Exhibit 1.

The Order of the District Court for Northern California dated June 07, 2017 that granted Alameda Health System's Motion to Dismiss my Amended Complaint

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

San Francisco Division

TATYANA EVGENIEVNA DREVALEVA, Plaintiff, v. ALAMEDA HEALTH SYSTEM, et al., Defendants.	Case No. 16-cv-07414-LB **ORDER ON MOTION TO DISMISS** [Re: ECF No. 41]

INTRODUCTION

1.

This is an employment dispute. Plaintiff Tatyana Drevaleva is an electrocardiogram technician who was fired from her position with defendant Alameda Health Systems (AHS) for alleged negligence. She sues AHS mainly for retaliatory discharge; she claims that AHS fired her after she asked about overtime pay, work breaks, and whether she would be transferred to the status of a full-time employee.[1] Her initial complaint also sued the California Department of Industrial Relations – Division of Labor Standards Enforcement ("DIR" or the "Department"), based on that agency's investigation of her termination. The Department found insufficient evidence that AHS

[1] *See generally* Am. Compl. – ECF No. 40. Record citations refer to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of documents.

had fired Ms. Drevaleva wrongfully.[2]

2.

In March 2017, this court dismissed the plaintiff's initial complaint under Rules 12(b)(1) and (6).[3] The court held that there was no federal subject-matter jurisdiction and that the plaintiff had failed to state a viable claim against the defendants. It also held that the Department was immune from suit under the Eleventh Amendment to the U.S. Constitution.[4] The court gave the plaintiff leave to amend her complaint. She has since done so.[5]

3.

The new complaint makes only the following significant changes. First, the plaintiff alleges that she has moved from California to New Mexico. Second, she appears not to name the DIR itself.[6] Third, she has added five employees of DIR as new, individual defendants. (This, presumably in response to the court's observation that the Department could be liable despite Eleventh Amendment immunity "only upon a showing of personal participation by an individual defendant."[7]) These new defendants have not been served.[8] Fourth, and last, the plaintiff "possibly" raises an employment discrimination claim under Title VII of the Civil Rights Act of 1964.[9] Elsewhere, though, she suggests that national-origin discrimination was not her driving

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[2] The Department treats the DIR and the DLSE as distinct entities. *See* ECF No. 52 at 2 (¶ 1). That is undoubtedly correct. For present purposes, though, it is unimportant to distinguish between them. This order thus speaks of the two as the unitary "Department" or "DIR" and intends its reasoning and conclusions to apply equally to both.

[3] Order – ECF No. 36 at 3–5.

[4] *Id.* at 4.

[5] Am. Compl. – ECF No. 40. References to the "complaint" are to the operative amended complaint unless otherwise noted.

[6] *See id.* at 1–2.

[7] *See* Order – ECF No. 36 at 4 (citing *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989)).

[8] The court has authorized service on the individual defendants; the U.S. Marshals Service is in the process of executing service. *See* ECF Nos. 48, 55. The court returns to this point later in the order.

[9] Am. Compl. – ECF No. 40 at 2.

grievance against AHS; and she agrees that she cannot state a *prima facie* Title VII discrimination claim.[10]

4.

The new complaint is otherwise essentially identical to the initial complaint. With the clarification and, to some degree, the enlargements provided by her opposition brief, the plaintiff seems to bring claims under the following laws and theories:

- Title VII discrimination
- Fair Labor Standards Act
- Occupational Safety & Health Act
- Labor–Management Relations Act
- National Labor Relations Act
- Federal due process
- California Labor Code
- California Industrial Welfare Commission Wage Order 2001-4
- Meyers-Milias–Brown Act (Cal. Gov't Code §§ 3500–11)
- Libel
- Fraud[11]

She also appears to seek punitive damages.[12]

5.

Defendant AHS now moves to dismiss the amended complaint under Rules 12(b)(1) and (6).[13] Defendant DIR has not so moved; but, in a case-management statement, it suggests that the new complaint does not name the Department itself as a defendant, and asks that it be "dismissed from

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[10] Opp. – ECF No. 47 at 26.

[11] For all these, see ECF No. 47 at 28–30.

[12] *Id.* at 34–35.

[13] ECF No. 41.

this case."[14]

6.

