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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

ANGELICA GRACIA GONZALEZ,  
Plaintiff,  
v.  
PETE BUTTIGIEG, Secretary  
Department of Transportation,  
Defendant.

Case No.: 20-cv-530-GPC

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

Pending before the Court is Defendant Pete Buttigieg<sup>1</sup> (“Defendant”)’s Motion to Dismiss Plaintiff Angelica Gracia Gonzalez (“Plaintiff”)’s Complaint (“Compl.”) pursuant to Federal Rule of Civil Procedure (“Rule”) 12(b)(6) and Rule 41(b). ECF No. 23. The parties have fully briefed the matter. ECF Nos. 25, 26, 28. The Court finds this matter suitable for disposition without oral argument and **HEREBY VACATES** the motion hearing set for October 29, 2021. After considering the parties’ moving papers

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<sup>1</sup> Though the Complaint was originally filed against former Secretary of Transportation Elaine Chao, Secretary Pete Buttigieg replaced former Secretary of Transportation Elaine Chao on February 3, 2021. Pursuant to Rule 25(d), Secretary Buttigieg is automatically substituted as a party.

1 and arguments contained therein, the Court HEREBY DISMISSES WITHOUT  
2 PREJUDICE Plaintiff’s Complaint. Plaintiff is granted leave to amend in accordance  
3 with this Order.

4 **I. DISCUSSION**

5 **A. Complaint**

6 Plaintiff was employed from November 2008 to May 2014 as a Border Inspector  
7 with the Department of Transportation (“DOT”) in Calexico, California. Compl. at 2.  
8 Plaintiff’s Complaint alleges “work retaliation” based on her filing of an Equal  
9 Employment Opportunity (“EEO”) complaint, which alleged that DOT employers had  
10 created a hostile work environment by discriminating against Plaintiff on the basis of sex,  
11 age, and disability. *Id.* Although Plaintiff’s instant Complaint is not absolutely clear, it  
12 can be distilled into three causes of action: (1) hostile work environment; (2) gender  
13 discrimination; and (3) retaliation. Defendant argues that Plaintiff’s Complaint should be  
14 dismissed for failure to state a claim because Plaintiff fails to allege facts sufficient to  
15 support these causes of action. ECF No. 23 at 5. Defendant also argues that Plaintiff’s  
16 Complaint should be dismissed under Rule 41(b) for failure to comply with Rule 8(a)  
17 because the Complaint is redundant and unclear, and Rule 10(b), which states that a party  
18 must state its claims in numbered paragraphs. *Id.* According to Defendants, Plaintiff’s  
19 failure to state her claims in numbered paragraphs “would prevent the DOT from filing  
20 an answer that complies with Rule 8(b), which requires defendants to admit or deny each  
21 allegation made against them in short and precise terms.” *Id.* at 6.

22 **B. Rule 12(b)(6) Standard**

23 A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a  
24 complaint, i.e., whether the complaint lacks either a cognizable legal theory or facts  
25 sufficient to support such a theory. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).  
26 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,  
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1 accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*,  
2 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570  
3 (2007) (internal quotation marks omitted)). “A claim has facial plausibility when the  
4 plaintiff pleads factual content that allows the court to draw the reasonable inference that  
5 the defendant is liable for the misconduct alleged.” *Id.* The court accepts factual  
6 allegations in the complaint as true and construes the pleadings in the light most  
7 favorable to the nonmoving party. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d  
8 1025, 1031 (9th Cir. 2008). However, the court is not bound to accept mere legal  
9 conclusions as true. *Iqbal*, 556 U.S. at 678. “In sum, for a complaint to survive a motion  
10 to dismiss, the non-conclusory factual content, and reasonable inferences from that  
11 content, must be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v.*  
12 *U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (internal quotation marks omitted).  
13 When ruling on a motion to dismiss, courts consider the complaint itself in its entirety, as  
14 well as documents incorporated into the complaint by reference, and matters of which a  
15 court may take judicial notice. *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308,  
16 322 (2007). Dismissal without leave to amend is improper unless it is clear that  
17 amendment is futile. *Manzarek*, 519 F.3d at 1031.

### 18 **C. Dismissal Pursuant to Rule 12(b)(6)**

19 As a threshold matter, the Court notes that Plaintiff attached various documents to  
20 her three-page Complaint, including a decision by the Administrative Law Judge (“ALJ”) in  
21 the underlying EEO complaint (ECF No. 1-2 at 71), as well as Plaintiff’s appeal of that  
22 decision to the EEOC. ECF No. 1-2 at 1. Plaintiff’s Complaint does not ask this Court to  
23 take judicial notice of these documents. Nor does the Court find that Plaintiff has  
24 attempted to incorporate these documents by reference because, while the Complaint  
25 mentions the fact that Plaintiff filed an appeal with the EEOC, the Complaint does not  
26 refer to the document itself. *See Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) (“A  
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1 court may consider evidence on which the complaint ‘necessarily relies’ if: (1) the  
2 complaint refers to the document; (2) the document is central to the plaintiff’s claim; and  
3 (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion.”).  
4 Therefore, the Court considers only the three pages of the Complaint itself. In the First  
5 Amended Complaint, which the Court will allow Plaintiff to file, Plaintiff should clarify  
6 whether she is asking the Court to take judicial notice of the administrative proceedings,  
7 and expand on whether and how the allegations and findings contained in those  
8 proceedings relate to her current claims before this Court.

