of her alleged disability. Under these circumstances, Plaintiff fails to state a
18 claim for wrongful termination.

19 Lastly, as Plaintiff fails to state a claim, she cannot currently obtain declaratory
20 relief. The court also notes that Plaintiff has withdrawn her request for punitive
21 damages.

22 As the court concludes that there may be circumstances under which Plaintiff
23 may be able to state a claim, the court sua sponte grants Plaintiff 15 days leave to
24 amend from the date of entry of this order. See Fed.R.Civ.P. 15(a).

25 In sum, the court grants the motion to dismiss all claims and grants Plaintiff

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1 leave to amend all claims except the FEHA-based claims which are dismissed with
2 prejudice and without leave to amend.

3 **IT IS SO ORDERED.**

4 DATED: August 26, 2014



Hon. Jeffrey T. Miller
United States District Judge

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6 cc: All parties

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