The court grants AHS's motion. The plaintiff states no viable federal claim against AHS. This court therefore lacks subject-matter jurisdiction over the claims asserted against this defendant.

Turning to the DIR defendants: The new complaint indeed seems not to name the Department itself as a defendant. Both the complaint's caption and its narrative description of the litigants names the individual "officials" of the DIR, but not the Department itself.[15] Furthermore, the plaintiff has not shown that DIR itself can be liable in the face of Eleventh Amendment immunity. Even if the Department itself is a target of the amended complaint, then, any claims against it remain dismissed under the court's previous order.

The plaintiff's recent move to New Mexico means that she apparently has diversity jurisdiction over the individual DIR-employee defendants. *See infra*, Analysis, Part 2. As noted above (*supra*, note 8), the court has ordered service on the individual defendants, but the U.S. Marshals Service has not yet effected that service. Normally in such cases, the *pro se* plaintiff provides the marshals with service addresses for the defendants. The plaintiff here seems to have provided the address of the DLSE's Oakland office.[16] The court is not certain that this qualifies as an adequate service address. The court will, in any case, follow up with the Marshals Service on the status of serving the new defendants. The court is not prepared to address whether the plaintiff alleges a viable claim against the new defendants without their responsive input. With respect to the individual DIR–DLSE defendants, the court asks the Department for the clarification described at the end of this order.

[14] ECF No. 52 at 2 (¶ 1).

[15] *Compare* Compl. – ECF No. 1 at 1 *with* Am. Compl. – ECF No. 40 at 1–2.

[16] *See* ECF No. 55.

ANALYSIS

1. Federal-Question Jurisdiction

1.1 General Observations

The plaintiff has not shown that this court can exercise federal-question jurisdiction (under 28 U.S.C. § 1331) over the claims that she brings against AHS.

The plaintiff's opposition brief cites a host of federal statutes. But these mostly are inapplicable on their face. The plaintiff cites laws dealing with jurisdiction over voting-rights cases (28 U.S.C. § 1343(a)(4)), or describing a general *limitation* on the federal courts' jurisdiction to enter injunctions in labor disputes (29 U.S.C. § 101), and so on. Suffice it to say that the vast majority of these laws simply do not apply here. Moreover, the plaintiff has not shown how her allegations trigger any of the cited statutes. The cited laws thus provide no basis for federal-question jurisdiction in this case.

Even allowing for the latitude that is granted *pro se* litigants, a plaintiff cannot simply list a welter of federal statutes (*see* ECF No. 47 at 5) and then flatly claim that these "are applicable" to establish federal-question jurisdiction.

The plaintiff's complaint is 37 pages long — and is attached to *315* pages of exhibits. It is not the court's job to search this large filing to find the viable claim or claims that may trigger federal-question jurisdiction. It is the plaintiff's burden to usefully show the court how allegations in her complaint trigger jurisdiction under any given statute. She generally has not done that. The court limits its discussion here to those parts of the plaintiff's complaint and brief that are minimally tractable: which is to say, to those allegations, laws, and arguments that suggest possible federal-question jurisdiction.

1.2 Title VII – Employment Discrimination

This appears to be the only new federal statute that the plaintiff cites. It is unclear, though, whether she even means to assert such a claim. Her complaint says that she "possibly" brings a

Title VII claim.[17] Her opposition brief likewise calls this a "possibl[e]" claim.[18] In the same equivocal vein, the plaintiff says that her grievance with AHS was not "primar[il]y" about national-origin discrimination.[19] Assume that the plaintiff did mean to advance a Title VII claim. Having been pointed to the basic requisites of such a claim, the plaintiff now concedes that she cannot state a *prima facie* claim under the governing test of *McDonnell–Douglas Corp. v. Green*, 411 U.S. 792 (1973).[20] This "possible" claim thus does not secure federal-question jurisdiction.

