

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  
SOUTHERN DISTRICT OF CALIFORNIA**

MICHELE BAKER,

Plaintiff,

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. 14cv0800 JM(JMA)

ORDER GRANTING MOTION TO  
DISMISS; GRANTING LEAVE TO  
AMEND

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 declaratory relief First Amended Complaint (“FAC”). 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 complaint and grants Plaintiff 21 days leave to amend from the date of entry of this order.

**BACKGROUND**

On April 4, 2014, RCBSD removed this action from the Superior Court for the

1 State of California, County of San Diego, based upon federal question jurisdiction  
2 under 28 U.S.C. §§1331, 1441, and 1446. The FAC alleges three claims for relief: (1)  
3 disability discrimination in violation of the Americans with Disabilities Act (“ADA”),  
4 42 U.S.C. §12112 et seq.; (2) retaliation and wrongful termination in violation of  
5 California public policy; and (3) declaratory and injunctive relief. (Ct. Dkt. 13). All  
6 of Plaintiff’s claims arise from the following generally described conduct.

7 Plaintiff, a 67-year-old teacher, was employed by RCBSD for over 13 years at  
8 the Cathedral Catholic High School (“CCHS”). (FAC ¶9). On August 23, 2012,  
9 Plaintiff “sustained and/or aggravated and/or developed perceived and/or physical  
10 disability(s) including, but not limited to, concussions, vision problems, including  
11 symptoms of dizziness, instability, loss of balance, and double vision and migraine  
12 headaches.” (FAC ¶12). The alleged disability limited Plaintiff’s “major life activities,  
13 including working, amongst others.” (FAC ¶13). After sustaining the condition,  
14 Plaintiff requested, and received, a one-week leave of absence under the California  
15 Family Rights Act (“CFRA”). (FAC ¶17). At RCBSD’s request, Plaintiff filed a  
16 workers compensation claim. After this incident, RCBSD allegedly began “harassing,  
17 discriminating against and retaliating Plaintiff in terms and conditions of her  
18 employment.” (FAC ¶14).

19 In January 2013, RCBSD conducted a performance review of Plaintiff, the first  
20 review since 2009. In February 2013, the Principal at CCHS, Michael Deely,  
21 “informed Plaintiff that various categories of work performance and work behavior  
22 were ‘areas for growth’ and that her contract was not being renewed.” (FAC ¶21). On  
23 August 8, 2013, Plaintiff alleges that she was “wrongfully terminated for the stated  
24 reason that Plaintiff had performance problems.” (FAC ¶22).

25 From August 23, 2012 and continuing through August 8, 2013, Plaintiff alleges  
26 that she was “discriminated, harassed, and retaliated against [] on the basis of  
27 Plaintiff’s perceived and/or physical disability(s), by the following continuous actions,  
28 and conduct;”

- 1 a. Failing to determine the extent of Plaintiff's disability and to
- 2 accommodate it;
- 3 b. Failing to inform Plaintiff of other "job opportunities within the
- 4 company;"
- 5 c. Failing move Plaintiff into other employment openings;
- 6 d. Failing to engage in the interactive process to accommodate
- 7 Plaintiff's disability;
- 8 e. "Harassing, discriminating against and retaliating against Plaintiff
- 9 based on Plaintiff's perceived and/or physical disability(s);"
- 10 f. "Harassing, discriminating against and retaliating against Plaintiff
- 11 based on taking and/or requesting and/or being entitled to
- 12 CFRA/FMLA and/or other medical and/or negotiated leave in order
- 13 to recuperate and heal;:
- 14 g. "Harassing, discriminating against and retaliating against Plaintiff
- 15 based on age, over forty, as herein alleged;"
- 16 h. Failure to renew the employment contract;
- 17 i. Retaliating against Plaintiff in failing to renew the employment
- 18 contract for no stated reason and/or the pretext that Plaintiff had
- 19 performance problems;
- 20 j. Failure to give Plaintiff written confirmation in the change in her
- 21 employment status as required by Unemployment Insurance Code
- 22 §1089;
- 23 k. Replacing Plaintiff with a younger and non-disabled individual;
- 24 and
- 25 l. Failing to rehire or re-employ Plaintiff.

19 (FAC ¶26).

20 The Second Cause of Action alleges that Plaintiff was retaliated against and  
21 terminated in violation of public policy and "discriminated, harassed, and retaliated  
22 against [] on the basis of Plaintiff's perceived and/or physical disability(s). (FAC ¶44).  
23 The FAC then repeats the same alleged course of conduct identified in the previous  
24 paragraph.

25 On August 8, 2014, this court granted RCBSD's motion to dismiss the FEHA  
26 claims with prejudice and granted the motion to dismiss the ADA and retaliation claims  
27 without prejudice and with leave to amend. Plaintiff amended her complaint and  
28 Defendant renews its motion to dismiss.

## 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 ADA Claim** (Claim 2)

2 The elements of a disability discrimination claim under the ADA are (1) the  
3 claimant has a disability (as defined in 42 U.S.C. §12102(2)), (2) the claimant is  
4 qualified to perform the essential function of the job, (3) the claimant has suffered  
5 adverse employment action because of the disability. Hutton v. Elf Atochem North  
6 America, Inc., 273 F.3d 884, 895 (9th Cir. 2001).

