

APPENDIX

Exhibit 1.

Order of the Court of Appeals for 9th Circuit dated February 28, 2019 that denied my Motion to Expedite Time on Appeal and prohibited me to file the motions for reconsideration, clarification, or modification of this denial.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

FEB 28 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

TATYANA EVGENIEVNA
DREVALEVA,

Plaintiff-Appellant,

v.

ALAMEDA HEALTH SYSTEM; et al.,

Defendants-Appellees.

No. 17-16382

D.C. No. 3:16-cv-07414-LB
Northern District of California,
San Francisco

ORDER

Before: CANBY and GRABER, Circuit Judges.

Appellant's "emergency motion to expedite time on appeal" is denied
(Docket Entry No. 81).

No motions for reconsideration, clarification, or modification of this denial
shall be filed or entertained.

Appellant's motions to supplement the record on appeal are referred to the
panel that will hear the merits of this appeal (Docket Entry Nos. 77, 80).

Briefing is complete.

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8 TATYANA EVGENIEVNA DREVALEVA,
9 Plaintiff,
10 v.
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12 ALAMEDA HEALTH SYSTEM, et al.,
13 Defendants.

14 Case No. 16-cv-07414-LB
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ORDER DISMISSING CLAIMS
Re: ECF No. 63

17 **INTRODUCTION**

18 This is an employment dispute. Plaintiff Tatyana Drevaleva is an electrocardiogram technician
19 who was fired from her position with Alameda Health Systems (AHS). The four individual
20 defendants — Bobit Santos, Catherine Daly, Joan Healy, and Eric Rood — move to dismiss the
21 plaintiff's claims against them.¹ These defendants are employees of the California Department of
22 Industrial Relations — Division of Labor Standards Enforcement (“DLSE”). They are the
23 regulatory employees who, roughly speaking, investigated the plaintiff's administrative grievance
24 concerning AHS and decided that she had not been fired wrongfully. They are sued here “in their
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27 ¹ ECF No. 63. Record citations refer to material in the Electronic Case File (“ECF”); pinpoint citations
28 are to the ECF-generated page numbers at the top of documents. The claims against these defendants
appear in the Amended Complaint (ECF No. 40).

1 personal capacit[ies].² All these defendants have either been served with a summons and the
2 complaint (Mr. Santos) or have waived service.³ The plaintiff and these DLSE defendants have
3 consented to magistrate jurisdiction.⁴ The court can decide this motion without oral argument. *See*
4 Civil L.R. 7-1(b). For the reasons given below, the court dismisses the plaintiff's claims against
5 these defendants with prejudice.

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STATEMENT

8 The court has twice previously addressed the plaintiff's claims.⁵ Twice the court has dismissed
9 those claims, or most of them, and has given the plaintiff leave to amend her complaint to state
10 viable causes of action. This discussion assumes that the reader is familiar with the court's earlier
11 orders. For present purposes, the court highlights only the following points.

12 After AHS fired her, the plaintiff filed an administrative grievance with DLSE claiming (as she
13 does in this suit) that she was fired in retaliation for participating in legally protected activity. The
14 DLSE defendants investigated her claim and decided that there was insufficient evidence that AHS
15 had fired her in retaliation for protected conduct. The DLSE's letter to the plaintiff reporting its
16 conclusion gives an adequate sense of the department's investigation, its assessment of the
17 plaintiff's and AHS's respective positions, and the DLSE's conclusion.⁶

18 The plaintiff now claims that the DLSE defendants denied her due process under the federal
19 Constitution; she also claims that their decision embodied various state-law torts against her. At
20 bottom, her grievance plainly reduces to disagreeing with the DLSE's decision. She alleges, for
21 example, that the DLSE defendants "did not want to take into their consideration all the[] facts."⁷

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24 ² Am. Compl. – ECF No. 40 at 2, 28.

25 ³ Reply Br. – ECF No. 75 at 1–2 n. 1 (citing ECF No. 63 at 2 n. 1). The defendants have not waived
service of other papers. *Id.*

26 ⁴ ECF Nos. 10, 71.

27 ⁵ ECF Nos. 36, 58.

28 ⁶ *See* Am. Compl. (Ex. 17) – ECF No. 40-17.

⁷ Am. Compl. – ECF No. 40 at 13.

1 But even the material that the plaintiff attaches to her complaint⁸ shows the opposite. The DLSE
2 defendants did evaluate the pertinent facts. They merely reached a conclusion that the plaintiff
3 disagrees with. The DLSE defendants correctly write that the “only acts” they are charged with are
4 the “investigation and determination of her claims within the scope of their employment and
5 pursuant to statutory authority.”⁹

6 The court previously dismissed the plaintiff’s claims against the DLSE itself.¹⁰ “Disagreeing
7 with an agency’s conclusion,” the court reasoned, “does not state a claim.”¹¹ The court also held
8 that the DLSE was immune from suit under the Eleventh Amendment to the U.S. Constitution.¹²
9 In an effort to evade that immunity, the plaintiff now sues the individual DLSE employee
10 defendants “in their personal capacit[ies].”¹³ For the reasons given below, none of her claims
11 against them are legally viable.

