U.S. JUDICIAL PRECENDTIAL

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APPENDIX **H**

(viii) **U.S. DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

REVIEW / DECISION

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

BRODERICK J. WARFIELD, Plaintiff, v. UNITED STATES AIR FORCE, et al., Defendants.	No. 2:20-cv-00853 KJM AC PS FINDINGS AND RECOMMENDATIONS

Plaintiff is proceeding pro se, and this action accordingly was referred to the undersigned by Local Rule 302(c)(21). Plaintiff was granted leave to proceed in forma pauperis, and his initial complaint was found unsuitable for service. ECF No. 3. Plaintiff filed a First Amended Complaint, which was also found unsuitable for service. ECF Nos. 4, 5. Now before the court is plaintiff's Second Amended Complaint ("SAC"). Because the court finds this complaint also to be unsuitable for service, the undersigned recommends that the complaint be dismissed without further leave to amend.

I. Screening Standard

The federal IFP statute requires federal courts to dismiss a case if the action is legally "frivolous or malicious," fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). Plaintiff must assist the court in determining whether or not the complaint is frivolous, by drafting

the complaint so that it complies with the Federal Rules of Civil Procedure ("Fed. R. Civ. P.").

A claim is legally frivolous when it lacks an arguable basis either in law or in fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989). In reviewing a complaint under this standard, the court will (1) accept as true all of the factual allegations contained in the complaint, unless they are clearly baseless or fanciful, (2) construe those allegations in the light most favorable to the plaintiff, and (3) resolve all doubts in the plaintiff's favor. See Neitzke, 490 U.S. at 327; Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 960 (9th Cir. 2010).

The court applies the same rules of construction in determining whether the complaint states a claim on which relief can be granted. Erickson v. Pardus, 551 U.S. 89, 94 (2007) (court must accept the allegations as true); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (court must construe the complaint in the light most favorable to the plaintiff). Pro se pleadings are held to a less stringent standard than those drafted by lawyers. Haines v. Kerner, 404 U.S. 519, 520 (1972). However, the court need not accept as true conclusory allegations, unreasonable inferences, or unwarranted deductions of fact. Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). A formulaic recitation of the elements of a cause of action does not suffice to state a claim. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555–57 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

To state a claim on which relief may be granted, the plaintiff must allege enough facts "to state a claim to relief that is plausible on its face." Bell Atlantic Corp., 550 U.S. at 570. "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." Ashcroft, 556 U.S. at 678. A pro se litigant is entitled to notice of the deficiencies in the complaint and an opportunity to amend, unless the complaint's deficiencies could not be cured by amendment. See Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987), superseded on other grounds by statute as stated in Lopez v. Smith, 203 F.3d 1122 (9th Cir. 2000)).

II. The Second Amended Complaint

Plaintiff bring this case under Title VII of the Civil Rights Act of 1964. ECF No. 6 at 25. In a form portion of the SAC, plaintiff checks boxes indicating that the discriminatory conduct of

which he complains includes failure to promote, unequal terms and conditions of employment, retaliation, and slander. Id. at 5. Plaintiff alleges that discriminatory acts occurred on May 20, 2019 and are still being committed against him. Id. He checks boxes indicating that he is being discriminated against on the basis of race, color, gender/sex, and national origin. Id. Plaintiff alleges his administrative remedies were exhausted on February 3, 2020 and that he was issued a Right to Sue letter from the Equal Employment Opportunity Commission ("EEOC"). Id. at 6.

Plaintiff also attaches a copy of his EEOC complaint dated May 29, 2019. Id. at 8-12. In it, plaintiff alleges that on May 21, 2019, he was "harassed because of [his] sexual harassment-hostile work environment, criminal history." Id. at 9. This EEOC document was attached to the initial complaint (ECF No. 1 at 12-16) and the First Amended Complaint (ECF No. 4 at 7-11). In this document, plaintiff alleges that he was discriminated against because of "sexual harassment-hostile environment, criminal history, and as a result of the discrimination was reprimanded, suspended, asked impermissible non-job-related questions, denied a work environment free of discrimination and/or retaliation." ECF No. 6 at 9. Further, he alleges he experienced retaliation in that he "reported or resisted any form of discrimination or harassment and as a result was laid off, denied hire or promotion, reprimanded, suspended, demoted, asked impermissible non-job-related questions, denied a work environment free of discrimination and/or retaliation, other." Id. Plaintiff alleges that on May 20, 2019, an officer named Kirkland accused him, falsely, of having sex with a minor. Id. Further, plaintiff alleges that he arrived for a job on May 21, 2019 and informed his supervisor, Rob Frye, that he was ill and would stay for the four-hour minimum rather than the full time for the job, at which point he was cursed at in front of the other employees. Id. a 10.

