

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Junior J. Aguilar v. Kristi Noem, et al.

No. CV-25-00056-TUC-JCH (EJM) (D. Ariz. Mar. 24, 2026) · No. No. CV-25-00056-TUC-JCH (EJM) ·

Decided March 24, 2026

OPINION

Aguilar

PER CURIAM.

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6 IN THE UNITED STATES DISTRICT COURT

7 FOR THE DISTRICT OF ARIZONA

8 9 Junior J Aguilar, No. CV-25-00056-TUC-JCH (EJM) 10 Plaintiff, ORDER 11 v. 12 Kristi
Noem, et al., 13 Defendants. 14 15 In this case, pro se Plaintiff Junior J. Aguilar brings several
counts against 16 Defendants related to his termination from his probationary employment with
U.S. 17 Customs and Border Protection (CBP). Doc. 5. Defendants filed a Motion to Dismiss 18
(Doc. 26), and Plaintiff filed a Motion for Leave to File Notice of Supplemental Facts 19
("Motion to Supplement Facts") (Doc. 33). Before the Court is Magistrate Judge Eric J. 20
Markovich's Report and Recommendation ("R&R") in which he recommends denying the 21
Motion to Supplement Facts and granting in part the Motion to Dismiss (Doc. 40). Plaintiff 22
objects to the R&R (Doc. 41). For the following reasons, the Court will overrule Plaintiff's 23
Objection and adopt Judge Markovich's R&R in full. 24 I. Standard of Review 25 This Court
"may accept, reject, or modify, in whole or in part, the findings or 26 recommendations made by
the magistrate judge." 28 U.S.C. § 636(b)(1). If an objection is 27 made, the Court "must review
the magistrate judge's findings and recommendations de 28 novo." *United States v. Reyna-Tapia*,
328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). The 1 Court is obligated to review only the specific
portions of the report, proposed findings, or 2 recommendations to which the parties object. See §
636(b)(1). Objections that merely 3 repeat or rehash arguments already addressed in the R&R are
insufficient to trigger de novo 4 review and are instead reviewed for clear error. See *Curtis v.*
Shinn, No. CV-19-04374- 5 PHX-DGC-JZB, 2021 WL 4596465, at *5 (D. Ariz. Oct. 6, 2021). If,
following review, 6 "the district court is satisfied with the magistrate judge's findings and
recommendations it 7 may in its discretion treat those findings and recommendations as its own."
Morris v. Shin, 8 No. CV 20-322, 2023 WL 6248830, at *7 n. 5 (D. Ariz. Sept. 26, 2023) (quoting
Goffman 9 v. Gross, 59 F.3d 668, 671 (7th Cir. 1995)). 10 II. Motion to Supplement Facts 11
Plaintiff does not object to the R&R's recommendation that the Court deny the 12 Motion to
Supplement Facts. See generally Doc. 41. Accordingly, the Court reviews this 13 recommendation
for clear error. See Fed. R. Civ. P. 72(b), advisory committee's note to 14 1983 amendment. The
Court agrees with the R&R that it may not consider facts not raised 15 in Plaintiff's Complaint

when determining whether to grant a motion to dismiss under 16 Federal Rule of Civil Procedure 12(b)(6). *Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 17 1197 n.1 (9th Cir. 1998); see also *Broom v. Bogan*, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003) 18 (“Facts raised for the first time in plaintiff’s opposition papers should be considered by the 19 court in determining whether to grant leave to amend or to dismiss the complaint with or 20 without prejudice.”). Because the R&R recommends—and the Court will grant—leave to 21 amend, Plaintiff will not be prejudiced by the denial of this Motion. Accordingly, the Court 22 will deny the Motion to Supplement Facts. 23 III. Motion to Dismiss 24 Plaintiff’s First Amended Complaint (FAC) alleges Secretary of Homeland Security 25 Kristi Noem and various U.S. CBP employees¹ discriminated against him on account of 26 his race and national origin by terminating his employment, retaliating against him, and 27 1 These Defendants include Executive Director of U.S. CBP Christopher Holtzer, 28 Supervisory U.S. CBP Officer Kathleen Covert, and Veteran Support Field Coordinator/Supervisor Jason Warren. Doc. 5 at 2. 1 failing to follow CBP’s own policies and procedures in terminating him “for unverified 2 statements without any due process.” Doc. 5 at 4. Plaintiff alleges Defendants violated four 3 specific rights: 4 1. Due Process Violation – I was terminated without a fair chance to respond (5 U.S.C. § 7513). 5

2. Discrimination – As a brown-skinned Hispanic and disabled veteran, I

6 was treated unfairly. 7 3. Retaliation – CBP blacklisted me, preventing future employment. 8 4. Defamation & Career Sabotage – Falsely labeling me disloyal ensured I would never work in law enforcement again. 9