1.3 Fair Labor Standards Act (FLSA)

The plaintiff fleetingly invokes the federal Fair Labor Standards Act (FLSA), specifically citing 29 U.S.C. §§ 207, 215–16. There are numerous fatal deficiencies in any claim that she might bring under the FLSA laws that she cites. For example, her factual allegations show that she has no viable FLSA overtime-compensation claim. The overtime statute that she cites applies when an employee works more than 40 hours in a week. 29 U.S.C. § 207(a)(1). Yet the plaintiff alleges that she worked 36-hour weeks.[21] Furthermore, under her own factual narrative, before being fired the plaintiff did not file a "complaint" or institute a "proceeding" that would trigger 29 U.S.C. § 215. Nor does the complaint suggest a viable claim under FLSA regulation 29 C.F.R. § 785.18.[22] That regulation notes that short breaks are "common in industry" and "must be counted as hours worked" without being "offset against other working time." 29 C.F.R. § 785.18. The regulation does not compel employers to provide such breaks. And the plaintiff herself alleges that an *employment agreement*, not a federal law, obligated AHS to provide such breaks. If Ms. Drevaleva has a federal claim for breach of an employment contract, then it must be one of two things. If her contract is an individual one, between her and AHS, then her claim would be under

[17] Am. Compl. – ECF No. 40 at 2.
[18] ECF No. 47 at 28.
[19] *Id.* at 26.
[20] *Id.*
[21] Am. Compl. – ECF No. 40 at 5.
[22] *See id.* at 7.

state law for breach of contract. If she claims that AHS was in breach of a collective-bargaining agreement, then her claim might be under § 301(a) of the Labor–Management Relations Act (LMRA) — except that, as discussed below, the LMRA does not apply to public entities such as AHS. In any case, she has no obvious claim under 29 C.F.R. 785.18. Finally, holding other problems aside, the FLSA claims that might be relevant here are generally subject to a two- or three-year time bar (29 U.S.C. § 255) that the plaintiff's December 2016 initial complaint failed to meet.[23]

1.4 The Labor–Management Relations Act (LMRA) and National Labor Relations Act (NLRA) Do Not Govern Public Employers

It is beyond serious dispute that AHS is a public agency. Its genesis statute declares it to be just that. *See* Cal. Health & Safety Code § 101850(a)(2(C).[24] Ms. Drevaleva charges AHS with denying her "affiliation to the Union" and thus violating 29 U.S.C. § 157 of the NLRA.[25] Neither the NLRA nor the LMRA applies to AHS. Governmental entities are excepted from the NLRA. *E.g., Saipan Hotel Corp. v. N.L.R.B.*, 114 F.3d 994, 997 (9th Cir. 1997) (citing 29 U.S.C. § 152(2)). "The LMRA," for its part, "is the comprehensive federal labor law, which, by its terms, is applicable only to labor relations in the private sector." *Santa Clara Valley Transp. Auth. v. Rea*, 140 Cal. App. 4th 1303, 1307 (2006). "[P]ublic entities are not 'employers' within the meaning of [this] federal law." *Santa Clara Valley Transp. Auth. v. Rea*, 140 Cal. App. 4th 1303, 1308 (2006) (citing 29 U.S.C.§ 152(2)). These statutes do not provide the plaintiff with federal-question jurisdiction.

1.5 Occupational Safety and Health Act (OSHA)

The plaintiff's discussion under the federal Occupational Safety and Health Act (OSHA) is without merit. *See* ECF No. 47 at 9–10. Nothing in the complaint alleges an OSHA violation. No

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[23] *See* Order – ECF No. 36 at 4.

[24] Strictly speaking, the statute uses AHS's previous name: the Alameda County Medical Center.

[25] Am. Compl. – ECF No. 40 at 3.

factual allegation suggests that this is an occupational-safety case. And none of the specific laws that the plaintiff cites — 29 U.S.C. §§ 651, 654, 662; 29 C.F.R. § 1977.11 — gives this court federal-question jurisdiction through OSHA. For example, section 662 gives the federal district courts over injunctive petitions brought by the Secretary of Labor. Section 651 is a Congressional statement of findings and of public policy in the field of "safe and healthful working conditions." 29 U.S.C. § 651(b). It is not a grant of jurisdiction, does not create a private right of action, and does not address anything that is going on in the plaintiff's complaint. The regulation that the plaintiff repeatedly cites (29 C.F.R. § 1977.11) relates to retaliation for giving "testimony." Nothing in the complaint suggests that AHS retaliated against the plaintiff for giving testimony. Furthermore, any complaint under § 1977.11 must be made within 30 days of the violation — a time bar that the plaintiff's own allegations show that she cannot meet. There is no federal-question jurisdiction in this case through OSHA.

