

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 8 2018

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

DAVID SHU,

Plaintiff-Appellant,

v.

MEGAN J. BRENNAN, Postmaster
General,

Defendant-Appellee.

No. 18-55290
18-55438

D.C. No.
2:17-cv-05393-PA-JEM
Central District of California,
Los Angeles

ORDER

Before: SILVERMAN, NGUYEN, and OWENS, Circuit Judges.

A review of the record and the opening briefs indicates that the questions raised in these appeals are so insubstantial as not to require further argument. *See* *United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (stating standard).

Accordingly, the motion to summarily affirm the district court's judgment (Docket Entry No. 15) is granted.

AFFIRMED.

MBI/MOATT

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 9 2019

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

DAVID SHU,

Plaintiff-Appellant,

v.

MEGAN J. BRENNAN, Postmaster
General,

Defendant-Appellee.

No. 18-55290
18-55438

D.C. No.
2:17-cv-05393-PA-JEM
Central District of California,
Los Angeles

ORDER

Before: SILVERMAN, NGUYEN, and OWENS, Circuit Judges.

Appellant has filed a combined motion for reconsideration and motion for reconsideration en banc of this court's November 8, 2018 order.

The motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court (Docket Entry No. 21 in No. 18-55290).

See 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

The request for a refund of the filing fee is also denied (Docket Entry No. 22 in No. 18-55290).

No further filings will be entertained in these closed cases.

MBI/MOATT

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 17-5393 PA (JEMx) Date March 15, 2018
Title David Shu v. Megan Brennan, Postmaster General of the United States

Present: The PERCY ANDERSON, UNITED STATES DISTRICT JUDGE
Honorable:

<u>Kamilla Sali-Suleyman</u>	<u>N/A</u>	<u>N/A</u>
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

None

None

Proceedings: IN CHAMBERS—ORDER

Plaintiff David Shu (“Plaintiff”), appearing pro se, filed a Complaint with this Court on July 21, 2017. (Docket No. 1.) Upon motion by defendant Megan Brennan, Postmaster General of the United States (“Defendant”), the Complaint was dismissed with leave to amend on December 4, 2017. (Docket No. 20.) Thereafter, Plaintiff filed a First Amended Complaint, which, again upon motion of Defendant, was dismissed with leave to amend on February 22, 2018. (Docket Nos. 23, 38.) The February 22 Order warned Plaintiff that “[f]ailure to file a Second Amended Complaint by March 12, 2017,¹ may result in the dismissal of this action.” (Docket No. 38.) To date, and despite the expiration of the deadline to do so, Plaintiff has not filed a second amended complaint. On February 28, 2018, Plaintiff did, however, file a Notice of Appeal of the Court’s February 22, 2018, Order. (Docket No. 40.)

Based on Plaintiff’s filing of the Notice of Appeal and his failure to file a second amended complaint, the Court concludes that Plaintiff chooses to stand on his First Amended Complaint and refuses to amend. Accordingly, the Court dismisses this action with prejudice. Cf. Jung v. K. & D. Min. Co., 356 U.S. 335, 78 S. Ct. 764, 2 L. Ed. 2d 806 (1958). Plaintiff’s Motion to Transfer Venue (Docket Nos. 41, 43) is denied as moot. The Court will enter a Judgment consistent with this Order.

IT IS SO ORDERED.

¹ Given that the February 22 Order was issued in 2018, the deadline was clearly intended to be in March 2018, rather than March 2017. Furthermore, Plaintiff did not seek clarification or otherwise indicate confusion as to the deadline.

1

JS-6

2

3

4

5

6

7

8

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

9

10

DAVID SHU, No. CV 17-5393 PA (JEMx)
Plaintiff, JUDGMENT OF DISMISSAL

11

12

13

14

15

16

v.
MEGAN BRENNAN, POSTMASTER
GENERAL OF THE UNITED STATES,

Defendant.