10 Id. at 5.

11 Defendants move to dismiss the following Defendants and claims: (1) Defendants 12 Holtzer, Kathleen Covert, Jason Warren, and U.S. CBP² as improper defendants; (2) 13 Plaintiff’s due process claim under the Civil Service Reform Act (CSRA) for lack of 14 subject matter jurisdiction; (3) Plaintiff’s Americans with Disabilities Act (ADA) claim for 15 failure to state a claim; (4) Plaintiff’s Rehabilitation Act claim for failure to state a claim; 16 (5) Plaintiff’s Title VII retaliation claim for failure to state a claim; and (6) Plaintiff’s 17 defamation claim for lack of subject matter jurisdiction.³ See Doc 26. 18 The R&R recommends the Court dismiss Defendants Holtzer, Covert, and Warren 19 as improper defendants. Doc. 40 at 8–9. The R&R also recommends the Court dismiss 20 Plaintiff’s CSRA, ADA, and defamation claims without leave to amend and Rehabilitation 21 Act and Title VII retaliation claims with leave to amend. Id. at 9–12, 14–20. Finally, the 22 R&R addresses several claims Plaintiff raises for the first time in response to Defendants’ 23 Motion to Dismiss. The R&R recommends Plaintiff not be permitted to include a Fifth 24 Amendment due process or First Amendment retaliation claim in his second amended 25 complaint (SAC) because including such claims would be futile, but because Plaintiff may 26 2 U.S. CBP is not actually listed as a Defendant in this case but is instead included as Plaintiff’s place of employment. See Doc. 5 at 3. The Court will direct the Clerk of Court 27 to remove U.S. CBP as a defendant on the docket sheet. 3 Plaintiff did not explicitly include many of

these claims in the “Violations of My Rights” 28 section of the FAC, but he marked Title VII, the ADA, and the Retaliation Act of 1973 as bases for jurisdiction in this case. See Doc. 5 at 3. 1 be able to allege sufficient facts to establish a “stigma-plus claim,” he should be granted 2 leave to amend to include this claim. Id. at 12–14, 20–21. The Court will address each of 3 Plaintiff’s objections to the R&R in turn. 4 A. “Procedural Fairness Violations” 5 Plaintiff argues that although he may have been a probationary employee—and thus 6 had no statutory property interest in his employment with CBP—the Court should allow 7 him to raise a due process claim in his SAC because “administrative fairness principles still 8 apply when agencies rely upon undisclosed information and fail to follow their own 9 procedures.” Doc. 41 at 3. Plaintiff cites *Stone v. FDIC*, 179 F.3d 1368 (Fed. Cir. 1999), 10 *Vitarelli v. Seaton*, 359 U.S. 535 (1959), and *Service v. Dulles*, 354 U.S. 363 (1957) to 11 support this argument. Id. at 3–4. 12 None of the above-cited cases support a valid due process claim here. In *Stone*, the 13 Federal Circuit stated that the plaintiff’s due process claim regarding removal from his 14 public employment “depend[ed] on his having a property right in continued employment.” 15 179 at 1374. The Court explicitly noted that “if [a] public employee is hired for a limited 16 appointment or is at will, then the employee does not have a property interest in continued 17 employment.” Id. at 1375. Both *Vitarelli*, 359 U.S. at 539 and *Dulles*, 354 U.S. at 388–89 18 held that the Plaintiffs had a valid cause of action for the violation of department policies 19 in their employment termination, but neither Court reached its decision on due process 20 grounds. See *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 92 n. 8 (1978) 21 (“[B]oth [*Service v. Dulles*] and *Accardi v. Shaughnessy*, 347 U.S. 260 (1954), upon which 22 *Service* relied, enunciate principles of federal administrative law rather than of 23 constitutional law binding upon the States.”). These cases do not support a Fifth 24 Amendment due process claim for the alleged violation of agency procedures. 25 Accordingly, based on Plaintiff’s own admissions, the R&R did not err in finding 26 that Plaintiff, as a probationary employee, had no property interest in his employment with 27 CBP and thus no due process claim relating to his termination. Plaintiff cannot remedy this 28 deficiency by attempting to assert a due process claim under *Accardi*. Though Plaintiff may 1 be able to state an Administrative Procedures Act (APA) claim under the *Accardi* doctrine, 2 Plaintiff’s FAC does not identify any CBP or DHS policies or regulations applicable to 3 him that were violated by his termination. If Plaintiff can identify such a regulation, under 4 *Accardi*, he may attempt to assert an APA claim in his SAC. 5 B. “Stigma-Plus Liberty Interest” 6 Plaintiff argues that “[t]he R&R improperly rejected Plaintiff’s stigma-plus liberty 7 interest claim” and cites case law recognizing reputational harm combined with loss of 8 employment opportunities as a protected liberty interest. Doc. 41 at 7. Plaintiff’s objection 9 seems to misunderstand the R&R’s finding: the R&R found that Plaintiff had not alleged 10 a stigma-plus claim in his FAC but recommended the Court grant leave to amend to allow 11 Plaintiff to try to assert such a claim in his SAC. See Doc. 40 at 13–14. The R&R did not 12 err in holding that Plaintiff did not (and seemingly did not attempt to) state a stigma-plus 13 claim in his FAC. Plaintiff’s arguments in his