1.6 Due Process — 14th Amendment

The federal-question discussion now switches from AHS to the individual DIR defendants. The plaintiff claims that, in how they investigated her grievance against AHS, the DIR-employee defendants violated her right to due process under the Fourteenth Amendment to the U.S. Constitution.[26] This claim is lodged against the new individual defendants only "in their personal capacities.[27] The plaintiff does not raise a due-process claim against AHS or the DIR itself.[28]

In connection with this claim the plaintiff cites 28 U.S.C. §§ 1343 and 1357. Neither statute relates to anything going on in this case. If her due-process claim rests only on these statutes, there is no merit to it.

On the basis of the material before it, though, the court thinks that a response from the individual defendants is necessary before it addresses whether Ms. Drevaleva has a minimally

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[26] *See* Am. Compl. – ECF No. 40 at 27.

[27] *Id.* at 27–29.

[28] *See id.*

viable due-process claim against any of the DIR–DLSE employees. As of this writing, again, although the court has ordered service of process, these defendants have not yet been served.

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The court lacks subject-matter jurisdiction over the claims against AHS. The complaint against AHS is consequently dismissed without prejudice.

2. Diversity Jurisdiction — Individual DIR–DLSE Employees

Diversity jurisdiction presents a more nuanced issue. The court did not have diversity jurisdiction over the original defendants (AHS and DIR) and would not have it over those entities now. By contrast, the court apparently can exercise diversity jurisdiction over the newly added defendants.

In opposing the motion to dismiss, the plaintiff writes: "I was a resident of California since 2004 to April 2nd, 2017 . . . . When I filed my first complaint, I was not diverse from defendants AHS and DIR who both resided in California. When I moved to New Mexico on April 2nd, 2017, I became fully diverse from defendants AHS and officers of DIR."[29]

This statement correctly recognizes that the plaintiff was not diverse from the defendants when she filed her original complaint, so that there was no federal jurisdiction under 28 U.S.C. § 1332. In suggesting that her April 2017 move to New Mexico cured that jurisdictional defect, however, the plaintiff errs.

Diversity jurisdiction depends on the "state of things" when the initial complaint is filed. *E.g., Grupo Dataflux v. Atlas Global Group LP,* 541 U.S. 567, 574–75 (2004); *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988). That the plaintiff changed her residence before filing an amended complaint does not change this "time of filing" rule; diversity jurisdiction still depends on the facts that existed when the plaintiff filed her original complaint. *See, e.g., Grupo Dataflux,* 541 U.S. at 574–75.

[29] ECF No. 47 at 11 (emphasis removed).

The only relevant deviation from this rule concerns the newly added defendants. With respect to the individual DIR employees that the plaintiff has added in her amended complaint, diversity jurisdiction depends on the facts as they stood when the *amended* complaint was filed. *China Basin Props., Ltd. v. Allendale Mut. Ins. Co.*, 818 F. Supp. 1301, 1302 (N.D. Cal. 1992); *see Lewis v. Lewis*, 358 F.2d 495, 502 (9th Cir. 1966) (no jurisdiction over new defendants where plaintiff's pre-amendment change of residence destroyed complete diversity). With respect to the continuing defendant, AHS, then, there is not complete diversity. There is not complete diversity despite the plaintiff's move to New Mexico. *See Grupo Dataflux,* 541 U.S. at 574–75. With respect to the new defendants, however, there is complete diversity. The plaintiff's New Mexico residence at the time of the amendment here controls — and obviously makes her diverse from the California-based individual defendants.[30] A leading treatise, citing the Ninth Circuit's decision in *Lewis, supra*, explains the matter in terms that apply exactly here:

> [A]lthough a party's post-filing change of citizenship is irrelevant with respect to the diversity of the original parties, it is relevant with respect to new parties. For example, ***if a plaintiff changes citizenship and then amends the complaint to add a new defendant*** against whom no claims were made in the original complaint, diversity between the plaintiff and the new defendant will be based on the ***plaintiff's citizenship at the time of the amendment***.