17

18

19

20

21

22

23

24

25

26

27

28

In accordance with the Court's March 15, 2018, Minute Order dismissing this action with prejudice, :

1. IT IS HEREBY ORDERED, ADJUDGED, and DECREED that this action is dismissed with prejudice;

2. IT IS FURTHER ORDERED, ADJUDGED, and DECREED that defendant Megan Brennan, Postmaster General of the United States, shall have judgment in her favor;

3. IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiff shall take nothing.

DATED: March 15, 2018


Percy Anderson
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 17-5393 PA (JEMx) Date February 22, 2018
Title David Shu v. Megan Brennan, Postmaster General of the United States

Present: The Honorable PERCY ANDERSON, UNITED STATES DISTRICT JUDGE

<u>Kamilla Sali-Suleyman</u>	<u>Not Reported</u>	<u>N/A</u>
<u>Deputy Clerk</u>	<u>Court Reporter</u>	<u>Tape No.</u>

Attorneys Present for Plaintiffs: None Attorneys Present for Defendants: None

Proceedings: IN CHAMBERS – COURT ORDER

Before the Court is a Motion to Dismiss or for a More Definite Statement filed by defendant Megan Brennan, Postmaster General of the United States (“Defendant”). (Docket No. 29.) Plaintiff David Shu (“Plaintiff”), appearing pro se, has filed an Opposition (Docket No. 30), to which Defendant has filed a Reply (Docket No. 35). Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds this matter appropriate for decision without oral argument, and the hearing scheduled for February 26, 2018, is taken off calendar.

On July 21, 2017, Plaintiff, a former employee of the United States Postal Service (USPS), filed this action against Defendant. (Docket No. 1.) Plaintiff’s original Complaint was 148 pages with 269 paragraphs and 156 pages of exhibits. (See Docket No. 1.) Defendant filed a Motion to Dismiss pursuant to Rule 12(b)(6) and Rule 8(a) or, alternatively, for a More Definite Statement pursuant to Rule 12(e), which was granted. Plaintiff then filed the First Amended Complaint, which contains 95 pages and 123 paragraphs, and an additional 59 pages of exhibits. The FAC alleges claims for (1) retaliation in violation of Title VII; (2) age discrimination; (3) race/national origin discrimination; (4) failure to prevent discrimination; (5) failure to hire; (6) breach of a settlement agreement; and (7) to vacate arbitration award.¹ (Docket No. 23 (FAC).) Defendant argues that the FAC continues to violate Rule 8(a)(2) and (d)(1), and that because of these violations, Defendant cannot meaningfully respond to the FAC. (See Mot. 1-4.)

Generally, plaintiffs in federal court are required to give only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a). Furthermore, Rule 8(d)(1) requires “[e]ach allegation [to] be simple, concise, and direct.” Fed. R. Civ. P. 8(d)(1). The purpose of Rule 8 is to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80 (1957)). A court may dismiss a cause of action for failing to comply with Rule 8(a) or 8(d)(1). See McHenry v. Renne,

¹ While Plaintiff cites other federal statutes, including 42 U.S.C. § 1983, in the Jurisdiction section of his FAC, they do not appear to be the bases of any of his claims. (See FAC ¶ 1.)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 17-5393 PA (JEMx) Date February 22, 2018
Title David Shu v. Megan Brennan, Postmaster General of the United States

84 F.3d 1172, 1179 (9th Cir. 1996); Corcoran v. Yorty, 347 F.2d 222, 223 (9th Cir. 1965); Cafasso v. Gen. Dynamics C4 Sys., 637 F.3d 1047, 1058 (9th Cir. 2011). At the same time, the Federal Rules require that all pleadings be “construed so as to do justice.” See Fed. R. Civ. P. 8(e). A complaint “should be short because ‘[u]nnecessary prolixity in a pleading places an unjustified burden on the court and the party who must respond to it because they are forced to select the relevant material from a mass of verbiage.’” Salahuddin v. Cuomo, 861 F.2d 40, 42 (2d Cir. 1988) (quoting 5 C. Wright & A. Miller, Federal Practice and Proc. § 1281, at 365 (1969)); United States ex rel. Garst v. Lockheed-Martin Corp., 328 F.3d 374, 378 (7th Cir. 2003) (“Rule 8(a) requires parties to make their pleadings straightforward, so that judges and adverse parties need not try to fish a gold coin from a bucket of mud.”); see also McHenry, 84 F.3d at 1179–80 (identifying practical issues faced by the court and opposing party where Rule 8 is violated). “While ‘the proper length and level of clarity for a pleading cannot be defined with any great precision,’ Rule 8(a) has ‘been held to be violated by a pleading that was needlessly long, or a complaint that was highly repetitious, or confused, or consisted of incomprehensible rambling.’” Cafasso, 637 F.3d at 1059 (quoting 5 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1217 (3d ed. 2010)).