### 9 **1. Hostile Workplace Claim**

10 To prevail on a hostile workplace claim under Title VII, a plaintiff must establish  
11 “a pattern of ongoing and persistent harassment severe enough to alter the conditions of  
12 employment.” *Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864, 871 (9th Cir. 2001)  
13 (quoting *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1108 (9th Cir. 1998) (internal  
14 quotations omitted)). To determine whether an environment is hostile or abusive under  
15 Title VII, courts look at all of the circumstances, including: “the frequency of the  
16 discriminatory conduct; its severity; whether it is physically threatening or humiliating, or  
17 a mere offensive utterance; and whether it unreasonably interferes with an employee’s  
18 work performance.” *Id.* (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)  
19 (internal quotations omitted)). Simple teasing, offhand comments, and isolated incidents,  
20 unless very serious, do not usually rise to the level of a discriminatory change in violation  
21 of Title VII. *Id.* The objective severity of harassment should be judged by the perspective  
22 of a reasonable person in the plaintiff’s position. *Oncale v. Sundowner Offshore Serv.,*  
23 *Inc.*, 523 U.S. 75, 81-82 (1998).

24 It is not clear from the face of the Complaint whether the instant claim of a hostile  
25 workplace is brought on the basis of sex, race, disability, or some other specific ground.  
26 Regardless, Plaintiff’s Complaint does not contain any facts that plausibly support a  
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1 hostile workplace claim. As a threshold matter, Plaintiff does not assert that she was  
2 subject to verbal or physical conduct of a racial or sexual nature. Nor is there any part of  
3 the Complaint that relates to unwelcome conduct that was sufficiently severe or pervasive  
4 enough to alter the conditions of Plaintiff's work environment. The closest the Complaint  
5 comes to alleging a hostile workplace environment is where Plaintiff asserts that "[w]hile  
6 I was in [sic] bed rest and not able to attend work my supervisor John A. Urias would  
7 constantly harass me via phone calls at at [sic] times of day to question me about medical  
8 documentation for my leave restriction." Compl. at 3:11-3:13. However, even taking  
9 these allegations as true and in the light most favorable to Plaintiff as the nonmoving  
10 party, the Complaint presents the Court with no basis for finding that such behavior  
11 would rise to the threshold of a hostile work environment claim under Title VII.  
12 According to the allegations themselves, the calls had a legitimate purpose (getting  
13 appropriate medical documentation relating to leave). *Id.* at 3:9 ("After my EEO filing I  
14 was immediately placed in a restriction for Leave and denied most medical leave because  
15 of lack of detail information [sic] from my doctors."). The calls were not physically  
16 threatening or humiliating, were not offensive utterances, and did not interfere with  
17 Plaintiff's work performance. Therefore, Plaintiff has failed to allege facts sufficient to  
18 support a plausible claim of a hostile work environment.

## 19                   **2.     Gender Discrimination Claim**

20               To bring a claim of discrimination under Title VII, a plaintiff must establish a  
21 prima facie case that includes the following elements: (1) plaintiff was a member of a  
22 protected class, (2) plaintiff was qualified for the position, (3) plaintiff experienced an  
23 adverse employment action, and (4) similarly situated individuals outside the protected  
24 class were treated more favorably, or that other circumstances surrounding the adverse  
25 employment action give rise to an inference of discrimination. *Peterson v. Hewlett-*  
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1 *Packard Co.*, 358 F.3d 599, 603 (9th Cir. 2004) (citing *McDonnell Douglas Corp. v.*  
2 *Green*, 411 U.S. 792, 802 (1973)).

3 Plaintiff has failed to allege a number of these elements, including whether she  
4 was qualified for the position and whether similarly situated individuals outside the  
5 protected class were treated more favorably, or whether there were other circumstances  
6 giving rise to an inference of discrimination based on gender. Plaintiff does state that she  
7 had “performed [her] Border Inspector duties acceptably and there are no reported  
8 problems concerning my work performance,” Compl. at 2:13-2:14, but this is  
9 insufficient, without more, to show that Plaintiff was qualified for the position, especially  
10 in comparison to other comparable employees who were not subject to similar adverse  
11 employment actions. While the Complaint does include some allegations of adverse  
12 employment actions, these are sparsely pled and provide no basis for the Court to  
13 conclude that any of the alleged adverse employment actions, whether putting Plaintiff on  
14 administrative leave or removing Plaintiff from her position as a Border Inspector, gives  
15 rise to an inference of discrimination on the basis of gender or sex. Indeed, the Complaint  
16 provides other explanations for these actions that are unrelated to any allegations of  
17 discrimination. *Id.* at 2:23 (Plaintiff was placed on administrative leave for allegedly  
18 threatening supervisors and presenting “suicidal and homicidal ideation”). The Court  
19 finds that Plaintiff has failed to allege any facts supporting a plausible claim of gender-  
20 based discrimination.