12 GOVERNING LAW

13 A Rule 12(b)(6) motion to dismiss for failure to state a claim tests the legal sufficiency of a
14 complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A claim will normally survive a
15 motion to dismiss if it offers a “short and plain statement . . . showing that the pleader is entitled to
16 relief.” *See Fed. R. Civ. P. 8(a)(2)*. This statement “must contain sufficient factual matter, accepted
17 as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
18 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial
19 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable
20 inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. “The
21 plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a mere
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24 ⁸ See especially ECF No. 40-17.

25 ⁹ ECF No. 36 at 4.

26 ¹⁰ *Id.* at 3–4.

27 ¹¹ *Id.* at 4.

¹² *Id.*

28 ¹³ Am. Compl. – ECF No. 40 at 2, 28.

1 possibility that a defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 556). “Where
2 a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of
3 the line between possibility and plausibility of ‘entitlement to relief.’” *Iqbal*, 556 U.S. at 678
4 (quoting *Twombly*, 550 U.S. at 557). Finally, while the court construes *pro se* pleadings more
5 “leniently,” the court cannot salvage claims that are fatally deficient. *See De la Vega v. Bureau of*
6 *Diplomatic Sec.*, 2007 WL 2900496, at *1 (N.D. Cal. Oct. 1, 2007) (“Although the judicial policy
7 of treating *pro se* litigants leniently suggests allowing leave to amend, even the substitution of the
8 United States as a defendant, would not cure the jurisdictional defects.”).

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ANALYSIS

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1. Due Process

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The plaintiff claims that the DLSE defendants deprived her of due process under the
13 Fourteenth Amendment to the U.S. Constitution.¹⁴ She claims that the defendants “deprived [her]
14 of liberty and property.”¹⁵ There is absolutely no suggestion in the record that the plaintiff was
15 ever in threat of losing her liberty in connection with being fired by AHS. Her due-process claim
16 for property deprivation, for its own reasons, also fails as a matter of law.

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A procedural due-process claim “hinges on proof of two elements: (1) a protect[ed] liberty or
18 property interest . . . and (2) a denial of adequate procedural protections.” *Pinnacle Armor, Inc. v.*
19 *United States*, 648 F.3d 708, 716 (9th Cir. 2011) (quoting *Foss v. Nat’l Marine Fisheries Serv.*, 161
20 F.3d 584, 588 (9th Cir. 1998) (citing in turn *Bd. of Regents v. Roth*, 408 U.S. 564, 569–71 (1972)).

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Under her own allegations, the plaintiff’s due-process claim fails on both heads. Several
22 related observations will show how. The plaintiff does not dispute that the DLSE carried out its
23 statutory duty to investigate her grievance. She merely disagrees with the conclusion. But it does
24 not impugn the soundness of the DLSE’s procedure — including what these individual defendants
25 actually did — that they reached a conclusion that the plaintiff dislikes. As fundamentally, the

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¹⁴ *Id.* at 26–27.

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¹⁵ *Id.* at 27.

1 plaintiff has no property interest in any particular conclusion. In the Supreme Court's definitive
2 term, she can have "no legitimate claim of entitlement" to the agency coming down one way
3 instead of another. *Cf. Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). (If the
4 rule were different, every regulatory decision would immediately spawn a viable due-process
5 claim.) So the DLSE's contrary conclusion cannot have wrongfully deprived her of a cognizable
6 interest in the due-process sense. Finally, it is undisputed that the DLSE's regulatory decision did
7 not impede the plaintiff's ability to sue her former employer. She was able to sue them before
8 filing her DLSE administrative grievance; and the DLSE's conclusion (that there was no wrongful
9 retaliation) did not preclude or procedurally hamper her lawsuit against AHS.¹⁶ In short, the
10 DLSE's decision impacted no property right.

11 The plaintiff has no viable due-process claim against these DLSE employees. Furthermore, the
12 nature of her claim — which ultimately disputes the correctness of their conclusion — cannot be
13 saved by amendment. The court therefore dismisses the due-process claims with prejudice.

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15 **2. State-Law Claims — Absolute Immunity and Privilege**

16 The plaintiff's California-law claims against the DLSE defendants fail to state a claim on
17 which relief can be granted. These defendants are absolutely immune from civil liability for their
18 discretionary conduct in investigating and reaching a decision on the plaintiff's administrative
19 grievance. Cal. Gov't Code § 820.2. Furthermore, the statements that these defendants made in
20 connection with their work carry an absolute privilege. Cal. Civ. Code § 47. They cannot
21 undergird tort claims, such as libel, defamation, or fraud. The court must therefore dismiss the
22 plaintiff's state-law claims against the DLSE defendants with prejudice.