Plaintiff contends that the Motion should be denied because the FAC is shorter than the original Complaint, and does not include allegations incorporating all preceding paragraphs. (Opp’n 3–4.) He further argues that the duration and complexity of the history underlying this case make the length of the FAC reasonable and necessary to demonstrate the plausibility of all seven causes of action; “short” is relative. (Id. at 4–5.) However, as acknowledged by the Seventh Circuit in Kadamovas, cited by Plaintiff, “[d]istrict judges are busy, and therefore have a right to dismiss a complaint that is so long that it imposes an undue burden on the judge, to the prejudice of other litigants seeking the judge’s attention. Often, it is true, ‘surplusage can and should be ignored,’ but ‘length may make a complaint unintelligible, by scattering and concealing in a morass of irrelevancies the few allegations that matter.’” Kadamovas v. Stevens, 706 F.3d 843, 844 (7th Cir. 2013) (quoting Garst, 328 F.3d at 378 (affirming dismissal of complaint of 400 paragraphs sprawling across 155 pages); citing Mann v. Boatright, 477 F.3d 1140, 1147–48 (10th Cir. 2007) (in dictum, complaint of 99 pages); In re Westinghouse Sec. Litig., 90 F.3d 696, 702–03 (3d Cir. 1996) (complaint of 600 paragraphs, 240 pages); Michaelis v. Neb. State Bar Ass’n, 717 F.2d 437, 439 (8th Cir. 1983) (per curiam) (complaint of 144 paragraphs, 98 pages)); see also Cafasso, 637 F.3d at 1059 (“Our district courts are busy enough without having to penetrate a tome approaching the magnitude of War and Peace to discern a plaintiff’s claims and allegations.”).

As in her prior Motion to Dismiss, Defendant complains of more than mere surplusage. The FAC contains many redundancies and excessive argument. Furthermore, many paragraphs of the FAC include more than one factual assertion and are lengthy, rendering citation thereto a challenge. See Fed. R. Civ. P. 8(d)(1) (“Each allegation must be simple, concise, and direct.”). Also, again, each page of each exhibit is treated as a separate “exhibit,” rather than each separate document being treated as an exhibit. These defects, combined with the FAC’s unwieldy length, render the factual allegations of the FAC convoluted. This places an unnecessary burden on Defendant and this Court. The Court finds dismissal with leave to amend appropriate.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 17-5393 PA (JEMx) Date February 22, 2018
Title David Shu v. Megan Brennan, Postmaster General of the United States

In addition, Defendant seeks dismissal of USPS to the extent Plaintiff intended to include USPS as a defendant to the FAC, as it is an improper defendant to Plaintiff's Title VII and age discrimination claims. (Mot. 1 n.1.) Plaintiff's Opposition fails to respond to this argument. USPS is not a proper defendant to the Title VII and age discrimination claims, and is therefore dismissed from those claims without leave to amend. See 42 U.S.C. § 2000e-16(c); Romain v. Shear, 799 F.2d 1416, 1418 (9th Cir. 1986).

For the foregoing reasons, the FAC, like the original Complaint, violates Rule 8(a)(2) and (d)(1). Defendant's Motion is granted and the FAC is dismissed with leave to amend. USPS is dismissed from Plaintiff's claims for violations of Title VII and age discrimination without leave to amend. Any Second Amended Complaint must be filed on or before March 12, 2017. Failure to file a Second Amended Complaint by March 12, 2017, may result in the dismissal of this action. Plaintiff is reminded that the Local Rules require him to file a courtesy copy of each filing with the Court. C.D. Cal. L.R. 5-4.5. Plaintiff's Motion for Partial Summary Judgment (Docket No. 33) is denied as moot.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 17-5393 PA (JEMx) Date December 29, 2017
Title David Shu v. Megan Brennan et al.

Present: The Honorable Philip S. Gutierrez, United States District Judge

<u>Wendy Hernandez</u>	<u>Not Reported</u>
<u>Deputy Clerk</u>	<u>Court Reporter</u>

Attorneys Present for Plaintiff(s): Not Present Attorneys Present for Defendant(s): Not Present

Proceedings (In Chambers): **Order DENYING Plaintiff's motion to disqualify Judge Percy Anderson**

Before the Court is Plaintiff David Shu's ("Plaintiff") motion for recusal of Judge Percy Anderson. *See* Dkt. # 24 ("Mot."). The motion was referred to this Court pursuant to General Order 14-03 and Local Rule 72-5. *See* Dkt. # 25. The Court finds the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78(b); L.R. 7-15. After considering Plaintiff's arguments, the Court DENIES the motion.