Response to Defendant's Motion to Dismiss 14 and Objection to the Report and Recommendation do not change the substance of the 15 Complaint and cannot cure this deficiency. The Court will overrule the objection but grant 16 Plaintiff leave to amend to attempt to assert facts supporting a stigma-plus claim in his 17 SAC. 18 C. "Retaliation and Cat's Paw Liability" 19 Plaintiff argues "[t]he R&R erred in dismissing Plaintiff's retaliation claim 20 [because] Plaintiff alleged that biased subordinate officials influenced the ultimate 21 termination decision." Doc. 41 at 8. In support of this argument, Plaintiff cites case law 22 finding that "an employer is liable where a subordinate's retaliatory animus is a proximate 23 cause of an adverse employment action." *Id.* (citing *Staub v. Proctor Hospital*, 562 U.S. 24 411, 421 (2011)). Again, Plaintiff's objection misunderstands the R&R's findings. As with 25 the stigma-plus claim, the R&R recommends granting leave to amend to allow Plaintiff to 26 try again to assert a Title VII retaliation claim. The R&R found that Plaintiff's FAC failed 27 to allege that he engaged in a protected activity that resulted in termination or that his 28 termination was related to such a protected activity. The R&R did not err in this finding. 1 Plaintiff may attempt to plead the facts necessary to support a Title VII retaliation claim in 2 his SAC. 3 D. "Disparate Treatment and Comparator Evidence" 4 Plaintiff's fourth objection "objects to dismissal because the record reflects 5 disparate treatment in disciplinary outcomes involving similarly situated probationary 6 trainees." *Id.* at 9. This is not an objection to any specific finding in the R&R, nor does it 7 provide the Court with a reason to disagree with any of the R&R's explicit findings. 8 Defendants did not move to dismiss claims related to disparate treatment on the basis of 9 race under the Title VII of the Civil Rights Act, and the R&R did not address these 10 allegations. In his SAC, Plaintiff may again attempt to raise claims related to his alleged 11 disparate treatment and should be careful to state on what basis he believes he was 12 discriminated against. 13 E. "Leave to Amend Should Be Granted" 14 "Plaintiff accepts the R&R's recommendation granting leave to amend and requests 15 amendment pursuant to *Forman v. Davis*, 371 U.S. 178 (1962)." Doc. 41 at 10. The R&R 16 recommends granting leave to amend Plaintiff's Rehabilitation Act, Title VII retaliation, 17 and stigma-plus claims. See generally Doc. 40. The R&R recommends denying leave to 18 amend Plaintiff's CSRA, ADA, defamation, and First Amendment retaliation claims. See 19 *id.* This portion of Plaintiff's objection contains no specific arguments as to which claims 20 he seeks leave to amend. See Doc. 41 at 10. The Court has explained above why it will not 21 grant leave to amend the Fifth Amendment due process claim. Plaintiff has not specifically 22 objected to any of the other claims the R&R recommends dismissing without leave to 23 amend. The Court finds the R&R's reasoning for denying leave to amend Plaintiff's CSRA, 24 ADA, defamation, and First Amendment retaliation claims is sound because amendment 25 would be futile. Accordingly, this objection is overruled as to those claims. 26 In their Response to Plaintiff's Objection to the R&R, Defendants argue the Court 27 should "dismiss Plaintiff's FAC in its entirety and deny Plaintiff's motion for leave to 28 amend." Doc. 42 at 15. Defendants did not file their own objection to the R&R, which 1 recommended granting leave to amend on several counts. See

