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

RODERICK FREEMAN,
Plaintiff,
v.
FLOWERS BAKING CO. OF
HENDERSON, LLC,
Defendant.

Case No.: 3:20-cv-02303-W-BGS

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT’S
MOTION TO DISMISS [DOC. 16]
WITHOUT LEAVE TO AMEND**

Defendant Flowers Baking Co. of Henderson, LLC (“Flowers”) moves to dismiss the second cause of action for harassment and the request for punitive damages from the Second Amended Complaint (“SAC”) under Federal Rule of Civil Procedure 12(b)(6). Plaintiff Roderick Freeman opposes.

The Court decides the matter on the papers submitted and without oral argument. Civ. L.R. 7.1(d.1). For the reasons that follow, the Court **GRANTS IN PART AND DENIES IN PART** Defendants’ motion [Doc. 16] **WITHOUT LEAVE TO AMEND**.

1 **I. BACKGROUND**

2 **A. Factual allegations**

3 Plaintiff Roderick Freeman, aged sixty-one, was hired by Defendant Flowers
4 Baking Co. of Henderson, LLC (“Flowers”) in or around January 2011 as a Branch Sales
5 Manager. (SAC [Doc. 14] ¶¶ 9–11.) He was promoted to the role of Director of Sales in
6 2013 and reclassified as an Area Sales Director in 2018 despite repeatedly outperforming
7 the annual sales quotas Flowers set for him. (*Id.* ¶¶ 10, 25.)

8 During a business meeting in or around June 2019, Freeman was approached by
9 his supervisor who said to him, “Rod, I see you have a beard these days, you look like
10 Papa Smurf.” (SAC ¶ 12.) Papa Smurf is an elderly cartoon character from the Belgian
11 series, *Smurfs*, which aired in the U.S. throughout the 1980’s.¹ (*Id.* ¶ 14.) After
12 researching Papa Smurf, Freeman was embarrassed by the association and proceeded to
13 shave his beard the same night. (*Id.* ¶ 15.)

14 Six to eight weeks later, the supervisor again referred to Freeman as the cartoon
15 character during a business meeting by saying, “Hey, Papa Smurf!” (SAC ¶¶ 18,19.)
16 This time, Freeman responded to the supervisor, “[t]hat really hurt my feelings. Did you
17 not see that I went home and shaved my beard after you called me Papa Smurf the last
18 time?” (*Id.* ¶ 20.) Instead of offering an apology or sympathy, the supervisor insisted the
19 comment was meant to be a “compliment” to indicate Freeman looked “distinguished.”
20 (*Id.* ¶ 21.) The supervisor’s alleged lack of remorse and Freeman’s feelings of
21 embarrassment took a toll on his daily interactions with the supervisor. (*Id.*)

22 After filing the First Amended Complaint, Freeman alleges he was contacted by a
23 coworker who “heard through the grape vine that Plaintiff had filed” this lawsuit. (SAC ¶
24 22.) The coworker told Freeman that he was “personally aware of several instances
25 where [his supervisor] had referred to Plaintiff as “Papa Smurf” to a number of other
26

27 ¹ Steve Gorman, *Smurfs head for big-screen at Columbia Pictures*, Reuters (Jun. 10, 2008 5:07 PM),
28 <https://www.reuters.com/article/idUSN1039068320080611>.

1 employees at the company on multiple occasions over the course of he last year.” (*Id.*)
2 Two of the occasions were while discussing scheduling and performances of the sales
3 branch with his coworkers. (*Id.*) Freeman alleges that “[b]ased on the timeline explained
4 to Plaintiff,” these comments took place after he confronted his supervisor and told her
5 how the label of “Papa Smurf” made him feel bad. (*Id.*) He further alleges that learning
6 about her additional use of the label “Papa Smurf” caused him additional “shame and
7 embarrassment.” (*Id.*)

8 9 **B. Procedural history**

10 On October 20, 2020, Freeman filed this lawsuit against Flowers in the San Diego
11 Superior Court. On November 24, 2020, Flowers removed the case to this Court and
12 filed a motion to dismiss the original Complaint. On December 15, 2020, before the
13 Court ruled on the motion, Freeman filed the FAC asserting causes of action for age
14 discrimination and harassment in violation of the California Fair Employment and
15 Housing Act (“FEHA”), Cal. Government Code §§ 12940(a) and (j), and requesting
16 punitive damages. (*FAC* [Doc. 6] ¶¶ 9–11.) Flower again moved to dismiss and on June
17 25, 2021, this Court granted the motion with leave to amend. (*See MTD Order* [Doc.
18 13].)