15 D. Coquillette *et al., Moore's Federal Practice* § 102.16[2][b][ii] (2015 ed.) (citing *Lewis*, 358 F.2d at 502) (emphases added).[31]

The amount in controversy is alleged to be greater than $75,000. Thus, there is apparent diversity jurisdiction over any viable claim that the plaintiff brings against the new defendants. *See China Basin Properties*, 818 F. Supp. at 1302; *Lewis*, 358 F.2d at 502.

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[30] For now, the court assumes that the individual defendants are California residents. Subject-matter jurisdiction can be tested at any stage in a lawsuit, of course, so if this assumption proves wrong, there will be opportunities to revisit the jurisdictional holding.

[31] Cases have mostly dealt with the roughly converse situation: Where the post-filing addition of a party destroys diversity jurisdiction. The implication for this discussion being that, in such cases, diversity (at least for claims against the new party) is tested at the time of amendment. *See, e.g., Owen Equip. Erection Co. v. Kroger*, 437 U.S. 365 (1978); *Am. Fiber & Finishing, Inc. v. Tyco Healthcare Grp., LP,* 362 F.3d 136, 140–41 (1st Cir. 2004).

3. State-Law Claims

The lack of subject-matter jurisdiction bars the court from making any finding or ruling on the state-law claims asserted against the dismissed defendant, AHS.

With respect to the DIR–DLSE itself, again, the plaintiff appears not to name it in her new complaint and thus to have dropped the Department from this lawsuit.

The plaintiff has established diversity (and possibly federal-question) jurisdiction for her claims against the newly added DIR-employee defendants. To the extent that her state-law claims are lodged against the individual DIR defendants, some further thoughts might guide future proceedings in this case.

The Department's status as a governmental entity has several important effects on the plaintiff's claims. First, a damages suit cannot be maintained against a public entity or its employees unless the complainant has first filed a timely written claim with the defendant and the latter has rejected this claim. *See generally* Cal. Gov't Code §§ 900.4, 905. The plaintiff does not allege that she presented her claims to the DIR before suing it or its employees.

Second, some of the laws that the plaintiff most centrally invokes — sections of the California Labor Code, and the Industrial Welfare Commission's Wage Order 2001-4 — do not apply to public entities. *See Cal. Correctional Peace Officers Ass'n v. State of Cal.*, 188 Cal. App. 4th 646 (2010) (I.W.C. wage orders); *Johnson v. Arvin–Edison Water Storage Dist.*, 174 Cal. App. 4th 729 (2009) (labor code); *Curcini c. County of Alameda*, 164 Cal. App. 4th 629 (2008) (same).

Finally, California law forbids awarding punitive damages against public entities. Cal. Gov't Code § 818.

* * *

CONCLUSION

This court does not have subject-matter jurisdiction of the claims against defendant AHS. The claims against AHS are therefore dismissed without prejudice. The plaintiff does not seem to name the DIR–DLSE itself in her new complaint. Under the court's previous order, then, there are no remaining claims in this lawsuit against the DIR itself. The court cannot now say whether the

plaintiff states viable due-process and state-law claims against the newly added, individual DIR-employee defendants. Those questions are better addressed after the new defendants have responded to the amended complaint — including making any argument on diversity jurisdiction. In these circumstances, the court asks the Department to do the following: Within 14 days of the date of this order, file a short status update explaining whether: (1) DIR's counsel will also be representing the individual defendants; and, if DIR's attorneys will represent the new defendants, (2) whether those defendants will consent to magistrate jurisdiction.

The court denies the plaintiff's "administrative motion to request missing documents." *See* (ECF No. 54.)

This disposes of ECF Nos. 41 and 54.

IT IS SO ORDERED.

Dated: June 7, 2017

LAUREL BEELER
United States Magistrate Judge

United States District Court
Northern District of California

Exhibit 2.

The Order of the District Court for Northern California dated July 07, 2017 that granted four DIR's Officers' Motion to Dismiss my Amended Complaint.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

San Francisco Division

TATYANA EVGENIEVNA DREVALEVA,

Plaintiff,

v.

ALAMEDA HEALTH SYSTEM, et al.,

Defendants.