### 21 **3. Retaliation Claim**

22 “Title VII prohibits an employer from discriminating against an employee for  
23 opposing an unlawful employment practice, such as filing a complaint alleging sexual  
24 orientation harassment and hostile work environment.” *Dawson v. Entek Intern.*, 630 F.3d  
25 928, 936 (9th Cir. 2011). “To establish a prima facie case, the employee must show that  
26 [s]he engaged in a protected activity, [s]he was subsequently subjected to an adverse  
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1 employment action, and that a causal link exists between the two.” *Id.* Plaintiffs must  
2 prove “but-for” causation. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360  
3 (2013). “This requires proof that the unlawful retaliation would not have occurred in the  
4 absence of the alleged wrongful action or actions of the employer.” *Id.* If a plaintiff  
5 establishes a prima facie case of unlawful retaliation, the burden shifts to the defendant  
6 employer to offer evidence that the challenged action was taken for legitimate, non-  
7 discriminatory reasons. *Dawson*, 630 F.3d at 936. If the employer makes such a showing,  
8 then the burden shifts back to the plaintiff to show that the defendant’s explanation is  
9 “merely a pretext for impermissible discrimination.” *Id.* (citing *Ray v. Henderson*, 217  
10 F.3d 1234, 1240 (9th Cir. 2000).

11 The Complaint states that Plaintiff filed an EEO complaint alleging discrimination  
12 on the basis of sex on or about June 3, 2012. Compl. at 2. The filing of an EEO complaint  
13 constitutes protected activity. *See Lombardi v. Castro*, 675 Fed. Appx. 690, 691 (9th Cir.  
14 2017). Furthermore, Plaintiff alleges that she was placed on leave and was later dismissed  
15 from her job with DOT, both of which constitute adverse employment actions for  
16 purposes of Title VII retaliation claims. Compl. at 3:2-3:4. *See Ray v. Henderson*, 217  
17 F.3d 1234, 1241 (9th Cir. 2000) (finding that the Ninth Circuit takes a broad view of  
18 what constitutes an adverse employment action). However, Plaintiff’s Complaint fails to  
19 allege any causal link between the EEO complaint filing and the adverse employment  
20 actions alleged. The Complaint itself points solely to other reasons for the leave and  
21 dismissal, including Plaintiff’s failure to follow instructions (Compl. 2:16), violent  
22 threats that Plaintiff made against her supervisors (Compl. 2:23) and failure to provide  
23 medical documentation supporting leave (Compl. 2:9). Plaintiff has failed to allege that  
24 her leave and dismissal were even related to, let alone caused by, the EEO complaint. As  
25 such, Plaintiff has failed to allege facts sufficient to support a plausible claim to relief for  
26 unlawful retaliation under Title VII.

1           **D. Dismissal Pursuant to Rule 41(b)**

2           Defendants further move to dismiss the Complaint without prejudice pursuant to  
3 Rule 41(b) because it allegedly violates Rule 8(a) and Rule 10(b). A complaint that fails  
4 to comply with Rule 8 may be dismissed pursuant to Rule 41(b). *Bourke v. City of San*  
5 *Diego*, No. 14-cv-1047-BAS, 2015 WL 687092, at \*2 (S.D.Cal. Feb, 18, 2015). “Where  
6 the allegations in a complaint are argumentative, prolix, replete with redundancy, and  
7 largely irrelevant, the complaint is properly dismissed for failure to comply with Rule  
8 8(a).” *Id.* Rule 41(b) provides, in relevant part, that “if the plaintiff fails . . . to comply  
9 with these rules . . . a defendant may move to dismiss the action or any claim against it.”  
10 Fed. R. Civ. P. 41(b). A dismissal under Rule 41(b) operates as an adjudication on the  
11 merits unless the dismissal order states otherwise. *Id.*

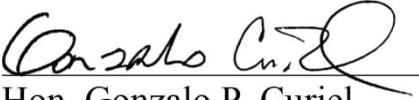
12           Since this Court has dismissed Plaintiff’s Complaint without prejudice pursuant to  
13 Rule 12(b)(6), Defendant’s alternative motion to dismiss pursuant to Rule 41(b) is denied  
14 as moot. Plaintiff’s Amended Complaint should be written using numbered paragraphs in  
15 order to facilitate clarity, as stated in Rule 10(b). Fed. R. Civ. P. 10(b) (“A party must  
16 state its claims or defenses in numbered paragraphs, each limited as far as practicable to a  
17 single set of circumstances”).

18           **II. CONCLUSION**

19           Based on the reasoning and analysis above, the Court HEREBY DISMISSES  
20 WITHOUT PREJUDICE Plaintiff’s Complaint. Plaintiff is granted leave to amend in  
21 accordance with this Order. Plaintiff should file the First Amended Complaint on or  
22 before November 22, 2021.

23           **IT IS SO ORDERED.**

24 Dated: October 27, 2021

25   
26 Hon. Gonzalo P. Curiel  
27 United States District Judge