generally Docket. 2 Accordingly, to the extent Defendants are objecting to the R&R's recommendations, their 3 objections are untimely. See Doc. 40 at 22 ("[A]ny party may serve and file written 4 objections within fourteen (14) days after being served with a copy of this Report and 5 Recommendation. . . . Failure to file timely objections to any factual or legal determination 6 of the Magistrate Judge may result in waiver of the right of review."). The Court reviews 7 the R&R's recommendation of granting leave to amend certain claims for clear error. 8 See Fed. R. Civ. P. 72(b), advisory committee's note to 1983 amendment. 9 Defendants attempt to construe the portion of Plaintiff's Objection addressing leave 10 to amend as a Motion for Leave to Amend and argue the Court should deny it as such for 11 failure to comply with Local Rule of Civil Procedure 15.1(a). The Court declines to 12 construe Plaintiff's objection as anything more than an objection. At the end of each section 13 of analysis, the R&R explicitly states whether it recommends the Court grant leave to 14 amend. The R&R does not direct Plaintiff to file a separate Motion for Leave to Amend, 15 and he did not file one. Accordingly, Plaintiff did not violate L.R. Civ. 15.1(a). The Court 16 construes pro se filings liberally, *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010), and if 17 the Court determines that a pleading could be cured by the allegation of other facts, a pro 18 se litigant is entitled to an opportunity to amend a complaint before dismissal of the action, 19 see *Lopez v. Smith*, 203 F.3d 1122, 1127–29 (9th Cir. 2000) (en banc). The R&R did not 20 clearly err in granting leave to amend, and the Court will follow its recommendation.⁴ 21

IV. Conclusion 22 The Court will adopt the objected-to portions of the R&R as outlined above. After 23 independent review, the Court is satisfied that the remainder of Judge Markovich's 24 recommendation is sound. The Court will adopt the R&R in full. 25

4 In arguing the Court should not grant leave to amend, Defendants assert the Court should 26 dismiss the FAC in its entirety. Doc. 41 at 15. In so doing, they argue Plaintiff will not be able to amend his FAC to state a disparate treatment claim. *Id.* at 14–15. Defendants' 27 original Motion to Dismiss sought "partial dismissal" and did not address the FAC's references to disparate treatment on the basis of race. Defendants may not retroactively 28 change the nature of their Motion. Defendant Noem may re-raise any arguments related to a potential disparate treatment claim after the SAC is filed.

A. Scope of Leave to Amend 2 Accordingly, the Court will dismiss Plaintiff's FAC and grant leave to amend. 3 Plaintiff's leave to amend is restricted by the guidelines laid out above and in the R&R. 4 Defendants Holtzer, Covert, and Warren are dismissed. Plaintiff may amend his 5 Rehabilitation Act, Title VII retaliation, and stigma-plus claims. If Plaintiff wishes to 6 attempt to bring a claim for CBP's alleged failure to follow its own policies, he may do so 7 under the APA. Plaintiff may not attempt to reallege claims under the CSRA, ADA, or Due 8 Process Clause of the Fifth Amendment or for defamation or First Amendment Retaliation. 9

B. Warnings 10 The SAC must be retyped or rewritten in its entirety on a court-approved form and 11 may not incorporate any part of the original Complaint or FAC by reference. A second 12 amended complaint supersedes the original Complaint and FAC. *Ferdik v. Bonzelet*, 13 963 F.2d 1258, 1262 (9th Cir. 1992); *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 14 1542, 1546 (9th

Cir. 1990). After amendment, the Court will treat the original Complaint 15 and FAC as nonexistent. Ferdik, 963 F.2d at 1262. Any cause of action that was raised in 16 the original Complaint or FAC is waived if it is not alleged in the SAC. Lacey v. Maricopa 17 County, 693 F.3d 896, 928 (9th Cir. 2012) (en banc). 18 The SAC should contain all the relevant factual allegations and legal theories on 19 which Plaintiff wishes to proceed. If Defendant files a motion to dismiss the SAC, Plaintiff 20 will not be able to cure any deficiencies with assertions or theories raised for the first time 21 in response to the motion to dismiss. Bare recitations of the elements of a cause of action 22 and conclusory statements will not be sufficient to state a claim. Ashcroft v. Iqbal, 556 U.S. 23 662, 678 (2009). If Plaintiff again fails to state a claim, the Court may not grant further 24 leave to amend. See Moore v. Kayport Package Express, Inc., 885 F.2d 531, 538 (9th Cir. 25 1989) (“Leave to amend need not be given if a complaint, as amended, is subject to 26 dismissal.”). 27 /// 28 /// V. Order 2 Accordingly, 3 IT IS ORDERED adopting in full the R&R (Doc. 40). 4 IT IS FURTHER ORDERED: 5 1. Denying Plaintiff’s Motion for Leave to File Notice of Supplemental 6 Facts (Doc. 33); 7 2. Granting in part Defendants’ Motion to Dismiss (Doc. 26) as outlined 8 above; 9 3. Dismissing Defendants Christopher Holtzer, Kathleen Covert, and Jason 10 Warren; 11 4. Dismissing Plaintiffs First Amended Complaint (Doc. 5) as outlined 12 above. Plaintiff may file a second amended complaint within 20 days of 13 the date of this Order; and 14 5. Directing the Clerk of Court to terminate United States Customs and 15 Border Protection as a defendant on the docket sheet. 16 Dated this 24th day of March, 2026. 17 18 / A

19 HAA

20 // John C. Hinderaker _/United States District Judge 22 23 24 25 26 27 28 -9-