Case No. 16-cv-07414-LB

ORDER DISMISSING CLAIMS

Re: ECF No. 63

INTRODUCTION

This is an employment dispute. Plaintiff Tatyana Drevaleva is an electrocardiogram technician who was fired from her position with Alameda Health Systems (AHS). The four individual defendants — Bobit Santos, Catherine Daly, Joan Healy, and Eric Rood — move to dismiss the plaintiff's claims against them.[1] These defendants are employees of the California Department of Industrial Relations — Division of Labor Standards Enforcement ("DLSE"). They are the regulatory employees who, roughly speaking, investigated the plaintiff's administrative grievance concerning AHS and decided that she had not been fired wrongfully. They are sued here "in their

[1] ECF No. 63. Record citations refer to material in the Electronic Case File ("ECF"); pinpoint citations 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).

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

STATEMENT

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

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

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

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[2] Am. Compl. – ECF No. 40 at 2, 28.

[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.*

[4] ECF Nos. 10, 71.

[5] ECF Nos. 36, 58.

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

[7] Am. Compl. – ECF No. 40 at 13.

But even the material that the plaintiff attaches to her complaint[8] shows the opposite. The DLSE defendants did evaluate the pertinent facts. They merely reached a conclusion that the plaintiff disagrees with. The DLSE defendants correctly write that the "only acts" they are charged with are the "investigation and determination of her claims within the scope of their employment and pursuant to statutory authority."[9]

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

GOVERNING LAW

A Rule 12(b)(6) motion to dismiss for failure to state a claim tests the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A claim will normally survive a motion to dismiss if it offers a "short and plain statement . . . showing that the pleader is entitled to relief." *See* Fed. R. Civ. P. 8(a)(2). This statement "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a mere

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[8] See especially ECF No. 40-17.

[9] ECF No. 36 at 4.

[10] *Id.* at 3–4.

[11] *Id.* at 4.

[12] *Id.*

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

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

ANALYSIS

1. Due Process

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

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

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

[14] *Id.* at 26–27.

[15] *Id.* at 27.

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

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

2. State-Law Claims — Absolute Immunity and Privilege

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

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

2.1 Absolute Discretionary-Act Immunity — Cal. Gov't Code § 820.2

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

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

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

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

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

2.2 Absolute Privilege — Cal. Civ. Code § 47

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

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

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

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

* * *

CONCLUSION

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

This disposes of ECF No. 63.

IT IS SO ORDERED.

Dated: July 7, 2017

LAUREL BEELER
United States Magistrate Judge

[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.

Exhibit 3.

The Order of the 9th Circuit dated December 24, 2019 that affirmed the Judgment of the District Court for Northern California.

Case: 17-16382, 12/24/2019, ID: 11543170, DktEntry: 111-1, Page 1 of 4

FILED

DEC 24 2019

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TATYANA EVGENIEVNA DREVALEVA, Plaintiff-Appellant, v. ALAMEDA HEALTH SYSTEM; DEPARTMENT OF INDUSTRIAL RELATIONS, Division of Labor Standards Enforcement; CATHERINE DALY; JOAN HEALY; BOBBIT SANTOS; ERIC ROOD, Defendants-Appellees.	No. 17-16382 D.C. No. 3:16-cv-07414-LB MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Laurel D. Beeler, Magistrate Judge, Presiding

Submitted July 15, 2019**
San Francisco, California

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: PAEZ and RAWLINSON, Circuit Judges, and HUCK,*** District Judge.

Tatyana Drevaleva (Drevaleva) appeals the dismissal of her complaint. We have jurisdiction under 28 U.S.C. § 1291 and review *de novo*. *See Steinle v. City and Cty. of San Francisco,* 919 F.3d 1154, 1160 (9th Cir. 2019).

1. As all parties consented to proceed before a magistrate judge, the magistrate judge was authorized to conduct any and all proceedings, up to and including dismissal. *See* 28 U.S.C. § 636(c)(1).

2. Because Drevaleva asserted no viable federal claims against Alameda Health System (AHS), a public agency, the district court lacked subject-matter jurisdiction. *See Herman Family Revocable Trust v. Teddy Bear*, 254 F.3d 802, 805 (9th Cir. 2001). Drevaleva concedes that she cannot make a *prima facie* showing under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* Her claims under the Fair Labor Standards Act (FLSA) and the Occupational Safety and Health Act (OSHA) were time-barred. AHS terminated Drevaleva in September, 2013, and she filed her complaint in December, 2016, outside the two-year statute of limitations for an FLSA claim and the thirty-day filing period for an OSHA claim. *See* 29 U.S.C. § 255(a) (FLSA); 29 U.S.C. §

*** The Honorable Paul C. Huck, United States District Judge for the U.S. District Court for Southern Florida, sitting by designation.

