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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

LIZA CHAPEN, individually as heir of
decedent and as Administratrix of the
ESTATE OF LAWRENCE P. CHAPEN,

Plaintiff,

v.

JOHN MUNOZ, an individual, MARC
LEPIRE, an individual, ROBERT MARTIN,
an individual, JOSEPH CYPHERS, an
individual, STEPHEN J. WEAVER, an
individual, DAVID MORROW, an individual,
STATE OF NEVADA, ex rel., its
DEPARTMENT OF CONSERVATION AND
NATURAL RESOURCES, DIVISION OF
STATE PARKS,

Defendants.

3:06-cv-00353-BES-VPC

ORDER

Currently before the Court is Defendant State of Nevada, Department of Conservation and Natural Resources, Division of State Parks' (the "State") Motion to Dismiss (#22) filed on February 15, 2008. Plaintiff Liza Chapen individually as heir of decedent and as Administratrix of the Estate of Lawrence P. Chapen ("Plaintiff") filed an Opposition to Motion to Dismiss (#23) on February 21, 2008, and the State filed a Reply (#24) on February 27, 2008. Plaintiff filed Supplemental Authority (#25) on October 22, 2008.

BACKGROUND

The initial complaint in this matter was filed on June 24, 2006. (Complaint (#1)). On July 2, 2006, Plaintiff filed an Amended Complaint (#3) in which he alleged that he was subjected to a hostile work environment by the individually named defendants. Plaintiff and

1 the individually named defendants were co-workers and employees of the State. Plaintiff filed
2 various causes of action against both the State and the individual defendants. These included
3 constitutional claims pursuant to 42 U.S.C. § 1983, battery, intentional infliction of emotional
4 distress, assault, negligence, violation of the Family Medical Leave Act (“FMLA”), and violation
5 of the Rehabilitation Act. In response, on August 18, 2006, the State filed a motion to dismiss
6 attacking Plaintiff’s constitutional claims under Section 1983 and his claim under the
7 Rehabilitation Act. (Motion to Dismiss (#6)). On August 6, 2007, this Court entered an Order
8 (#8) granting the State’s motion. In the Order, the Court dismissed Plaintiff’s claims under
9 both 42 U.S.C. § 1983 and the Rehabilitation Act but granted Plaintiff leave to amend his
10 complaint to cure the pleading deficiencies in those claims. On August 31, 2007, Plaintiff filed
11 a Second Amended Complaint (#9).¹

12 The State has now filed a second Motion to Dismiss (#22) seeking to dismiss Plaintiff’s
13 constitutional claims under Section 1983. The State also seeks dismissal of Plaintiff’s claims
14 under the FMLA and for negligence.

15 ANALYSIS

16 The purpose of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency
17 of the complaint. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal under Rule
18 12(b)(6) is proper only when a complaint exhibits either a “lack of a cognizable legal theory or
19 the absence of sufficient facts alleged under a cognizable legal theory.” Balistreri v. Pacifica
20 Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). The Court must accept as true all material
21 allegations in the complaint as well as all reasonable inferences that may be drawn from such
22 allegations. LSO, Ltd. v. Stroh, 205 F.3d 1146, 1150 (9th Cir. 2000). The Court must also
23 construe the allegations of the complaint in the light most favorable to the nonmoving party.
24 Shwarz v. United States, 234 F.3d 428, 435 (9th Cir. 2000). The Court may only grant a
25 motion to dismiss under Rule 12(b)(6) if it is certain that the plaintiff will not be entitled to relief

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27 ¹ Several months later, Plaintiff filed a Third Amended Complaint (#19) following Lawrence
28 P. Chapen’s death and substituting as plaintiff “Liza Chapen, individually as heir of decedent and as
Administratrix of the Estate of Lawrence P. Chapen.” (Third Amended Complaint (#19)). This is the
only substantive change between the Second and Third Amended Complaints.

1 under any set of facts that could be proven under the allegations of the complaint. Cahill v.
2 Liberty Mut. Ins. Co., 80 F.3d 336, 338 (9th Cir. 1996).

3 “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need
4 detailed factual allegations, a plaintiff’s obligation to provide the grounds for his entitlement to
5 relief requires more than labels and conclusions, and a formulaic recitation of the elements of
6 a cause of action will not do.” Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1965
7 (2007)(internal quotations and citations omitted). “Factual allegations must be enough to raise
8 a right to relief above the speculative level.” Id.