19 On July 11, 2021, Freeman filed the SAC. Flowers now seeks to dismiss the first
20 cause of action for harassment and the request for punitive damages.

21 22 **II. LEGAL STANDARD**

23 The Court must dismiss a cause of action for failure to state a claim upon which
24 relief can be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Rule 12(b)(6)
25 tests the legal sufficiency of the complaint. See Parks Sch. of Bus., Inc. v. Symington, 51
26 F.3d 1480, 1484 (9th Cir. 1995). A complaint may be dismissed as a matter of law either
27 for lack of a cognizable legal theory or for insufficient facts under a cognizable theory.
28 Balisteri v. Pacifica Police Dep’t., 901 F.2d 696, 699 (9th Cir. 1990). In ruling on the

1 motion, a court must “accept all material allegations of fact as true and construe the
2 complaint in a light most favorable to the non-moving party.” Vasquez v. L.A. Cnty.,
3 487 F.3d 1246, 1249 (9th Cir. 2007).

4 A complaint must contain “a short and plain statement of the claim showing that
5 the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The Supreme Court has
6 interpreted this rule to mean that “[f]actual allegations must be enough to raise a right to
7 relief above the speculative level.” Bell Atl. Corp. v. Twombly, 550 U.S. 554, 555
8 (2007). The allegations in the complaint must “contain sufficient factual matter, accepted
9 as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556
10 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570).

11 Well-pled allegations in the complaint are assumed true, but a court is not required
12 to accept legal conclusions couched as facts, unwarranted deductions, or unreasonable
13 inferences. See Papasan v. Allain, 478 U.S. 265, 286 (1986); Sprewell v. Golden State
14 Warriors, 266 F.3d 979, 988 (9th Cir. 2001).

16 **III. DISCUSSION**

17 **A. The SAC Fails to Allege Harassment under FEHA**

18 Freeman’s second cause of action alleges harassment based on age in violation of
19 FEHA. Freeman contends his supervisor’s comments comparing him to Papa Smurf
20 created a hostile-working environment. (SAC ¶¶ 12–24.) Flowers argues the comments
21 were not sufficiently severe and pervasive to alter the conditions of employment and
22 instead were “isolated and trivial.” (P&A [Doc. 16-1] 1:19–3:23.) The Court agrees with
23 Flowers.

24 To establish a prima facie hostile work environment claim, Freeman must allege
25 facts showing: (1) he was subjected to verbal or physical conduct because of his protected
26 status; (2) the conduct was unwelcome, and (3) the conduct was sufficiently severe or
27 pervasive to alter the conditions of his employment and create an abusive working
28 environment. Surrell v. California Water Serv., 518 F.3d 1097, 1108 (9th Cir. 2008).

1 California courts have adopted the same standard for hostile work environment claims
2 under FEHA as federal courts under Title VII. Lyle v. Warner Brothers Television
3 Productions, 38 Cal.4th 264, 279 (2006) (citation omitted) (in context of gender
4 harassment).

5 In evaluating whether the harassment was sufficiently severe and pervasive, the
6 court considers the totality of the circumstances, including the nature and frequency of
7 the offensive conduct, as well as the total number of days over which the offensive
8 conduct occurs. Fisher v. San Pedro Peninsula Hosp., 214 Cal. App. 3d 590, 609 (1989).
9 Isolated, sporadic, or trivial acts do not rise to the hostile standard. Id. Further, if “the
10 plaintiff neither witnesses the other incidents nor knows that they occurred, those
11 incidents cannot affect his or her perception of the hostility of the work environment.”
12 Patterson v. Boeing Company, 2018 WL 5937911 at *23 (C.D. Cal., 2018); see also
13 Nguyen v. Qualcomm, Inc., 2011 WL 1119564 at *10 (S.D. Cal., 2011) (holding that a
14 Plaintiff who alleged that her coworkers spoke negatively and laughed at her in her
15 absence did not rise to a level of sufficiently severe or pervasive to establish a hostile
16 work environment claim.)