660(c)(2) (OSHA). Neither the National Labor Relations Act nor the Labor Management Relations Act applies to public entities such as AHS. *See* 29 U.S.C. § 152(2).

3. The district court lacked diversity jurisdiction over Drevaleva's claims against AHS because Drevaleva and AHS were both domiciled in California when she filed the complaint. *See Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 570 (2004).

4. As the district court lacked federal question and diversity jurisdiction over Drevaleva's claims against AHS, it did not abuse its discretion by declining to exercise supplemental jurisdiction over the state law claims asserted against AHS. *See Ventura Content, Ltd. v. Motherless, Inc.*, 885 F.3d 597, 603, 619 (9th Cir. 2018).

5. Although the court had diversity jurisdiction to resolve Drevaleva's claims against the newly added defendants State Employees[1] after her post-filing relocation to another state, she has disavowed due process claims under the Fifth and Fourteenth Amendments. Finally, absolute immunity and absolute privilege precluded any viable state law claims against the State Employees based on their official and discretionary acts related to investigation of Drevaleva's termination.

[1] The State Employees are Catherine Daly, Joan Healy, Bobit Santos, and Eric Rood. No claim was asserted against the Department of Industrial Relations.

See Cal. Gov't Code § 820.2; *see also* Cal. Civ. Code § 47(a).

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- The proceeding involves a question of exceptional importance; or
- The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form10instructions.pdf

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to (*party name(s)*):

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

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(use "s/[typed name]" to sign electronically-filed documents)

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Reply Brief / Cross-Appeal Reply Brief			$	$
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Exhibit 4.

The Order of the 9th Circuit dated January 22, 2020 that denied my Petition for Panel rehearing.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TATYANA EVGENIEVNA DREVALEVA, Plaintiff-Appellant, v. ALAMEDA HEALTH SYSTEM; DEPARTMENT OF INDUSTRIAL RELATIONS, Division of Labor Standards Enforcement; CATHERINE DALY; JOAN HEALY; BOBBIT SANTOS; ERIC ROOD, Defendants-Appellees.	No. 17-16382 D.C. No. 3:16-cv-07414-LB Northern District of California, San Francisco ORDER

Before: PAEZ and RAWLINSON, Circuit Judges, and HUCK,* District Judge.

The panel has voted to deny the Petition for Panel Rehearing.

Therefore, the Petition for Panel Rehearing, filed December 28, 2019, is DENIED.

* The Honorable Paul C. Huck, United States District Judge for the U.S. District Court for Southern Florida, sitting by designation.

Exhibit 5.

The Order of the 9th Circuit dated March 04, 2020 that denied my Petition for Rehearing En Banc.

FILED

MAR 4 2020

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TATYANA EVGENIEVNA DREVALEVA, Plaintiff-Appellant, v. ALAMEDA HEALTH SYSTEM; DEPARTMENT OF INDUSTRIAL RELATIONS, Division of Labor Standards Enforcement; CATHERINE DALY; JOAN HEALY; BOBBIT SANTOS; ERIC ROOD, Defendants-Appellees.	No. 17-16382 D.C. No. 3:16-cv-07414-LB Northern District of California, San Francisco ORDER

Before: PAEZ and RAWLINSON, Circuit Judges, and HUCK,* District Judge.

Plaintiff-Appellant's Petition for Rehearing En Banc, filed January 28, 2020, is REJECTED as untimely.

Plaintiff-Appellant's Application for Permission to Exceed a Page and a Word Count Limitation in my Petition for Rehearing En Banc, filed January 28, 2020, is DENIED as moot.

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* The Honorable Paul C. Huck, United States District Judge for the U.S. District Court for Southern Florida, sitting by designation.

Plaintiff-Appellant's Request for Permission to File a Supplemental Brief, filed February 8, 2020, is DENIED.

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