9 I. 42 U.S.C. § 1983 Claims

10 The State first moves to dismiss Plaintiff’s Section 1983 claims. In its motion, the State
11 asserts that Plaintiff continues to plead a First Amendment retaliation claim even though such
12 claim was dismissed in the Court’s August 6, 2007 Order. (Motion to Dismiss (#22) at 3).
13 However, in his Opposition, Plaintiff states that he “has not filed a First Amendment claim,
14 contrary to the assertion of the motion.” (Opposition to Motion to Dismiss (#23) at 1).
15 Moreover, there is no such claim asserted in Plaintiff’s Second Amended Complaint. As such,
16 because Plaintiff concedes that he does not assert a First Amendment retaliation claim, the
17 Court does not need to address this issue.²

18 Second, the State moves to dismiss Plaintiff’s equal protection claim under Section
19 1983. According to the State, this claim should be dismissed because Plaintiff’s Second
20 Amended Complaint fails “to cure the pleading defects with respect to this claim.” (Motion to
21 Dismiss (#22) at 4). In response, Plaintiff argues that the equal protection claim should survive
22 because he added language that “others similiary situated were not treated adversely” to the
23 claim after it was dismissed. (Opposition to Motion to Dismiss (#23) at 1).

24 In the Court’s Order initially dismissing Plaintiff’s equal protection claim, the Court
25 stated that “the facts presented in Plaintiff’s Amended Complaint are not sufficient to state a

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27 ² Plaintiff filed a First Amendment retaliation claim in his Amended Complaint (#3). This claim
28 was dismissed in the Court’s Order (#8) granting the State’s original motion to dismiss. Although
Plaintiff filed a supplemental authority dealing with First Amendment retaliation claims, he has not filed
a motion to reconsider the Court’s previous Order. Rather, Plaintiff concedes that he has not asserted
such a claim in his Second Amended Complaint.

1 claim for violation of the Equal Protection Clause of the Fourteenth Amendment.” (Order (#8)
2 at 5). Specifically, the Court noted that Plaintiff failed to allege that similarly situated
3 individuals were treated differently or that such different treatment was based on a
4 discriminatory purpose. In addition, the Court stated that Plaintiff “must state specific conduct
5 that enables the Court to determine whether Plaintiff may be entitled to relief if he is able to
6 prove his allegations.” Id.

7 “The Court is not required to accept legal conclusions cast in the form of factual
8 allegations if those conclusions cannot reasonably be drawn from the facts alleged.” Clegg
9 v. Cult Awareness Network, 18 F.3d 752, 755 (9th Cir. 1994). Despite the Court’s previous
10 Order stating that Plaintiff failed to allege sufficient facts to state an equal protection claim,
11 Plaintiff added no additional facts to his Second Amended Complaint. Rather, Plaintiff added
12 the sentence “[o]thers similiary situated were not treated adversely.” (Second Amended
13 Complaint (#9) at 4). Without additional facts, Plaintiff’s assertion is merely a legal conclusion
14 in the form of a factual allegation. Thus, Plaintiff has again failed to state specific conduct that
15 enables the Court to determine whether Plaintiff may be entitled to relief. As a result, this
16 claim is dismissed.

17 **II. Family and Medical Leave Act Claim**

18 In Plaintiff’s Second Amended Complaint, he asserts that the State “failed to provide
19 Plaintiff with leave to which he was entitled under the Family Medical Leave Act after knowing
20 Plaintiff had a serious health condition for which leave was required.” (Second Amended
21 Complaint (#9) at 7). Specifically, Plaintiff asserts that after providing the State with a
22 certification from a health care provider stating that Plaintiff was entitled to FMLA leave, the
23 State “ordered Plaintiff to fitness for duty and FMLA second opinion examinations by a
24 physician.” (Second Amended Complaint (#9)). According to Plaintiff, this request violated
25 his rights under the FMLA because the physician called for the second opinion would ignore
26 the “etiology of the stress” Plaintiff suffered from and would reach a different conclusion from
27 Plaintiff’s initial medical certification. Plaintiff thus argued that because the second physician
28 would not agree that he was entitled to FMLA leave, Plaintiff was placed in a “catch-22”

1 situation and felt “compelled to resign.” Id. at 8. As a result, Plaintiff asserts that the State
2 violated the FMLA by putting him in such a position.

