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6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 DUANE D KRUGER,

9 Plaintiff,

10 v.

11 CARLOS DEL TORO,

12 Defendant.

Case No. 3:23-cv-05932-TMC

ORDER GRANTING MOTION TO
DISMISS AND LEAVE TO AMEND

13
14 Before the Court is Defendant Carlos Del Toro's motion to dismiss (Dkt. 13). Having
15 reviewed the parties' briefing and the complaint (Dkt. 2), the Court GRANTS the motion to
16 dismiss and GRANTS Mr. Kruger leave to amend his complaint.

17 **I. BACKGROUND**

18 Plaintiff Duane D. Kruger, born in 1960, brings this action under the Age Discrimination
19 in Employment Act of 1968, 29 U.S.C. §§ 621–34 ("ADEA"). Dkt. 2 at 3, 5. He claims that
20 during his employment with the Department of the Navy at the Puget Sound Naval Shipyard, the
21 Navy discriminated against him based on his age by failing to promote him, subjecting him to
22 unequal employment terms and conditions, and retaliating against him. *Id.* at 3–4. He stated that
23 the discriminatory acts occurred from April to July, 2020, and noted that these acts are ongoing.
24

1 *Id.* at 5. Mr. Kruger alleges that “[i]n the year 2020, a promotion selection process was
2 conducted which denied [e]qual [o]ppportunity for [s]election.” *Id.*

3 Before bringing this action, Mr. Kruger filed an Equal Employment Opportunity
4 Commission (“EEOC”) charge alleging he was not selected for a promotion opportunity while he
5 was on administrative leave from his job at the Navy. *Id.* at 8. After an investigation, an
6 Administrative Judge found no discrimination, the Navy issued a final order implementing that
7 decision, and the EEOC affirmed the final order on appeal. *Id.* at 9. On July 24, 2023,
8 Mr. Kruger received a letter from the EEOC denying his request for reconsideration and
9 notifying him of his right to file a civil action in a U.S. District Court. *Id.* Mr. Kruger filed this
10 action before the deadline stated in the letter. *See id.*; Dkt. 1.

11 II. DISCUSSION

12 A. Legal Standard

13 Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain “a short and
14 plain statement of the claim showing that the pleader is entitled to relief.” Under Federal Rule of
15 Civil Procedure 12(b)(6), the Court may dismiss a complaint for “failure to state a claim upon
16 which relief can be granted.” Rule 12(b)(6) motions may be based on either the lack of a
17 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.
18 *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (citation
19 omitted).

20 To survive a Rule 12(b)(6) motion, the complaint “does not need detailed factual
21 allegations,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, but “must contain sufficient factual
22 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Boquist v.*
23 *Courtney*, 32 F.4th 764, 773 (9th Cir. 2022) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678,
24 (2009)). “A claim is facially plausible ‘when the plaintiff pleads factual content that allows the

1 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”
2 *Id.* (quoting *Iqbal*, 556 U.S. at 678). “[A] plaintiff’s obligation to provide the grounds of his
3 entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the
4 elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (internal quotations
5 omitted).

6 The Court “must accept as true all factual allegations in the complaint and draw all
7 reasonable inferences in favor of the nonmoving party.” *Retail Prop. Tr. v. United Bhd. of*
8 *Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir. 2014). But the Court is “not bound to
9 accept as true a legal conclusion couched as a factual allegation.” *Twombly*, 550 U.S. at 555.
10 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory
11 statements, do not suffice.” *Iqbal*, 556 U.S. at 678.

12 **B. Mr. Kruger has not alleged sufficient facts to support a failure-to-promote claim.**

13 To state a failure-to-promote claim under the ADEA, a plaintiff must allege facts
14 showing that he was “(1) at least forty years old, (2) qualified for the position for which an
15 application was submitted, (3) denied the position, and (4) the promotion was given to a
16 substantially younger person.” *Shelley v. Geren*, 666 F.3d 599, 608 (9th Cir. 2012). Regarding
17 the second prong, the plaintiff does not need to show he applied for a position if he instead
18 shows that the employer did not award promotions through a competitive process; for example,
19 by using discriminatory evaluative criteria, failing to post the job opening, or failing to accept
20 formal applications. *See Lyons v. England*, 307 F.3d 1092, 1114 (9th Cir. 2002). Regarding the
21 fourth prong, the person who received the position generally must be at least ten years younger
22 than the plaintiff. *France v. Johnson*, 795 F.3d 1170, 1174 (9th Cir. 2015), *as amended on reh’g*
23 (Oct. 14, 2015). But if the age gap is less than ten years, the plaintiff may allege additional facts
24 showing “the employer considered his or her age to be significant.” *Id.*

