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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL GUTIERREZ,)	
)	
Plaintiff,)	CASE NO. C10-1072Z
)	
v.)	
)	ORDER
DAVID CORT, et al.,)	
)	
Defendants.)	
_____)	

This MATTER comes before the Court on Defendant Precision Engines, L.L.C’s (“Precision”) Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b), docket no. 34, and Plaintiff’s motion to appoint a pro bono mediator, docket no. 39. For the following reasons, the Court GRANTS in part and DENIES in part Defendant’s motion to dismiss. The Court DENIES, without prejudice, Plaintiff’s motion to appoint a pro bono mediator.

01 **I. Background**

02 Plaintiff Michael Gutierrez is a former employee of Precision. Mot., Ex. 1 (docket no. 10).
03 Plaintiff's employment was terminated on May 9, 2008. Id. Plaintiff filed a complaint with the
04 Washington State Human Rights Commission ("WHRC") on March 6, 2008, alleging that
05 Precision discriminated against him based on his race, age, and disability. Id. Thereafter,
06 Plaintiff filed this lawsuit on June 29, 2010, alleging that several of Precision's employees
07 discriminated against him based on race and age. Compl. (docket no. 3).
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09 On December 21, 2010, the Court dismissed Plaintiff's fraud and state law discrimination
10 claims against the individual employees without prejudice. Order (docket no. 23). Plaintiff filed
11 an amended complaint on January 1, 2011, adding Precision. Am. Compl. (docket no. 24). On
12 March 23, 2011, the Court dismissed with prejudice Plaintiff's remaining claims against all
13 individual Defendants. The remaining Defendant in this case, Precision, filed a motion on April
14 12, 2011, to dismiss Plaintiff's complaint for insufficiency of service of process (Fed. R. Civ. P.
15 12(b)(5)), and failure to state a claim (Fed. R. Civ. P. 12(b)(6)). On May 10, 2011, the Court
16 issued an order to file proof of service of the summons and complaint no later than July 21, 2011,
17 and deferred ruling on Precision's motion to dismiss, renoting the motion to July 22, 2011. Docket
18 no. 42. Plaintiff filed proof of service of summons on June 22, 2011, docket no. 45, but has not
19 otherwise responded to Plaintiff's motion to dismiss.
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01 **II. Discussion**

02 **A. Motion to Dismiss under Fed. R. Civ. P. 12(b)(5)**

03 In response to the Court’s order to file proof of service of summons, Plaintiff served Bob
04 Dalton, sales manager for Precision Engines. In Defendant’s reply to its motion to dismiss,
05 Defendant argues Dalton was not the correct individual to serve because he is not a managing agent
06 under Washington law, RCW 4.28.080(9) or under Fed. R. Civ. P. 4(h)(1)(B), and that therefore the
07 Court should dismiss for insufficient service. Even assuming Dalton is not a “managing agent”
08 and therefore lacked the requisite authority to accept service on behalf of Precision, Precision has
09 received sufficient notice of the complaint, and it has not shown that it has been prejudiced by the
10 defect. See Campagnolo S.R.L. v. Full Speed Ahead, Inc., No. 08-1372, 2009 WL 1788381 (W.D.
11 Wash., June 22, 2009) (“Rule 4 is a flexible rule that should be liberally construed so long as a party
12 receives sufficient notice of the complaint.”) (citing United Food & Commercial Workers Union v.
13 Alpha Beta Co., 736 F.2d 1371, 1382 (9th Cir. 1984)).

15 **B. Motion to Dismiss under Fed. R. Civ. P. 12(b)(6)**

16 Precision argues in its motion to dismiss for failure to state a claim under Fed. R. Civ. P.
17 12(b)(6) that: (1) Plaintiff’s federal discrimination claim is barred by his failure to file charges with
18 the EEOC within 300 days of the adverse employment action, or alternatively, by Plaintiff’s failure
19 to file suit within 90 days of receiving his right to sue letter from the EEOC; (2) Plaintiff has failed
20 to allege facts giving rise to a state law discrimination claim; and (3) Plaintiff has failed to allege
21 facts giving rise to his tort claims for fraud and negligence.

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01 1. Standard of Review

02 To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must contain
03 sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face.
04 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). A claim has facial plausibility when the plaintiff
05 pleads factual content that allows the court to draw the reasonable inference that the defendant is
06 liable for the misconduct alleged. Id. The plaintiff is obligated to provide grounds for his
07 entitlement to relief that amount to more than labels and conclusions or a formulaic recitation of the
08 elements of a cause of action. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 545 (2007). A
09 Court may also dismiss a claim that lacks a cognizable legal theory, or the absence of sufficient
10 facts to form a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th
11 Cir. 1988). Generally a court may not consider matters outside the pleadings in deciding a motion
12 to dismiss under Rule 12(b)(6). See Fed. R. Civ. P. 12(d) (a court must treat a motion to dismiss as
13 one for summary judgment where the parties present matters outside the pleadings for the Court's
14 consideration).

16 2. Plaintiff's Federal Discrimination Claim

17 Defendant points to a document outside the pleadings – Plaintiff's charge filed with the
18 Washington State Human Rights Commission – to support its argument that Plaintiff's Title VII
19 claim is time-barred. In order to consider this document, the Court would need to construe the
20 motion to dismiss as a motion for summary judgment under Fed. R. Civ. P. 12(d). See San Pedro
21 Hotel, Co., Inc., v. City of Los Angeles, 159 F.3d 470, 477 (9th Cir. 1998). The Court declines to
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01 construe the motion as a motion for summary judgment and DENIES Defendant's motion to
02 dismiss Plaintiff's federal claim.