Under 28 U.S.C. § 455(a), "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The Ninth Circuit has interpreted § 455(a) as requiring recusal when "a reasonable person with knowledge of all of the facts would conclude that the judge's impartiality might reasonably be questioned." *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008) (quoting *Clemens v. U.S. Dist. Ct.*, 428 F.3d 1175, 1178 (9th Cir. 2005)). In other words, § 455(a) "asks whether a reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits." *Clemens*, 428 F.3d at 1178 (quoting *In re Mason*, 916 F.2d 384, 385 (7th Cir. 1990)). "The 'reasonable person' is not someone who is 'hypersensitive or unduly suspicious,' but rather is a 'well-informed, thoughtful observer.'" *Holland*, 519 F.3d at 913 (quoting *In re Mason*, 916 F.2d at 385).

Under § 455(b)(1), any justice, judge, or magistrate of the United States "shall also disqualify himself . . . [w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." To prove that disqualification is warranted under § 455(b)(1), a petitioner must offer evidence of a "negative bias or prejudice [which] . . . must be grounded in some personal animus or malice that the judge harbors against him, of a kind that a fair-minded person could not entirely set aside when judging certain persons or causes." *United States v. Balistreri*, 779 F.2d 1191, 1201 (7th Cir. 1985) (citations omitted); *see Hook v. McDade*, 89 F.3d 350, 355 (7th Cir. 1996) (finding that

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 17-5393 PA (JEMx) Date December 29, 2017
Title David Shu v. Megan Brennan et al.

disqualification is appropriate if “actual bias or prejudice is ‘proved by compelling evidence’”). To determine whether bias exists, courts consider “whether a reasonable person would be convinced the judge [is] biased.” *Hook*, 89 F.3d at 355 (citations omitted).

Plaintiff alleges that “Judge Anderson’s impartiality might be questioned” because “he has personal bias, has served in governmental employment,” and is an alumnus of the University of California, Los Angeles (“UCLA”) and its law school. *Mot.* 1:18–24. The Court does not find these arguments availing. Plaintiff’s primary objection to Judge Anderson’s conduct appears to be rooted in an unfavorable ruling that was issued regarding Plaintiff’s compliance with Local Rule 7-3. *See id.* 2:1–4:22; *see also* Dkt. # 20. However, there is no indication in the motion or elsewhere that Judge Anderson harbors any personal bias or animus towards Plaintiff. Plaintiff’s dissatisfaction with Judge Anderson is purely based on disagreements with the Judge’s rulings. This is not a basis for disqualification. *See Blixseth v. Yellowstone Mountain Club, LLC*, 742 F.3d 1215, 1220 (9th Cir. 2014) (explaining that disqualification can be based on judicial rulings only if they result from improper extrajudicial knowledge or “reveal such a high degree of favoritism or antagonism as to make fair judgment impossible”). To the extent Plaintiff received an adverse ruling that he believes is erroneous, Plaintiff’s claim of error may be properly addressed through a motion for reconsideration or an appeal. *See F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1145 (9th Cir. 2001) (holding that even though “[j]udges are known to make procedural errors and even substantive errors on occasion,” any such errors are a basis for appeal, not disqualification). Furthermore, the Court determines that neither Judge Anderson’s previous service with the U.S. Attorney’s Office nor his affiliation with UCLA, both cited by Plaintiff as grounds for recusal, *see Mot.* 8:21–9:9, suggests that Judge Anderson’s impartiality might be reasonably questioned.

Having concluded that all grounds for disqualification are insufficient, the Court **DENIES** Plaintiff’s motion to disqualify.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

DAVID SHU,

No. CV 09-2326 AHM (AGRx)

Plaintiff,

AMENDED
ORDER DISMISSING ACTION WITH
PREJUDICE

JOHN E. POTTER, POSTMASTER
GENERAL, UNITED STATES POSTAL
SERVICE

Defendant -

17 IT IS SO ORDERED that pursuant to the separately filed
18 Stipulation for Compromise Settlement, this action is hereby
19 dismissed with prejudice. Each party to bear its own costs and
20 fees. However, the Court will retain jurisdiction to enforce the
21 agreed settlement.

DATED: January 25, 2011

UNITED STATES DISTRICT JUDGE

24 PRESENTED BY:
ANDRÉ BIROTE JR.
25 United States Attorney
LEON W. WEIDMAN
26 Chief, Civil Division

27 /s/ Jason K. Axe
28 JASON K. AXE
Attorneys for Defendant