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27 ¹⁶ See Am. Compl. (Ex. 17) – ECF No. 40-17; *see generally Kamar v. RadioShack Corp.*, 2008 WL
28 2229166, at *6 (C.D. Cal. May 15, 2008) (describing dual judicial and administrative avenues of relief
for unpaid-wage claims).

1 **2.1 Absolute Discretionary-Act Immunity — Cal. Gov’t Code § 820.2**

2 The DLSE defendants are absolutely immune from the plaintiff’s state-law claims. Section
3 820.2 of the California Government Code provides:

4 Except as otherwise provided by statute, a public employee is not liable for an
5 injury resulting from his act or omission where the act or omission was the result of
6 the exercise of the discretion vested in him, whether or not such discretion be
7 abused.

8 Cal. Gov’t Code § 820.2 “Under [§ 820.2], *absolute immunity* is created for injury resulting from
9 a public employee’s exercise of discretion ‘whether or not such discretion be abused.’” *Kim v.*
10 *Walker*, 208 Cal. App. 3d 375, 382 (1989) (quoting § 820.2) (emphasis added).¹⁷

11 The challenged acts here — the DLSE defendants’ investigation and decision — were
12 discretionary acts that fall within the protection of § 820.2. On this point the plaintiff’s own
13 allegations leave no doubt: The challenged conduct consisted of an “actual act of discretion” —
14 namely, an evaluative, “considered decision” of whether the plaintiff had been fired wrongfully.
15 See *Caldwell v. Montoya*, 10 Cal. 4th 972, 983 (1995) (“actual act”) (citing *Johnson v. State of*
16 *California*, 69 Cal.2d 782, 794 n. 8 (1968) (“considered decision”)). Immunity is not lost merely
17 because a complainant alleges that a regulatory decision was not “correct.” See *Caldwell*, 10 Cal.
18 4th at 983–84 (citing *Hardy v. Vial*, 48 Cal.2d 577, 582–83 (1957)).

19 Section 820.2 absolutely immunizes the DLSE defendants against the plaintiff’s state-law
20 claims. The statute compels this court to dismiss those claims with prejudice.

21 **2.2 Absolute Privilege — Cal. Civ. Code § 47**

22 For a subset of the plaintiff’s claims, another California statute leads to the same result.
23 Section 47 of the California Civil Code draws an “absolute privilege” over statements that the
24 DLSE defendants made in investigating, resolving, and reporting their decision on the plaintiff’s
25 administrative grievance. See, e.g., *Braun v. Bureau of State Audits*, 67 Cal. App. 4th 1382, 1388–
26 94 (1998). Section 47 provides that, “A privileged publication or broadcast is one made: (a) In the

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¹⁷ *Kim* was disapproved on other grounds by *State of California v. Super. Ct. of Kings Cnty.*, 32 Cal.
28 4th 1234, 1241 n. 8 (2004).

1 proper discharge of an official duty [or] . . . (b) In any . . . official proceeding authorized by law.”
2 Cal. Civ. Code § 47. This statute bars claims based upon (among other things) statements made by
3 official regulatory bodies in the course of their duly authorized work. *See, e.g., Braun*, 67 Cal.
4 App. 4th at 1388–94 (affirming no-claim dismissal) (state “investigative audit” was “official
5 proceeding” under § 47; “all statements made in furtherance of” the audit and its “report” were
6 “protected by the absolute privilege” of § 47).

7 The plaintiff repeatedly takes issue with statements that specific DLSE defendants made in
8 carrying out their investigation; which is to say, statements that they made in describing the
9 plaintiff’s grievance or in reporting the DLSE’s analysis and decision to her.¹⁸ Section 47 gives the
10 DLSE defendants an “absolute privilege” to make such statements. They cannot form the basis of
11 an actionable claim. To the extent that the plaintiff rests her claims on statements that the DLSE
12 defendants made in carrying out their administrative work, the court dismisses those claims with
13 prejudice.¹⁹

14 * * *

15 CONCLUSION

16 The court grants the DLSE defendants’ motion. The plaintiff’s claims against these defendants
17 are dismissed with prejudice. This order leaves the plaintiff without a viable claim in this court.
18 The court will therefore enter a separate judgment that terminates this case.

19 This disposes of ECF No. 63.

20 **IT IS SO ORDERED.**

21 Dated: July 7, 2017



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23 LAUREL BEELER
United States Magistrate Judge
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28 ¹⁸ *See, e.g.*, Am. Compl. – ECF No. 40 at 11 (“pure lie and defamation”; “libel”).

¹⁹ The court expresses no opinion on the DLSE defendants’ other due-process or state-law arguments.

**Additional material
from this filing is
available in the
Clerk's Office.**