Plaintiff seeks 18 million dollars in damages. Id. at 15. He includes a page at the end of the various attachments to his complaint listing bases for federal question jurisdiction other than Title VII, including the Information Privacy Act, Breach of Contract, 5 U.S.C. Ch. 75 adverse actions, and 5 U.S.C. § 7116 unfair labor practices, the First, Fourth, Fifth, Eight, Ninth, and Fourteenth Amendments to the Constitution, provisions of the U.S. Criminal Code (Title 18), and several provisions of the Labor Code (Title 29). Id. at 17. No facts accompany this list of

statutes and constitutional amendments.

III. Analysis

A. Liability Under Title VII of the Civil Rights Act

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* prohibits employers from discriminating against employees on the basis of "race, color, religion, sex, or national origin." See 42 U.S.C. § 2000e-2(a). To establish a prima facie case of disparate treatment discrimination under Title VII, a plaintiff must show that he (1) is a member of a protected class; (2) was qualified for and was performing his job satisfactorily; (3) experienced an adverse employment action; and that (4) similarly situated persons outside his protected class were treated more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination. Hawn v. Exec. Jet Mgmt., Inc., 615 F.3d 1151, 1156 (9th Cir. 2010).

The creation of a "hostile work environment" through harassment is another form of prohibited discrimination under Title VII. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64–65 (1986). "A hostile work environment claim involves a workplace atmosphere so discriminatory and abusive that it unreasonably interferes with the job performance of those harassed." Brooks v. City of San Mateo, 229 F.3d 917, 923 (9th Cir. 2000). "To prevail on a hostile workplace claim premised on...sex, a plaintiff must show: (1) that he was subjected to verbal or physical conduct of a...sexual nature; (2) that the conduct was unwelcome; and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive work environment." Vasquez v. Ctyi of Los Angeles, 349 F.3d 634, 642 (9th Cir. 2003), as amended (Jan. 2, 2004), as amended (Jan. 2, 2004), as amended (Jan. 2, 2004). "The working environment must both subjectively and objectively be perceived as abusive." Brooks, 229 F.3d at 923–24 (noting frequency, severity, and level of interference with work performance as factors "particularly relevant to the inquiry").

B. Plaintiff Fails to State a Claim for Relief Under Title VII

The SAC does not allege facts that support the elements of any cognizable Title VII claim.

While plaintiff has checked boxes in the form section of his complaint indicating that he experienced both discrimination and harassment, the SAC does not allege specific facts that demonstrate sex discrimination or harassment, or race or national origin discrimination. Plaintiff's conclusory allegations, as he has been repeatedly informed, are insufficient to state a claim. See Western Mining Council, 643 F.2d at 624. The SAC does not provide a comprehensible narrative of the employment dispute giving rise to this lawsuit, nor clearly identify any particular adverse action, facts demonstrating discriminatory intent, or conduct amounting to harassment. The attachments to the complaint do not elucidate matters.

Plaintiff has previously been informed of the pleading standard established by Rule 8 of the Federal Rules of Civil Procedure, and of the elements of a Title VII claim. See ECF Nos. 3, 5. The SAC nonetheless fails to give fair notice to defendants of the nature of the claim(s), and fails to plainly and succinctly state facts supporting the elements of the claim(s), as the rules require. See Jones v. Community Redevelopment Agency of City of Los Angeles, 733 F.2d 646, 649 (9th Cir. 1984). The court is no clearer now than upon reading the original complaint about what happened between plaintiff and defendant, and what precise actions by which actors are alleged to have been discriminatory in violation of Title VII. The SAC also fails to provide factual allegations that address the other elements of liability under Title VII that are set forth above and in prior screening orders. In sum, plaintiff has not alleged facts sufficient to satisfy the facial plausibility standard. See Bell Atlantic Corp., 550 U.S. at 570; Ashcroft, 556 U.S. at 678. Accordingly, the SAC lacks an arguable basis in law and in fact, and is therefore subject to dismissal for failure to state a claim. See Neitzke, 490 U.S. at 325.