7 The ADA defines disability as “a physical or mental impairment that  
8 substantially limits one or more major life activities of [the] individual [who claims the  
9 disability],” or “a record of such an impairment,” or “being regarded as having such an  
10 impairment.” 42 U.S.C. § 12102(1). “Major life activities” include “caring for oneself,  
11 performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting,  
12 bending, speaking, breathing, learning, reading, concentrating, thinking,  
13 communicating, and working.” 42 U.S.C. § 12102(2)(A). The Ninth Circuit in  
14 Weaving v. City of Hillsboro, 763 F.3d 1106 (9th Cir. 2014), recently articulated that  
15 the term “disability” is to be construed broadly to accomplish the purposes of the ADA.

16  
17 A 2008 amendment to the ADA provides, “The definition of disability in  
18 this chapter shall be construed in favor of broad coverage of individuals  
19 under this chapter, to the maximum extent permitted by the terms of this  
20 chapter.” 42 U.S.C. § 12102(4)(A). “The term ‘substantially limits’ shall  
21 be interpreted consistently with the findings and purposes of the ADA  
22 Amendments Act of 2008.” *Id.* § 12102(4)(B). Those findings and  
23 purposes specifically express Congress's view that prior Supreme Court  
24 and lower court cases, as well as Equal Employment Opportunity  
25 Commission (“EEOC”) regulations, had given “substantially limits” an  
26 unduly narrow construction. ADA Amendments Act of 2008, §  
27 2(a)(4)-(8), Pub.L. No. 110–325, 122 Stat. 3553, 3553. “An impairment  
28 that substantially limits one major life activity need not limit other major  
life activities in order to be considered a disability.” 42 U.S.C. §  
12102(4)(C). According to post 2008 regulations promulgated by the  
EEOC,

An impairment is a disability ... if it substantially limits the  
ability of an individual to perform a major life activity as  
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.

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

3 Id. at 1112

4 Here, Plaintiff alleges that she suffered, from August 2012 to the present time,  
5 from a disability consisting of a concussion and vision problems, including dizziness,  
6 instability, loss of balance, and double vision. (FAC ¶¶11-13, 15). The disabilities  
7 affected major life activities including working, walking and seeing. (FAC ¶15).  
8 Plaintiff further alleges that she was “regarded as having” a disability in violation of  
9 42 U.S.C. § 12102(1). Plaintiff notified Principal Deely of her double vision,  
10 dizziness, and migraines. As such, Plaintiff concludes that she was “regarded” as a  
11 disabled person. Id.

12 Although a very close call, the court concludes that the FAC’s allegations fail  
13 to raise more than a mere possibility of misconduct. The FAC alleges that Plaintiff fell  
14 in August 2012, requested and received one week of medical leave, and worked  
15 continuously for almost one year without taking additional time off because of her  
16 alleged disabilities. This allegation undermines Plaintiff’s allegation that her  
17 “disabilities” affected her ability to work. The fact that the FAC borrows from 42  
18 U.S.C. §12102(a)(2)(A) (defining “major life activities” to include working and “caring  
19 for oneself . . . seeing, hearing, eating, sleeping, walking, . . .”) to allege that major life  
20 activities such as working, walking, and seeing were impacted by her disability, fail to  
21 state a claim. “[T]hreadbare recitals of the elements of a cause of action, supported by  
22 mere conclusory statements, do not suffice” to state a claim. Iqbal, 556 U.S. at 578.  
23 The FAC alleges that Plaintiff successfully performed her work-related duties for  
24 almost one year without the need for any medical leave or accommodation. (FAC ¶25,  
25 Plaintiff “could perform the essential duties of Plaintiff’s job with or without an  
26 accommodation”).

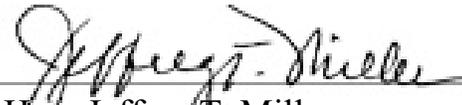
27 With respect to Plaintiff’s claim that she was regarded as disabled, she alleges  
28 adverse employment actions consisting of “hostility towards Plaintiff taking time off

1 for medical appointments (FAC ¶19a), unfairly scrutinizing her work performance  
2 (FAC ¶19b), excessively critiquing Plaintiff's work behavior (FAC ¶19c), and  
3 suddenly required 'annual review and evaluations' from Plaintiff which was a marked  
4 departure from Defendant's past conduct." (Opp. at p.8:1-5). The generic use of the  
5 terms like "hostility, unfairly scrutinizing, and excessively critiquing," without more,  
6 fail to sufficiently inform Defendant of the nature of the wrongful conduct such that it  
7 may productively pursue discovery and respond to the FAC.<sup>1</sup>

8 In sum, the court concludes that the FAC fails to adequately allege that Plaintiff  
9 is disabled for purposes of the ADA. Consequently, Plaintiff fails to state a claim for  
10 either ADA discrimination, retaliation, or wrongful termination and the court dismisses  
11 all claims. The court also grants Plaintiff 21 days' leave to amend from the date of  
12 entry of this order to file a Second Amended Complaint ("SAC"). Plaintiff is also  
13 advised that the failure to state a claim in the SAC may result in the dismissal of the  
14 SAC with prejudice.

15 **IT IS SO ORDERED.**

16 DATED: December 17, 2014

17   
18 Hon. Jeffrey T. Miller  
United States District Judge

19 cc: All parties

20  
21  
22  
23  
24  
25  
26  
27  
28

---

<sup>1</sup> With respect to Plaintiff's failure to accommodate allegations, the court notes that Plaintiff fails to allege that she ever requested accommodation of her disability.