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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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<p>STEVEN BRAGORGOS, Plaintiff, v. ELAINE CHAO, in her capacity as SECRETARY OF TRANSPORTATION, Defendant.</p>
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Case No. 3:17-cv-0358-LRH-(VPC)

ORDER

Before the court is defendant Elaine Chao’s (“Chao”), in her capacity as Secretary of the United States Department of Transportation (“DOT”), motion to dismiss. ECF No. 11. Plaintiff Steven Bragorgos (“Bragorgos”) filed an opposition (ECF No. 14) to which Chao replied (ECF No. 18).

I. Facts and Procedural Background

On or about November 30, 2014, Bragorgos was hired by the DOT to work in the Federal Highway Administration as a Finance Manager in Carson City, Nevada. Prior to working with the DOT, Bragorgos served active duty in the United States Army Reserve for over twenty years. During that time, Bragorgos suffered several physical and mental injuries which left him partially disabled. DOT allegedly knew of Bragorgos’s disability at the time he was hired.

For the next several years, Bragorgos allegedly performed his job satisfactorily and received three satisfactory job performance evaluations. Beginning in early 2016, Bragorgos’s

1 disabilities intensified culminating in a request for accommodation from the DOT in July 2016.
2 However, Bragorgos alleges that DOT did not provide any accommodation for his disabilities.
3 Instead, on August 8, 2016, Bragorgos was relieved of his supervisory position as a Finance
4 Manager and given duties that he could not easily perform due to his disability. In October
5 2016, Bragorgos filed an EEOC complaint alleging discrimination based on his age and
6 disability. Then, on or about December 7, 2016, Bragorgos was denied a step increase and
7 given a notice that his performance was no longer satisfactory. He was subsequently placed on
8 a Performance Improvement Plan in January 2017. At the time he was removed as Finance
9 Manager, given new duties that he allegedly could not perform, denied a step increase, and
10 placed on the performance plan, Bragorgos was 53 years old.

11 On June 8, 2017, Bragorgos filed a complaint against Chao in her official capacity
12 alleging four causes of action: (1) age discrimination in violation of the Age Discrimination
13 Employment Act (“ADEA”), 29 U.S.C. § 621, et seq.; (2) violation of the Rehabilitation Act of
14 1973, 29 U.S.C. § 701, et seq.; (3) violation of the Americans with Disabilities Act (“ADA”),
15 42 U.S.C. § 12101, et seq.; and (4) a hostile and abusive work environment in violation of Title
16 VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000(e), et seq. ECF No. 1.
17 Thereafter, Chao filed the present motion to dismiss. ECF No. 11.

18 **II. Legal Standard**

19 Defendant Chao seeks dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil
20 Procedure for failure to state a legally cognizable cause of action. See FED. R. CIV. P. 12(b)(6)
21 (stating that a party may file a motion to dismiss for “failure to state a claim upon which relief
22 can be granted[.]”). To survive a motion to dismiss for failure to state a claim, a complaint must
23 satisfy the notice pleading standard of Rule 8(a)(2) of the Federal Rules of Civil Procedure. See
24 *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008). Under
25 Rule 8(a)(2), a complaint must contain “a short and plain statement of the claim showing that
26 the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2). Rule 8(a)(2) does not require detailed
27 factual allegations; however, a pleading that offers only “‘labels and conclusions’ or ‘a
28 formulaic recitation of the elements of a cause of action’” is insufficient and fails to meet this

1 broad pleading standard. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic*
2 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

3 To sufficiently allege a claim under Rule 8(a)(2), viewed within the context of a
4 Rule 12(b)(6) motion to dismiss, a complaint must “contain sufficient factual matter, accepted
5 as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting *Twombly*, 550 U.S.
6 at 570). A claim has facial plausibility when the pleaded factual content allows the court to
7 draw the reasonable inference, based on the court’s judicial experience and common sense, that
8 the defendant is liable for the alleged misconduct. See *Id.* at 678-679 (stating that “[t]he
9 plausibility standard is not akin to a probability requirement, but it asks for more than a sheer
10 possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are
11 merely consistent with a defendant’s liability, it stops short of the line between possibility and
12 plausibility of entitlement to relief.”) (internal quotation marks and citations omitted). Further,
13 in reviewing a motion to dismiss, the court accepts the factual allegations in the complaint as
14 true. *Id.* However, bare assertions in a complaint amounting “to nothing more than a formulaic
15 recitation of the elements of a . . . claim . . . are not entitled to an assumption of truth.” *Moss v.*
16 *U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 698) (internal
17 quotation marks omitted). The court discounts these allegations because “they do nothing more
18 than state a legal conclusion—even if that conclusion is cast in the form of a factual
19 allegation.” *Id.* “In sum, for a complaint to survive a motion to dismiss, the non-conclusory
20 ‘factual content,’ and reasonable inferences from that content, must be plausibly suggestive of a
21 claim entitling the plaintiff to relief.” *Id.*

22 **III. Discussion**

23 In her motion to dismiss, Chao contends that all four causes of action fail to state a
24 claim upon which relief can be granted. See ECF No. 11. Bragorgos concedes in his opposition
25 that his first cause of action for a violation of the ADEA and third cause of action for a
26 violation of the ADA should be dismissed for failure to state a claim. See ECF No. 14, p. 12.
27 Therefore, the court shall only address Bragorgos’s claims for a violation of the Rehabilitation
28 Act and for a Title VII hostile working environment claim.

