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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

WILLIAM HERRON,)	3:13-cv-00075-HDM-VPC
)	
Plaintiff,)	
)	ORDER
vs.)	
)	
PERI & SON'S FARMS, INC.,)	
)	
Defendant.)	
_____)	

Before the court is the defendant Peri & Son's Farms ("defendant") motion to dismiss plaintiff William Herron's ("plaintiff") first amended complaint for failure to state a claim (#16). Plaintiff has responded (#20), and defendant has replied (#23). Also before the court is the defendant's motion to dismiss for failure to exhaust administrative remedies (#22). Plaintiff has responded (#25), and defendant has replied (#26).

1 On March 12, 2013, defendant moved to dismiss plaintiff's
2 original complaint, filed on February 14, 2013, for failure to
3 state a claim. Before deciding the motion to dismiss, the court
4 granted plaintiff leave to file an amended complaint to cure
5 certain deficiencies in his complaint. Plaintiff filed an amended
6 complaint on September 5, 2013. The court therefore denied the
7 defendant's first motion to dismiss as moot.

8 Defendant has now moved to dismiss plaintiff's first amended
9 complaint, which purports to assert claims of discrimination,
10 failure to accommodate, and retaliation under the Americans with
11 Disabilities Act ("ADA").

12 In its motion to dismiss filed on September 20, 2013 (#16),
13 defendant argues that plaintiff's complaint fails to state a claim
14 because it does not allege any facts demonstrating that plaintiff:
15 (1) is disabled within the meaning of the ADA; (2) is a qualified
16 individual who could perform the essential functions of the job
17 with or without reasonable accommodation; or (3) was terminated
18 because of his disability. Defendant further argues that plaintiff
19 has not sufficiently alleged how defendant denied him a reasonable
20 accommodation.

21 In considering a motion to dismiss under Rule 12(b)(6), the
22 court must accept as true all material allegations in the complaint
23 as well as all reasonable inferences that may be drawn from such
24 allegations. *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1150 n.2 (9th Cir.
25 2000). The allegations of the complaint also must be construed in
26 the light most favorable to the nonmoving party. *Shwarz v. United*
27 *States*, 234 F.3d 428, 435 (9th Cir. 2000).

28 "Under the notice pleading standard of the Federal Rules,

1 plaintiffs are only required to give a 'short and plain statement'
2 of their claims in the complaint." *Paulsen v. CNF, Inc.*, 559 F.3d
3 1061, 1071 (9th Cir. 2009) (quoting *Diaz v. Int'l Longshore &*
4 *Warehouse Union, Local 13*, 474 F.3d 1202, 1205 (9th Cir. 2007)).
5 The rule "does not require 'detailed factual allegations.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic*
6 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). It does, however,
7 require that a complaint "contain sufficient factual matter . . .
8 to state a claim to relief that is plausible on its face." *Id.* "A
9 claim has facial plausibility when the plaintiff pleads factual
10 content that allows the court to draw the reasonable inference that
11 the defendant is liable for the misconduct alleged." *Id.* A
12 pleading is insufficient if it offers only labels and conclusions,
13 a formulaic recitation of the elements of a cause of action, or
14 "naked assertions devoid of further factual enhancement." *Id.*
15 (internal punctuation omitted).
16

17 Plaintiff's complaint states a plausible claim of disability
18 discrimination and failure to accommodate. Accordingly, the motion
19 to dismiss those claims for failure to state a claim is **DENIED**. In
20 so deciding, the court notes that defendant's motion largely seeks
21 detailed factual allegations that are not required by *Twombly* or
22 *Iqbal*. The court further notes that the cases cited by defendant
23 to suggest plaintiff's complaint is insufficiently pled are
24 materially distinguishable. Finally, the court notes that many of
25 the defendant's arguments take issue with the facts as alleged by
26 plaintiff; factual disagreements are not a proper basis for
27 dismissal.

28 Defendant also argues that plaintiff's retaliation claim is

1 insufficiently pled. The court does not reach that issue.
2 Plaintiff's original complaint did not assert a claim of
3 retaliation under the ADA. Under Federal Rule of Civil Procedure
4 15(a)(1), the plaintiff may file an amended complaint once as a
5 matter of course within 21 days of serving the complaint or within
6 21 days after service of a motion under Rule 12(b). Otherwise, a
7 complaint may be amended only with leave of court or consent of the
8 opposing party. Fed. R. Civ. P. 15(a)(2). Plaintiff's complaint
9 was not filed as a matter of course under Rule 15(a)(1). Rather,
10 it was filed pursuant to leave of court. Importantly, the court
11 granted plaintiff leave to cure the deficiencies in the original
12 complaint. It did not grant plaintiff leave to add additional
13 claims. Because plaintiff has not been granted leave to include a
14 claim of retaliation in his complaint, the retaliation claim is
15 hereby **STRICKEN**. The court therefore declines to address the
16 defendant's remaining arguments, in both motions, with respect to
17 plaintiff's retaliation claim, as all such arguments are moot.

18 Finally, in its motion to dismiss filed on October 18, 2013
19 (#22), defendant argues that plaintiff failed to exhaust his
20 reasonable accommodation claim. Whether the reasonable
21 accommodation claim is "like or reasonably related" to the
22 allegations in plaintiff's NERC charge or "within the scope of [a
23 NERC] investigation that reasonably could be expected to grow out
24 of the allegations," *Leong v. Potter*, 347 F.3d 1117, 1122 (9th Cir.
25 2003), is a close question. Defendant's motion to dismiss the
26 reasonable accommodation claim for failure to exhaust is therefore
27 denied without prejudice to renew in a motion for summary judgment.

28 In accordance with the foregoing, defendant's motion to

1 dismiss for failure to state a claim (#16) is **DENIED**, the
2 plaintiff's retaliation claim is **STRICKEN**, and defendant's motion
3 to dismiss for failure to exhaust (#22) is **DENIED WITHOUT PREJUDICE**
4 to renew in relevant part in a motion for summary judgment.

5 IT IS SO ORDERED.

6 DATED: This 12th day of December, 2013.

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UNITED STATES DISTRICT JUDGE

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