17 In Mokler v. County of Orange, 157 Cal. App. 4th 121 (2007), plaintiff sued her
18 former employer for a hostile-work environment under FEHA. Id. at 575. The claim was
19 based on three acts of harassment by a work colleague that occurred over a five-week
20 period. Id. at 144. The acts consisted of: (1) calling plaintiff an “aging nun”; (2) pulling
21 plaintiff close to the colleague’s body and making an inappropriate comment; and (3)
22 placing his arm around plaintiff, stating she looked nice and demanding to know her
23 address. Id. Although the court recognized that conduct was inappropriate, it concluded
24 the “acts of harassment fall short of establishing ‘a pattern of continuous, pervasive
25 harassment [citation omitted], necessary to show a hostile working environment under
26 FEHA.’” Id. at 145.

27 Here, Freeman’s hostile work environment claim is based on his supervisor
28 referring to him as “Papa Smurf” on two separate occasions spanning a six to eight-week

1 period and two specified instances over an entire calendar year. (SAC ¶¶ 12–20, 22.) As
2 this Court found in ruling on Flower’s first motion to dismiss, these comments are simply
3 too isolated and sporadic to have altered the condition of Freeman’s workplace. (*MTD*
4 *Order* 7:19–27.) With regard to the new allegations that Freeman’s supervisor called him
5 “Papa Smurf” behind his back, because Freeman was admittedly unaware of the
6 comments, they could not have affected his perception of the work environment. Surrell,
7 518 F.3d at 1108.

8 In Summary, under Mokler, the Court finds Freeman’s original allegations of being
9 personally called “Papa Smurf” insufficient to establish the harassing conduct was
10 sufficiently severe or pervasive to state a claim for hostile work environment. Under
11 Patterson and Nguyen, Freeman’s new allegation of being unknowingly called “Papa
12 Smurf” are also not sufficient to state a claim for a hostile-work environment.

13
14 **B. Punitive Damages**

15 Finally, Flowers seeks to dismiss Freeman’s claim for punitive damages. Flowers
16 argues the SAC’s factual allegations are insufficient to give rise to punitive damages.
17 (*P&A* 3:26–5:7.) The Court disagrees.

18 Punitive damages may be awarded where a jury finds by clear and convincing
19 evidence that an act of oppression, malice or fraud has been committed. Cal. Civ. Code §
20 3294(a). A corporate employer is liable for punitive damages based on the acts of its
21 employees where such “wrongful conduct was committed, authorized, or ratified by a
22 corporate officer, director or managing agent. Id. § 3294(b). Section 3294 defines
23 “malice” as conduct intended to cause injury to a plaintiff or “despicable conduct which
24 is carried on by the defendant with a willful and conscious disregard of the rights or
25 safety of others.” Id. § 3294(c)(1). “Oppression” is defined as despicable conduct
26 “subject[ing] a person to cruel and unjust hardship in conscious disregard of that person’s
27 rights.” Id. § 3294(c)(2).

1 Here, the SAC alleges Freeman’s supervisor discriminated against him by not
2 offering him a promotion and then misled him regarding a non-existent application
3 process. (SAC ¶¶ 30–36.) Flowers asserts that the supervisor’s statements did not rise to
4 a level of malicious, fraudulent, or oppressive conduct. (P&A 9:18–10:11.) However,
5 viewing the facts in the light most favorable to the non-moving party, the supervisor’s
6 actions of intentionally misleading Freeman about the promotion process may rise to an
7 oppressive level necessary for punitive damages. Thus, the Court will not dismiss the
8 prayer for punitive damages.

9
10 **C. Leave to Amend**

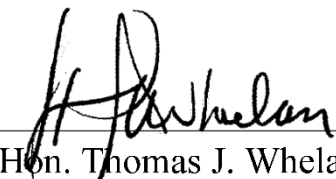
11 Leave to amend should be freely granted. Schaffer Family Investors, LLC v.
12 Sonnier, 120 F.Supp.3d 1028, 1038 (2015). However, amendment will be denied where
13 it would be futile. Id. Freeman has now had three attempts to allege a hostile work
14 environment claim. Since the allegations still fall well short of stating such a claim,
15 further leave to amend is not warranted.

16
17 **IV. CONCLUSION & ORDER**

18 For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN**
19 **PART** Defendant’s motion [Doc. 16] and **ORDERS** the Second Cause of Action for
20 Harassment **DISMISSED WITHOUT LEAVE TO AMEND.**

21 **IT IS SO ORDERED.**

22 Dated: November 18, 2021

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24 
25 Hon. Thomas J. Whelan
United States District Judge