1 By stating that he was born in 1960, Mr. Kruger has shown that he was at least forty
2 years old. *See* Dkt. 2 at 5. But Mr. Kruger has not alleged facts showing that he satisfies the
3 remaining three prongs. He has not stated facts showing that he applied for a position for which
4 he was qualified, or alternatively, that his employer used a non-competitive process. *See*
5 *generally* Dkt. 2. Although Mr. Kruger alleges that “[i]n the year 2020, a promotion selection
6 process was conducted which denied [e]qual [o]ppportunity for [s]election,” Dkt. 2 at 5, to show
7 this process was non-competitive, Mr. Kruger would need to provide more detail explaining
8 what hiring process his employer used, including the parts of the process he alleges were non-
9 competitive. *See Lyons v. England*, 307 F.3d 1092, 1114 (9th Cir. 2002). In addition, Mr. Kruger
10 has not shown that he was denied the position or that the person who received the promotion was
11 substantially younger than him. Mr. Kruger thus has not alleged sufficient facts to support a
12 plausible failure-to-promote claim.

13 **C. Mr. Kruger has not alleged sufficient facts to support a retaliation claim.**

14 Under the ADEA, an employer may not “retaliate against an employee for opposing the
15 employer’s discriminatory practices or participating in any investigation or proceeding under the
16 ADEA.” *O’Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 763 (9th Cir. 1996) (citing
17 29 U.S.C. § 623(d)). To state a claim for retaliation, a plaintiff must establish (1) that he engaged
18 in activity protected by the ADEA, such as opposing discriminatory practices or participating in
19 an ADEA proceeding; (2) “that he was discharged or suffered some other adverse employment
20 decision;” and (3) “that there is a causal connection between the two.” *Id.*

21 Mr. Kruger has not alleged facts identifying a protected activity in which he was
22 engaged, or showing he faced an adverse employment action because of that protected activity.
23 He thus has not stated sufficient facts to support a plausible retaliation claim.

1 **D. Leave to amend is proper.**

2 When dismissing a complaint, “a district court should grant leave to amend even if no
3 request to amend the pleading was made, unless it determines that the pleading could not
4 possibly be cured by the allegation of other facts.” *Doe v. United States*, 58 F.3d 494, 497 (9th
5 Cir. 1995). Under Federal Rule of Civil Procedure 15(a)(2), “a party may amend its pleading
6 only with the opposing party’s written consent or the court’s leave. The court should freely give
7 leave when justice so requires.” The Court shall apply this policy “with extreme liberality.”
8 *Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003). The “rule favoring
9 liberality in amendments to pleadings is particularly important for the pro se litigant,” who is “far
10 more prone to making errors in pleading” than a represented litigant. *Lopez v. Smith*, 203 F.3d
11 1122, 1131 (9th Cir. 2000) (quoting *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987)).

12 Given Mr. Kruger’s pro se status and the liberal standard of Rule 15, leave to amend is
13 proper. The Court grants Mr. Kruger leave to amend his complaint to add factual allegations
14 explaining the following, to the extent applicable:

- 15 • The position for which the Navy denied Mr. Kruger a promotion.
- 16 • What qualifications the position required.
- 17 • Mr. Kruger’s qualifications for the position.
- 18 • The process the Navy used to fill the position, and if Mr. Kruger alleges the process
19 was unfair or non-competitive, the ways in which it was unfair or non-competitive.
- 20 • What steps Mr. Kruger took to apply for the position, or if he did not apply, whether
21 he knew about the position or an application process.
- 22 • The age of the person who received the position, and if that person is less than ten
23 years younger than Mr. Kruger, information showing that the Navy considered
24 Mr. Kruger’s age to be important when making its hiring decision.

- What action(s) Mr. Kruger took to either (1) oppose discriminatory practices in the Navy, or (2) participate in an ADEA investigation or proceeding.
- The Navy’s response to Mr. Kruger’s action(s), and how that response had a negative impact on his employment.
- Information showing the Navy responded as it did because of Mr. Kruger’s action(s).
- Any other facts that support Mr. Kruger’s claims.

III. CONCLUSION

For the above reasons, the Court GRANTS Del Toro’s motion to dismiss and DISMISSES Mr. Kruger’s failure-to-promote and retaliation claims without prejudice.¹ The Court also GRANTS Mr. Kruger leave to amend his complaint. The Court ORDERS Mr. Kruger to file and serve his amended pleading on all parties no later than April 4, 2024.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing pro se at said party’s last known address.

Dated this 4th day of March, 2024.



Tiffany M. Cartwright
United States District Judge

¹ Mr. Kruger also stated in his complaint that he is claiming “unequal employment terms and conditions,” Dkt. 2 at 4, but Del Toro did not address this claim in his motion to dismiss, *see* Dkt. 13.