3 In its motion to dismiss, the State argues that “there was neither adverse treatment nor
4 retaliatory motive with regard to Plaintiff’s request for FMLA leave.” (Motion to Dismiss (#22)
5 at 5). According to the State, Plaintiff was terminated because of his “failure to follow through
6 on a lawful request from his employer for a second medical evaluation based on Defendant
7 Morrow’s uneasiness concerning a medical certification previously submitted by Plaintiff.” Id.
8 The State asserts that it was “Plaintiff’s choice not to seek the second opinion to certify
9 eligibility for FMLA covered leave.” Id. Plaintiff did not file any response to this argument in
10 his opposition.³

11 “The FMLA provides job security to employees who must be absent from work because
12 of their own illnesses, to care for family members who are ill, or to care for new babies.” Bailey
13 v. Southwest Gas Co., 275 F.3d 1181, 1185 (9th Cir. 2002)(quoting Bachelor v. Am. West
14 Airlines, 259 F.3d 1112, 1119 (9th Cir. 2001)). Under the FMLA, “employees are entitled to
15 take up to twelve weeks of leave each year and are guaranteed reinstatement after exercising
16 their leave rights.” Id. “It is unlawful for an employer to interfere with, restrain or deny an
17 employee’s exercise of FMLA rights.” Id.; see 29 U.S.C. § 2615(a). In addition, “an employer
18 may not discharge an employee because the employee has opposed practices made unlawful
19 under the FMLA.” Id.; see 29 U.S.C. § 2615(a).

20 If an employee asks for leave because of his or her own serious health condition, or
21 that of a child, spouse, or parent, the employer may require that the request be supported by
22 timely certification from the appropriate treating health care provider. 29 U.S.C. § 2613(a); see
23 also Bailey, 275 F.3d at 1185-86. “If an employer has reason to doubt the validity of a medical
24 certification, the employee may be required to obtain a second medical opinion at the
25 employer’s expense.” Bailey, 275 F.3d at 1186. “The employer is permitted to designate the

27 ³ Under Local Rule 7-2 “[t]he failure of an opposing party to file points and authorities in
28 response to any motion shall constitute a consent to the granting of the motion.” LR 7-2(d). Plaintiff’s
Opposition to Motion to Dismiss (#23) was approximately one page and, as noted, failed to address the
State’s argument relating to his FMLA claim. By failing to oppose, Plaintiff consents to the State’s
argument pursuant to Local Rule 7-2(d). However, Plaintiff’s failure to oppose the State’s argument,
on its own, is an insufficient ground for dismissal. See Ghazali v. Moran, 46 F.3d 52, 53 (9th cir. 1995).

1 health care provider to furnish the second opinion.” 29 C.F.R. § 825.307(b)(2); see also 29
2 U.S.C. § 2613(c)(1). The only limitation listed by the statute is that the health care provider
3 “shall not be employed on a regular basis by the employer.” 29 U.S.C. § 2613(c)(2).

4 The FMLA provides a resolution for instances where there are conflicting opinions
5 between the initial certification and the second opinion. “In any case in which the second
6 opinion . . . differs from the opinion in the original certification . . . , the employer may require,
7 at the expense of the employer, that the employee obtain the opinion of a third health care
8 provider.” 29 U.S.C. § 2613(d)(1). The third health care provider should be “designated or
9 approved jointly by the employer and the employee.” Id. In addition, the statute states that
10 the third opinion “shall be considered final and shall be binding on the employer and the
11 employee.” 29 U.S.C. § 2613(d)(2). According to the regulations, “[t]he employer and the
12 employee must each act in good faith to attempt to reach agreement on whom to select for
13 the third opinion provider.”⁴ 29 C.F.R. § 825.307(c). As an example, the regulations provide
14 that “an employee who refuses to agree to see a doctor in the specialty in question may be
15 failing to act in good faith.” Id.