C. Plaintiff Cannot Pursue Claims Predicated on the Criminal Code

Despite having been informed that he cannot base civil causes of action directly on the Criminal Code, plaintiff has persisted in his attempt to do so. See ECF No. 6 at 19. "Criminal proceedings, unlike private civil proceedings, are public acts initiated and controlled by the Executive Branch." Clinton v. Jones, 520 U.S. 681, 718 (1997). Accordingly, Title 18 of the United States Code does not establish any private right of action and cannot support a civil lawsuit. See Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir. 1980) (criminal provisions provide

no basis for civil liability).

D. Further Leave to Amend Would Be Futile

For the reasons explained above, the SAC is subject to summary dismissal under 28 U.S.C. § 1915(e)(2) for failure to state a claim upon which relief may be granted. Ordinarily, pro se plaintiffs are given the opportunity to amend a deficient complaint. Noll, 809 F.2d at 144. In this case, plaintiff has twice had the opportunity to amend. Despite being given guidance from the court regarding elements of claims and presentation of facts, plaintiff submitted a Second Amended Complaint that fails to cure several fundamental deficiencies of the original and First Amended Complaint. In light of the circumstances of this case, it is clear to the undersigned that further leave to amend would be futile. Accordingly, the undersigned recommends dismissal without further leave to amend.

IV. Conclusion

For the reasons explained above, the undersigned recommends that the Second Amended Complaint (ECF No. 6) be DISMISSED with prejudice.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days after being served with these findings and recommendations, plaintiff may file written objections with the court and serve a copy on all parties. Id.; see also Local Rule 304(b). Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may waive the right to appeal the District Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

DATED: August 11, 2020

ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE

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APPENDIX H (viii) **U.S. DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

DECISION

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

BRODERICK J. WARFIELD,

Plaintiff,

v.

UNITED STATES AIR FORCE, et al.,

Defendants.

No. 2:20-cv-0853 KJM AC PS

ORDER

Plaintiff proceeds in this action in pro per. The matter was referred to a United States Magistrate Judge as provided by Local Rule 302(c)(21).

On August 12, 2020, the magistrate judge filed findings and recommendations, which were served on plaintiff and which contained notice to plaintiff that any objections to the findings and recommendations were to be filed within twenty-one days. ECF No. 7. Plaintiff filed a document titled "Statement to Dispute Dismissal of Case," which the court construes as objections. ECF No. 8.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this court has conducted a *de novo* review of this case. Having reviewed the file, the court finds the findings and recommendations to be supported by the record and by the proper analysis.

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Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed August 12, 2020, are adopted in full;

2. The Second Amended Complaint (ECF No. 6) is DISMISSED with prejudice; and

3. The Clerk of Court is directed to close this case.

DATED: October 28, 2020.

NOT FOR PUBLICATION

FILED

SEP 21 2021

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRODERICK J. WARFIELD, Plaintiff-Appellant, v. UNITED STATES AIR FORCE, 60th Security Forces, Travis Air Force Base, CA; et al., Defendants-Appellees.	No. 20-17176 D.C. No. 2:20-cv-00853-KJM-AC MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Kimberly J. Mueller, District Judge, Presiding

Submitted September 14, 2021**

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

Broderick J. Warfield appeals pro se from the district court's judgment dismissing his employment discrimination action. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Watison v. Carter*, 668 F.3d 1108, 1112

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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).

(9th Cir. 2012) (dismissal under 28 U.S.C. § 1915(e)(2)(B)(ii)); *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 968 (9th Cir. 2006) (failure to comply with notice pleading requirements of Federal Rule of Civil Procedure 8). We affirm.

The district court properly dismissed Warfield's action because, despite two opportunities to amend, Warfield failed to allege clearly the bases for his claims and failed to allege facts sufficient to state a plausible claim. *See* Fed. R. Civ. P. 8(a)(2) (requiring a pleading to contain "a short and plain statement of the claim showing that the pleader is entitled to relief"); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (explaining that Rule 8 requires the complaint "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests" (alteration in original, citation and internal quotation marks omitted)); *Hebbe v. Pliler*, 627 F.3d 338, 341-42 (9th Cir. 2010) (explaining that although pro se pleadings are construed liberally, a plaintiff must present factual allegations sufficient to state a plausible claim for relief); *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980) (explaining that criminal statutes do not give rise to civil liability).

The district court did not abuse its discretion by denying further leave to amend because amendment would have been futile. *See Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011) (setting forth standard of review and explaining that leave to amend may be denied when amendment would be futile); *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1072 (9th

Cir. 2008) (explaining that "the district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint" (citation and internal quotation marks omitted)).

We do not consider arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

Warfield's motion for appointment of counsel (Docket Entry No. 4) and motion to unseal documents (Docket Entry No. 6) are denied.

AFFIRMED.

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