03 3. Plaintiff's State Discrimination Claim

04 Plaintiff appears to allege sufficient facts to state a claim for disparate treatment under state
05 law. See Am. Compl. at 2, docket no. 24 (alleging that Plaintiff, a person of Hispanic descent, was
06 terminated for damaging \$200.00 worth of ignition leads, while two Caucasian employees were not
07 even written up, despite damaging over \$17,000.00 in ignition leads). Accordingly, the Court
08 DENIES Defendant's motion to dismiss Plaintiff's state discrimination claim.

09 4. Plaintiff's Claims of Fraud

10 "In alleging fraud...a party must state with particularity the circumstances constituting fraud
11 or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged
12 generally." Fed. R. Civ. P. 9(b). In Washington, to establish fraud, "the plaintiff must
13 demonstrate: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) speaker's
14 knowledge of its falsity; (5) speaker's intention that it shall be acted upon by the plaintiff; (6)
15 plaintiff's ignorance of falsity; (7) reliance; (8) right to rely; and (9) damages." Chen v. State of
16 Washington, 86 Wn. App. 183, 188 (1997).

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18 The Court previously dismissed Plaintiff's fraud claims without prejudice. See Order
19 (docket no. 23). Plaintiff has since amended his complaint, adding a string of statements
20 punctuated with the word "fraud".¹ However, Plaintiff has failed to allege scienter, or even that
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¹ See, e.g., Am. Compl. ¶ 7 ("(FRAUD) There are 7 pins from .150"- .157" 4 were commercially available so I had to find, clean, and measure the other size pins and put into labeled bags. Sometimes you have to bore the fixed orifice with a pin and 400

01 Plaintiff somehow relied on and was harmed by Defendant's fraudulent conduct. Accordingly, the
02 Court GRANTS Defendant's motion to dismiss Plaintiff's fraud claims and DISMISSES Plaintiff's
03 fraud claims with prejudice.

04 5. Plaintiff's Claim of Negligence

05 Plaintiff's negligence claim appears to be related to unsafe working conditions² and to
06 injuries which he claims were acquired on the job.³ However, when the State of Washington
07 adopted the Washington Industrial Safety and Health Act, the Legislature abolished the courts'
08 jurisdiction to hear negligence claims for personal work injuries, unless the employee was injured
09 by the "deliberate intention" of his employer. RCW 51.04.010; See also Shellenbarger v.
10 Longview Fibre Co., 125 Wn. App. 41, 45-46 (2004). Since Plaintiff has not alleged that his
11 employer deliberately intended to injure him, or willfully disregarded actual knowledge that the
12 injury would occur, the Court GRANTS Defendant's motion to dismiss Plaintiff's negligence
13 claims and DISMISSES Plaintiff's negligence claims without prejudice.

14 **III. Conclusion**

15 For the foregoing reasons, the Court hereby GRANTS in PART and DENIES in PART
16 Defendant's motion to dismiss, docket no. 34, as follows. The Court:
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19 grit sand paper wrapped around this pin and rotate inside this orifice and check cc flow per hour when very hot there were a set
20 parameter of oil dispersion per hour.") (emphasis in original). See also id. ("There were many instances. Like not punching in
21 for work at 6:00 A.M., when many times I was there at 5:15A.M[.] Or our name tags were taped to the wall...and anybody can
22 punch in on your name tag and then you're [sic] work order with out [sic] you knowing and adding time to it without you
knowing until later with a warning and further disciplines [sic]. (**FRAUD**)") (emphasis in original).

² For example, Plaintiff states that "In the @20'x25' room there were a few personnel that worked in this room and testing room
out in the rear area of @35x50'x20' tall room with no ventilation and dealing with aviation lubricants and solvents and other
smoky inhalants in the air." Compl. ¶ 4 (docket no. 3).

³ For example, Plaintiff states that "I have submitted my last blood test which shows I still have lead in my blood 2 years later. I
never worked with lead solder and other toxins in back room [sic] in such high concentrations before in my life." Am. Compl.
¶ 1 (emphasis in original).

01 (1) DENIES Defendant's motion to dismiss for insufficient service under
02 Fed. R. Civ. P. 12(b)(5).

03 (2) DENIES Defendant's motion to dismiss Plaintiff's federal discrimination claim.

04 (3) DENIES Defendant's motion to dismiss Plaintiff's state discrimination claim.

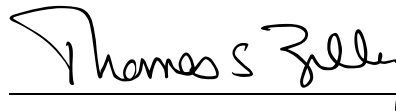
05 (4) GRANTS Defendant's motion to dismiss Plaintiff's fraud claims and DISMISSES
06 Plaintiff's fraud claims with prejudice.

07 (5) GRANTS Defendant's motion to dismiss Plaintiff's negligence claim and
08 DISMISSES Plaintiff's negligence claim without prejudice, and with leave to amend. Any
09 amended complaint alleging a negligence claim must be filed within 30 days of this Order.

10 (6) The Court hereby DENIES Plaintiff's motion to appoint a pro bono mediator, docket
11 no. 39, without prejudice.

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13 IT IS SO ORDERED.

14 DATED this 16th day of August, 2011.

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17 Thomas S. Zilly
18 United States District Judge
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