16 29 C.F.R. § 825.305(d) provides consequences if an employee fails to cooperate with
17 the certification process. “If the employee fails to provide the employer with a complete and
18 sufficient certification, despite the opportunity to cure the certification . . . or fails to provide any
19 certification, the employer may deny the taking of FMLA leave.” 29 C.F.R. § 825.305(d). That
20 provision further states that it “will apply in any case where an employer requests a certification
21 permitted by these regulations, whether it is the initial certification, a recertification, a second
22 or third opinion, or a fitness for duty certification, including any clarifications necessary to
23 determine if such certifications are authentic and sufficient.”⁵ Id.

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25 ⁴ The regulations include consequences if either the employer or employee refuse to act in good
26 faith in attempting to reach agreement on the third provider. “If the employer does not attempt in good
27 faith to reach agreement, the employer will be bound by the first certification.” Id. “If the employee
does not attempt in good faith to reach agreement, the employee will be bound by the second
certification.” Id.

28 ⁵ Although the Ninth Circuit has not addressed this exact issue, the Seventh Circuit has stated
that an “employee who fails to cooperate with the second-opinion process under § 2613(c) loses the
benefit of leave under §2612(a)(1)(C) or (D).” Diaz v. Fort Wayne Foundry Corp., 131 F.3d 711, 713
(7th Cir. 1997).

1 In this matter, Plaintiff has filed a claim against the State asserting that the State
2 violated the FMLA by requiring Plaintiff to subject himself to a second opinion medical
3 examination. However, as can be seen from the foregoing statutory provisions and
4 regulations, Plaintiff's refusal to consent to a second opinion is not a protected activity under
5 the FMLA, nor is such a request by the State unlawful. In fact, the FMLA expressly provides
6 that an employer is entitled to such an opinion when there is reason to doubt the validity of a
7 medical certification. Although Plaintiff argues that the second opinion would conflict with the
8 initial certification because the second health care provider would ignore "the etiology of the
9 stress," the statute provides a remedy in such a situation. Rather than refusing to take the
10 second opinion examination, the statute provides that in the case of conflicting opinions, the
11 employee has the right to seek an opinion from a third health care provider designated or
12 approved jointly by the employer and the employee. Thus, based on the foregoing, Plaintiff's
13 claim for violation of the FMLA is dismissed for failure to state a claim. The State's request
14 that Plaintiff get a second opinion medical examination is not unlawful under the Act.

15 III. Negligence Claim

16 Finally, the State moves to dismiss Plaintiff's negligence claim because "Plaintiff pleads
17 no facts with regard to duty-of-care, when and where this alleged duty was breached, no
18 causation of facts that link the alleged breach-of-duty, nor any alleged damages in this cause
19 of action." (Motion to Dismiss (#22) at 5). In response, Plaintiff argues that "[i]n terms of
20 negligence, Plaintiff has alleged a duty to exercise reasonable care so as to avoid foreseeable
21 harm and that such harm resulted." (Opposition to Motion to Dismiss (#23) at 1). He also
22 asserts that the "harm is described in the factual allegations," and the "breach of duties are
23 alleged in the wrongful conduct in the factual allegations." Id.

24 "A claim for negligence in Nevada requires that the plaintiff satisfy four elements: (1)
25 an existing duty of care, (2) breach, (3) legal causation, and (4) damages. Turner v. Mandalay
26 Sports Entm't, LLC, 180 P.3d 1172, 1175 (Nev. 2008). Although Plaintiff has set forth the
27 appropriate legal theory for a negligence claim, Plaintiff has provided no set of facts to support
28 such a claim. As noted, a plaintiff must set forth more than a "formulaic recitation of the

1 elements of a cause of action” in order to survive a motion to dismiss. See Bell Atlantic Corp,
2 127 S.Ct. at 1965. Because the facts alleged in the Second Amended Complaint are
3 insufficient to state a claim of negligence against the State, this claim must be dismissed.

4 **CONCLUSION**

5 For the foregoing reasons, IT IS HEREBY ORDERED that the State of Nevada, ex.rel.,
6 its Department of Conservation and Natural Resources, Division of State Parks’ Motion to
7 Dismiss (#22) is GRANTED. Plaintiff’s claims under 42 U.S.C. § 1983 are dismissed.
8 Plaintiff’s claim for violation of the FMLA is dismissed. Plaintiff’s claim for negligence against
9 the State is dismissed. The Clerk of the Court shall enter judgment accordingly.

10 Dated this 25th day of February, 2009.

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13 United States District Judge

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