1 **A. Rehabilitation Act**

2 In her motion to dismiss, Chao contends that Bragorgos has failed to exhaust his
3 administrative remedies related to his Rehabilitation Act claim and therefore, the court is
4 without jurisdiction over this claim. See ECF No. 11. As addressed below, the court disagrees
5 and finds that Bragorgos has sufficiently exhausted his administrative remedies as to this claim.

6 The Rehabilitation Act, codified at 29 U.S.C. § 701 et seq., prohibits discrimination in
7 employment on the basis of an employee’s disability. In order for a district court to have
8 subject matter jurisdiction over a claim under the Rehabilitation Act, a plaintiff must have
9 exhausted all available administrative remedies. See *B.K.B. v. Maui Police Dept.*, 276 F.3d
10 1091, 1099 (9th Cir. 2002); see also, *Bullock v. Berrien*, 688 F.3d 613, 616 (9th Cir. 2012). To
11 exhaust all administrative remedies, a plaintiff must timely file a charge with the EEOC
12 identifying the alleged discrimination. *Id.*; see also, *Vasquez v. County of Los Angeles*, 349
13 F.3d 634, 644 (9th Cir. 2004). Generally, allegations of discrimination not included in the
14 administrative charge “may not be considered by a federal court.” *Id.* at 1100. (quoting *Green*
15 *v. Los Angeles County Superintendent of Schs.*, 883 F.2d 1472, 1475-76 (9th Cir. 1989).
16 However, a federal court’s subject matter jurisdiction extends over all allegations of
17 discrimination that fall within the scope of the EEOC charge and are thus “like or reasonably
18 related to the allegations contained in the EEOC charge.” *Id.* EEOC charges are construed with
19 “utmost liberality since they are made by those unschooled in the technicalities of formal
20 pleading.” *Id.* (quoting *Kaplan v. Int’l Alliance of Theatrical & Stage Employees*, 525 F.3d
21 1354, 1359 (9th Cir. 1975).

22 The court has reviewed the documents and pleadings on file in this manner and finds
23 that although Bragorgos did not specifically allege a claim under the Rehabilitation Act in his
24 EEOC charge, he did raise a general claim for disability discrimination in that charge and
25 alleges that he told his employers of his disability before the alleged adverse employment
26 actions. See ECF No. 13, Ex. 1 (identifying a claim for discrimination based on disability (post-
27 traumatic stress disorder and depression). The court finds that Bragorgos’s claim for violation
28 of the Rehabilitation Act is reasonably related to this charge of discrimination based on

1 disability such that an EEOC investigation on his claim could have been reasonably expected to
2 grow out of that charge. As such, the court finds that Bragorgos's claim under the
3 Rehabilitation Act was properly exhausted and therefore, the court has subject matter
4 jurisdiction over this claim. See e.g., *Leong v. Potter*, 347 F.3d 1117 (9th Cir. 2003) (holding
5 that a claim not specifically mentioned in an EEOC charge, but was likely to grow out of an
6 EEOC investigation into the underlying charge was properly exhausted to invoke the court's
7 subject matter jurisdiction). Accordingly, the court shall deny Chao's motion to dismiss as to
8 this claim.

9 **B. Title VII**

10 Chao also contends that Bragorgos has failed to exhaust his administrative remedies as
11 to his Title VII claim and therefore, the court is likewise without jurisdiction over this claim.
12 See ECF No. 11. The court agrees.

13 Title VII prohibits discrimination against an employee on the basis of race, color,
14 religion, sex, or national origin. See 42 U.S.C. § 2000e-2(a). Although not explicitly included
15 in the text of Title VII, claims based on a hostile work environment fall within Title VII's
16 protections. See *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993).

17 In his EEOC charge, Bragorgos does not raise any claim for a hostile work
18 environment. Although Bragorgos does mention his sex at one point in the charge, his charge
19 of discrimination does not describe any allegedly discriminatory conduct related to his sex.
20 Further, Bragorgos did not tie any of his alleged adverse employment actions in his EEOC
21 charge to his sex. Rather, he relates these employment actions to discrimination based on his
22 age and disability. Further, his hostile working environment claim relies on different theories
23 and different statutes than his other claims. Thus, in contrast to his Rehabilitation Act claim, an
24 EEOC investigation into a claim of a hostile working environment would be unlikely to grow
25 out of his charge of discrimination. Therefore, the court finds that Bragorgos has failed to
26 exhaust his administrative remedies as to his hostile working environment claim. Accordingly,
27 the court shall grant Chao's motion to dismiss this claim.

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1 IT IS THEREFORE ORDERED that defendant's motion to dismiss (ECF No. 11) is
2 GRANTED in-part and DENIED in-part in accordance with this order. Plaintiff's first cause of
3 action for a violation of the ADEA, third cause of action for a violation of the ADA, and fourth
4 cause of action for a hostile work environment in violation of Title VII are DISMISSED in
5 their entirety from plaintiff's complaint (ECF No. 1).

6 IT IS SO ORDERED.

7 DATED this 10th day of October, 2017.



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9 LARRY R. HICKS
10 UNITED STATES DISTRICT JUDGE
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